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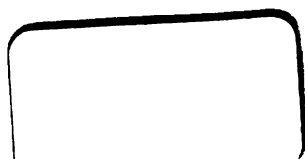
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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE R. R. CO. v. WALDEN.

(Filed May 21, 1903—Not to be reported.)

Railroads—Negligence—Instructions—Appellee, a woman about fifty years of age, was driving along a highway which crossed appellant's track at right angles, a short distance from Carlisle, when a train going at a high rate of speed struck her vehicle, threw her out and inflicted serious injuries, for which she recovered \$800 damages. There was a lofty elevation which obstructed the view of the approaching train from appellee, and the evidence was conflicting as to whether the whistle or bell were sounded in due time to give sufficient warning to travelers to avoid the danger. The court properly refused to give a peremptory instruction as it was a question to be determined by the jury, from all the evidence, as to whether the railroad company exercised proper care to avoid injury to travelers at the crossing. The court properly defined gross negligence to be the absence of slight care. Even though the instruction on gross negligence may have been improper, the verdict shows that it was not prejudicial. Appellant having failed to object or except to an instruction, can not complain on appeal.

E. M. Dickson, B. D. Warfield and E. W. Hines for appellant.

John I. Williamson for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Nunn.

On the 27th day of June, 1901, the appellee was traveling along the Carlisle and Jackson turnpike road, in Nicholas county, Kentucky, going toward the town of Carlisle. The turnpike crosses appellant's road at about right angles within less than a half mile of the town limits. Appellee was about fifty years of age, and a boy of about twelve years of age was driving for her in a surrey-top phaeton. The general course of the railroad was east and west. Appellee was approaching the railroad from the north, and on the north side of the railroad track. Between her and the railroad is situated what is known as the Dinsmore hill, a lofty elevation beginning near the point of the turnpike crossing and extending east parallel with the railroad back nearly to the station of appellant in the town of Carlisle.

As appellee was crossing the track of appellant on the morning of that day the engine of one of appellant's passenger trains either struck appellee's vehicle and turned it over or frightened her horse, and caused it to turn over, and she was thrown out and severely injured, and she brought this action against the appellant company to recover damages for injuries, alleging that their agents and servants in charge of the train carelessly and negligently ran their train of cars against her, or her vehicle, without giving her any warning of their approach. The appellant denied these allegations, and alleged that she was injured by reason of her contributory negligence. Issues were formed by the pleadings. A trial was had which resulted in a verdict in favor of appellee for \$800. The court overruled appellant's motion for a new trial, and the case is here on appeal.

The evidence, as appears from the record, shows that this was an exceptionally dangerous crossing, especially to one approaching from the north side of the track, by reason of the Dinsmore hill referred to, and a sharp curve in appellant's track at that point. Appellee and her son testify that they were approaching appellant's track at a slow gait, and looking and listening for a train, but did not hear any noises or signals from the train, or see any train until their horse's front feet were upon the track and the train was approaching at a very short distance from them. Four or five other witnesses introduced by appellee, who were approaching the crossing from the same side of the track, stated that they did not see the train or hear the blowing of the whistle or ringing of the bell, except one and possibly two stated that they heard the whistle blow for the station at Carlisle.

The evidence further shows that the crossing of the Jackstown turnpike is 858 feet from the station in Carlisle; that the distance from the first whistling post to the Jackstown crossing is 1,267 feet, and the distance from the second whistling post for the Miller's station pike to the Jackstown pike crossing is 738 feet. The Miller's station pike is some 300 feet further up the railroad from Carlisle station than the Jackstown pike crossing. It is shown that this Jackstown pike crossing is a very important one on account of the large number of people crossing it, about seventy-five persons per day.

Appellant's engineer and fireman stated that the whistle was blown at both whistling posts and the bell was rung continuously from the station at Carlisle to the Jackstown crossing, and also when appellee was discovered on the track the alarm whistle was sounded. The engineer stated that by reason of the curve of the track and the Dinsmore hill and the projection of his engine he could not see the appellee until she had about crossed the track. The fireman being on the inside of the curve, and on the north side of the engine, stated that he saw her about the time her horse stepped upon the track, and at a distance of about 125 or 130 feet; that he at once warned the engineer, who gave the alarm signal, and shut off the steam, and put on the air brakes. The engineer stated that when he put on the air brakes he was about ninety feet from the crossing, and that he could not stop until the train had gone beyond the crossing, some twenty or thirty feet. The conductor and one or two other witnesses stated that the alarm whistle was sounded when they were about 150 yards from the crossing. Sixteen or eighteen other witnesses, who were on the south side of the railroad, whose view and hearing were not obstructed by the Dinsmore hill, stated that they

heard the train whistle at one of the posts, and the alarm whistle sounded, but none of them heard or remembered the ringing of the bell until after the alarm whistle.

Appellant asks for a reversal of this case upon three grounds:

1st. Because the court refused to give a peremptory instruction to find for appellant.

In the case of C. & O. R. R. Co. v. Gunter, 21 Ky. Law Rep., 1805, the court in discussing an instruction, said: "The fifth instruction told the jury that if they believed the Walcott crossing was 'an exceptionally dangerous crossing, it was the duty of the defendant to keep a watchman at such crossing, or to use some other effective means to warn travelers of the approach of its trains to said crossing, and the failure to do so was negligence on the part of the defendant.' This was, we think, a peremptory instruction to find for plaintiff if the jury believed that the crossing was exceptionally dangerous. It required the company to adopt means which should be actually effective to warn the traveling public of the approach of trains. The company was required only to use such means to give warning of the approach of trains as, considering the character of the crossing, were reasonably sufficient to warn travelers of the approach of trains, and the jury are the judges of the reasonable sufficiency of the means actually employed." (99 Ky., 502.)

From these authorities, and many others to the same effect, decided by this court, and the character and surroundings of the crossing, and the evidence in this case, it was the province of the jury to judge of the reasonable sufficiency of the means employed to warn persons who were about to make the crossing of the approach of the train.

2d. The appellant objects to instruction "D," claiming that the pleadings of plaintiff did not authorize same. The instruction was to the effect that if the injury inflicted upon plaintiff could have been prevented or avoided by defendant by the exercise of ordinary care and diligence after discovering plaintiff's dangerous situation, etc.

Even if the pleadings did not authorize the instruction, the evidence which did authorize it was produced by the appellant, and there was no objection nor exception offered to it by any one. In the case of L. & N. R. R. Co. v. Taylor, 92 Ky., 57, where in that case the petition alleged that the defendant was negligent in not having upon the chimney of one of its engines a proper spark-arrester, or in not having the same properly adjusted, but did not allege that the one they had was defective, on this point the court said: "The proof was heard pro and con, without objection, as to the negligence complained of, consisting of a defective spark-arrester, or improperly adjusting it, which cured the defect in the petition in that regard, if any defect, in that particular, there was." (8 Ky. Law Rep., 419; 24 Ky. Law Rep., part II, 1671.)

3d. Appellant objects to certain other instructions. Instruction "H" objected to is not objectionable. This court has repeatedly decided that gross negligence is the absence of slight care. (23 Ky. Law Rep., 1960; 81 Ky., 409; 85 Ky., 434; 100 Ky., 421; 14 Ky. Law Rep., 336.) If the instruction on gross negligence had been improper, the amount of the verdict shows that it was not prejudicial.

The instructions as a whole were fair, and finding no error prejudicial to the appellant the case is, therefore, affirmed.

LEGER v. COMMONWEALTH.

(Filed May 21, 1908—Not to be reported.)

1. Criminal law—Burning a storehouse—Accessories—Evidence—Appellant was indicted as an accessory before the fact for burning a storehouse and was properly convicted and sentenced to two years' confinement in the penitentiary, as under section 1128, Kentucky Statutes, an accessory before the fact shall be liable to the same punishment as principals. The principal testified as a witness for the prosecution, but there was sufficient corroborating evidence to authorize a conviction.

2. Continuance—The court did not err in refusing to grant a continuance as it gave compulsory process which secured the attendance of all witnesses for defendant except two, and the affidavit as to the statements of these witnesses was read as their depositions as the trial did not take place at the same term the indictment was found.

A. W. Baker for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Jackson Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was indicted and convicted under section 1169, Kentucky Statutes, for the offense of willfully and unlawfully burning a storehouse, and sentenced to two years' confinement in the penitentiary.

The indictment charged appellant with being an accessory to the crime before the fact. It also charged him with being an aider and abettor. James Brummett is charged in the indictment as principal, the person who actually burned the storehouse. Under section 1128, Kentucky Statutes, "in all felonies, accessories before the fact shall be liable to the same punishment as principals, and may be prosecuted jointly with the principals, or severally, though the principals be not taken or tried, unless otherwise provided in this chapter."

An aider and abettor is guilty as a principal, and may be indicted jointly with the principal, and though indicted as an aider and abettor, might be convicted as a principal. (*Benge v. Commonwealth*, 92 Ky., 1; *Travis v. Commonwealth*, 96 Ky., 77; *Howard v. Commonwealth*, 96 Ky., 19; *Ward v. Commonwealth*, 14 Bush, 233; *Frey v. Commonwealth*, 83 Ky., 190.)

On the trial of this case the principal, Brummett, voluntarily testified as a witness for the Commonwealth. There was other evidence corroborating and substantiating his testimony, enough to satisfy the requirements of the Criminal Code, section 241. The instructions to the jury were formally excepted to, but appear to us to be without grounds of criticism. The principal complaint seems to be the failure of the court to grant appellant a continuance because of the absence of certain witnesses named. The court set the case over until a later day in the term; awarded attachments and warrants of arrest for absent witnesses; appointed special bailiffs to bring them at the expense of the Commonwealth. In other words, the court afforded appellant every advantage of the constitutional provision guaranteeing to him compulsory process to procure the attendance of his witnesses. In fact all of the witnesses absent were obtained at the trial except two, and as to these the Commonwealth attorney having consented thereto, the

affidavit was allowed to be read as their testimony. The trial was had at the next term after the indictment was found. The circuit court seems to have done all that was in his power, and appellant was afforded every process known to our practice to insure a full and fair presentation of his defense.

Perceiving no error in the proceedings, the judgment must be affirmed.

DAWSON v. COMMONWEALTH.

(Filed May 22, 1903—Not to be reported.)

Criminal law—Robbery—Appellant prosecutes this appeal from a conviction for robbery. The facts proven show that appellant, by stealth, placed her hand in the pocket of the prosecuting witness and took therefrom a small sum of money, and that afterwards, in a conversation between them concerning the taking of the money, she drew a pistol on him. It was error to give an instruction which permitted a conviction for robbery as the evidence shows that if there was any violence or putting in fear it was after the taking of the money. Appellant should have been convicted of petit larceny only.

Isaac Sherman for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Paynter.

The appellant was tried and convicted upon a charge of robbery. The prosecuting witness, Louis Curts, and the accused lived on the same alley in the city of Louisville. While they were engaged in a conversation at the gate of the accused she put her hand in his pants pocket, when he grabbed her hand and said: "Don't play with my money in that way;" and she said: "I have not got your money." He replied: "Yes you have;" then she laughed. He testified that he let her take her hand out, after she had done that, and said to her: "Give me my money now; don't play with my money," and then she stepped back and drew a pistol and told him that if he accused her of taking his money she would blow his brains out. He was asked if he resisted the taking of the money out of his pocket, and he replied: "I did not think she was going to take it, or that she meant any harm after she laughed." And he further said: "He did not try to keep her from taking the money out of his pocket." On this state of facts the court gave the jury instruction No. 1, which reads as follows: "If the jury believe from the evidence, to the exclusion of a reasonable doubt, that in this county, and before the finding of the indictment herein, Mary Dawson did unlawfully and with force and arms willfully and feloniously make an assault upon Louis Curts, and did in a forcible and violent manner, feloniously put said Curts in fear of bodily harm, and by violence and force, and by fear of bodily harm, feloniously and against the will and consent of said Curts, did take from the person of said Curts \$1.50, or any other sum or value of good or lawful money of the United States, and said defendant did forcibly, and against the will and consent of said Curts, feloniously take, steal and carry away, with the fraudulent intent to convert the same to her own use and to permanently deprive said Curts of his property therein, then

the jury should find the accused guilty of robbery and fix her punishment by confinement in the penitentiary not less than two nor more than ten years, in the discretion of the jury."

The court failed to instruct the jury upon the question of petit larceny. From Curtis' evidence it appeared that the accused stealthily placed her hand in his pocket and took therefrom the money without using force or violence. In *Commonwealth v. Prewett*, 82 Ky., 249, robbery is defined to be: "The felonious and forcible taking from the person of another of goods or money to any value, by violence or putting in fear." The violence must accompany the act of taking the property. Any resistance after the property has been taken, made in an effort to regain, does not relate back to the act of taking, so as to make it robbery. (*Jones v. Commonwealth*, 24 Ky. Law Rep., 0000, opinion delivered May 20, 1903.) The fact that she drew a pistol after the taking of the money had been accomplished did not make the act of taking robbery. The prosecutor was not put in fear until after the money had been taken, therefore, if the instruction was correct in other respects, there was no evidence upon which to base that part which authorizes the jury to find the defendant guilty, if it believe from the evidence that the accused put the prosecutor in fear. We are of the opinion that the instruction was erroneous, because the Commonwealth wholly failed to prove that any force or violence accompanied the act of taking the money. The prosecutor grabbed her hand and released it without resisting the removal of the money from his pocket. The facts show that the accused was guilty of petit larceny, and the court should have so instructed the jury alone on that question.

The judgment is reversed for proceedings consistent with this opinion.

CITY OF LOUISVILLE v. BAILEY.

(Filed May 22, 1903—Not to be reported.)

1. Municipal government—Negligence—Appellee recovered a judgment against appellant for damages for personal injuries caused by falling over a stick which protruded out from under a tool box on a sidewalk, which had been left in that condition by employes of the city while engaged in repairing the streets, from which the city prosecutes this appeal. Held—That the court properly instructed the jury that it was the duty of the city to keep its sidewalks in a reasonably safe condition for the use of citizens using same while exercising reasonable care. A proper instruction as to contributory negligence was given, and the verdict appearing to be supported by the evidence, will not be disturbed.

2. Damages—A verdict and judgment for \$7,000 damages will not be disturbed on the ground of same being excessive as the injuries were painful and permanent, and appellee being a young woman, the judgment is not excessive.

H. L. Stone for appellant.

W. C. Owens for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 3.

Opinion of the court by Judge Paynter.

The appellant was engaged by its employees in improving First street just south of Jefferson street. A tool box which was used by the workmen so engaged was placed upon the edge of the sidewalk on First street; it was upon two sticks of wood (one near each end), which protruded beyond it on the sidewalk twelve to fourteen inches. Their wagons and kettles were left on the street, and next to the driveway a red light was placed some eight or ten feet from the tool box. On the night of the 3d of December, 1901, the appellee, Anna Bailey, while walking on First street her foot struck one of the sticks of wood projecting from the tool box over the pavement, which threw her heavily upon her left side. Shortly after she became very sick and on reaching home sent for the physician. She was forced to take her bed, where she practically remained until the middle of the following March. She was bruised on her left hip, side and shoulder, which made her lame for several months; her uterus and ovaries were displaced and her suffering was intense for months after receiving her injuries. Other facts connected with her injury and suffering might be stated. Before receiving this fall the appellee was a healthy woman. To recover damages against the city for the injuries which she received this action was instituted. The jury returned a verdict in her favor for \$7,000.

The court gave instruction No. 1, which reads as follows: "The court instructs the jury that it is the duty of the defendant to use ordinary care in keeping its sidewalks in a reasonably safe condition for persons walking upon the same, and it is the duty of those walking upon the sidewalk to use ordinary care for their own safety; and if the jury believe from the evidence that the defendant, its agents, servants, or employees, were guilty of negligence in leaving the stick, over which the plaintiff stumbled, if she did stumble over same, projecting into the sidewalk, and that by reason of such negligence, if any, the plaintiff was injured, they should find for the plaintiff, unless they believe from the evidence that the plaintiff was guilty of negligence which so far contributed to her injuries that but for the same she would not have been injured, in which latter event they should find for the defendant."

It is insisted that the court erred in giving this instruction, because it is claimed that the court should have told the jury that if the appellant did not at the time and place of the accident keep its sidewalk in a reasonably safe condition for persons walking upon the same with ordinary care for their own safety, they should find for appellee, provided they believed from the evidence that the appellee received her injury by reason of such failure or negligence on the part of the appellant. It is insisted that this idea is not sufficiently expressed in instruction No. 1. The court instructed the jury as to the care the city should exercise in keeping its sidewalk in a reasonably safe condition, etc., and the care which those who used the sidewalks should use in walking upon them. The act of negligence complained of consisted in placing the stick upon the sidewalk in the manner hereinbefore stated. The jury was not authorized under the instruction to find appellant guilty of an act of negligence, except for its negligence, if any, in having the stick placed upon the sidewalk. It was the duty of the court in the instruction to limit the jury to that act alone, when it was determining the question, whether the servants of appellant were guilty of negligence result-

ing in the appellee's injury. Under the instruction the jury could not have found for the appellee unless it had believed appellant was not keeping its sidewalk in a reasonably safe condition for persons walking upon same, and that it was negligence to place and leave the stick upon the sidewalk.

It is insisted that by the instruction the case was erroneously made to turn upon what the jury believed was negligence in the city leaving the stick projecting upon the sidewalk. This is true, and properly so, as the right of the appellee to recover depended upon the question whether it was negligence to leave the stick at the place where found.

As another ground for a reversal counsel for the appellant claims that the appellee's reply failed to contain a denial of the averments in the answer of contributory negligence. We are of the opinion that this was sufficiently done in the reply. The court gave substantially the usual instruction upon the question of contributory negligence. The jury was told that if it believed from the evidence that plaintiff was guilty of negligence, which so far contributed to her injury that but for the same she would not have been injured, it should find for the defendant. Is the verdict excessive? The appellee is a young woman and was in perfect health before she was injured. Since receiving it she has suffered almost constant pain, and at times it was excruciating. Considering the permanent character of her injury and the pain which she endured, and which she is likely to endure, we do not think the verdict is excessive.

The judgment is affirmed.

LITTLE'S ADM'R v. CITY NATIONAL BANK OF FULTON.

(Filed May 22, 1903.)

Bank's right to offset indebtedness against deposits—L. died having on deposit in appellee bank \$547.68, and the bank held against him as principal a note for \$350, which matured the day after his death. The bank deducted the amount of the note and paid the balance to the administrator. This action was brought by the administrator to recover the amount retained by the bank, and this appeal involves the right of the bank to apply a deposit to the extinguishment of the depositor's indebtedness. Held—That the bank holds a lien upon the deposits in its hands to secure the repayment of the depositor's indebtedness, and may enforce that lien as the debts mature by applying the debtor's deposits upon them, thus setting the two off against each other.

R. B. Flatt for appellant.

Gus & Ed. Thomas for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Hobson.

C. H. Little died a resident of Fulton county on April 1, 1900. At the time of his death he had on deposit in his own name in the Citizens Bank of Fulton, Ky., \$547.68, and the bank held a note against him for \$350, on which J. C. Bennett and William Brown were sureties, which matured on April 2, or the day after his death. The bank paid to his administrator \$197.68, the balance of the deposit over and above the amount of the note,

but declined to pay the remainder of the amount, insisting upon its right to offset the note against it. The administrator then filed this suit against the bank, and the court having dismissed the action, he appeals.

The right of a bank to apply a deposit to the extinguishment of the depositor's indebtedness grows out of the doctrine that the relationship between the bank and the depositor is that of debtor and creditor.

"The bank holds a lien upon the deposits in its hands to secure the repayment of the depositor's indebtedness, and may enforce that lien as the debts mature by applying the debtor's deposits upon them, thus setting 'the two off against each other.'" (3 Am. & Eng. Ency. of Law, 835.)

In *Masonics' Savings Bank v. Bangs*, 8 Ky. Law Rep., 16, this court said that the right of a bank to this lien is recognized by all the elementary books on the subject and by an unbroken line of American decisions. In *Kentucky Flour Co. v. Merchants National Bank*, 90 Ky., 225, an insolvent debtor, who was indebted to the bank with which he had money on deposit, made an assignment before the debt of the bank had matured. It was held that the bank, although its debt had not matured, might offset its debt against the deposit as being between it and the assignee. The case here is much stronger in behalf of the bank, for its debt had matured before there was administration on the estate of the decedent or any demand made of it for the deposit, and when the suit was brought it had an existing demand which it could plead as a set-off. In *Ford v. Thornton*, 3 Leigh, 665, a debtor died before the note fell due; his estate proved to be insolvent; the bank at the time of his death had money of his on deposit, and it was held that the bank was entitled to apply the deposit to the payment of the note. In *Knecht v. United Savings Institute*, 2 Mo. App., 563, a bank held a note against a depositor who died insolvent before the note matured. The note was for more than the amount of the deposit; a balance was struck between the two demands, and the bank was allowed to prove up the remainder of its claim against the estate. In *Mathewson v. Strafford*, 45 N. H., 108, on substantially the same facts, the executor sued to recover the testator's deposit, and the bank was allowed to set-off its note against the testator, although it had not matured at his death, and the estate was insolvent. So in *Camden National Bank v. Green*, 45 N. J. Eq., 546, the testator having died, leaving a balance to his credit in the bank, which he, will to his wife, and she having had it transferred to her own account, the estate proving insolvent and the note held by the bank against the testator having matured, the bank was held entitled to set-off the deposit against the note, nor rights of third persons having intervened. (To the same effect 1 Moss on Banking, section 329, and cases cited, last edition.) A contrary rule is laid down in Pennsylvania where the estate is insolvent, but where the estate is solvent the same rule is followed as above indicated. (*Bosler v. Exchange Bank*, 4 Pa., 32, 45 Am. Dec., 665.) But this ruling is in conflict with the current of authority and the principles established in this State. With us insolvency is a well-settled ground for equitable set-off, and where a decedent owes a debt and has a claim coming to him from the same person, the rule is that the claims will be offset, although the estate is insolvent, on the ground that only the balance is really due from one party to the other. (*Newman on Pleadings*, 595-598; *Ell v. Horine*, 35 Ky., 398.) The

rule also is that if a bank after the note matures suffers the debtor to check out his deposit, and he then becomes insolvent, the surety in the note will be discharged. (*Pursifull v Pineville Banking Co.*, 97 Ky., 154.)

Judgment affirmed.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v. BELL.

(Filed May 22, 1903—Not to be reported.)

Railroads—Negligence—Appellee, a negro woman, was a passenger on appellant's train, and sprained her ankle while alighting from its train at Junction City. She brought this action and recovered \$800 damages for said injury. She alleges that the injury resulted from the failure of the brakeman to be at the usual place to furnish a stool upon which to step and thus shorten the distance between the step of the car and the gravel platform at the depot. The evidence introduced by appellant was to the effect that the company did not furnish a stool for colored passengers to step on. The court properly instructed the jury that they might consider the question as to whether the company had been accustomed to furnish a stool in order to aid passengers to alight, and that a failure to continue same was negligence for which they might give damages. It was the duty of appellant to make no distinction between the accommodations furnished for white and colored passengers.

Chas. H. Rodes and John Galvin for appellant.

Robt. Harding and Rawlings & Voirs for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Barker.

Appellee, Annie K. Bell, who is a colored woman residing in Junction City, Ky., instituted this action in the Boyle Circuit Court against the appellant to recover damages in the sum of \$1,000 for the spraining of her ankle, caused, as she alleges, by the failure of appellant to afford her a safe method of alighting from its car when she arrived at her destination. The facts, as shown by the record, are substantially these: Appellee purchased a ticket from appellant to ride on one of its passenger trains from Danville to Junction City, a distance of about four miles. At the time she reached her point of destination it was dark, and when she attempted to step from the platform of the car to the ground, she fell, spraining her ankle. The lower step of the car platform is twenty-three inches above the level of the station platform. Appellee claims that at the time she fell the porter of the train was not there to assist her in alighting, as was his duty, and there was no stool or box, such as is commonly used to shorten the distance from the lower step to the station platform. Appellee testified that she had often ridden upon appellant's train, and that always, prior to the accident, a stool or box had been placed on the station platform, so as to shorten the distance of the last step, and that she thought that this provision for her safety had been complied with; that owing to the darkness she did not observe its absence, and that her fall was caused by this omission of appellant, and the failure of its porter to be at his post of duty, to assist her in alighting. She was thoroughly familiar with the station, and testified that the station platform was made of crushed stone, rolled hard and smooth.

Appellant's evidence tended to show that no stool or box was ever used with the car for colored passengers, although this convenience was used in connection with the coach for white passengers. It was admitted that it was the duty of the colored porter, Frank Pursell, upon the arrival of the train at the station, to aid and assist the passengers to alight from the car. There is no error complained of in the instructions of the court, and the case appears to be one entirely of fact. It was within the province of the jury to determine whether they would believe the evidence of appellant or that of appellee. Undoubtedly it was the duty of appellant to afford its passengers a safe method of descending from its trains when they arrived at their destinations. The lower step of the car is shown to have been twenty-three inches from the surface of the station platform, and it can be readily seen that if it was true that appellee had been accustomed to find a box or stool to shorten this distance when she alighted from the train, and that it was so dark she did not notice its absence on the occasion upon which she received her injury, she might easily have been injured in the manner complained of by stepping down this unexpected long distance.

We can not recognize the right on the part of appellant to make the distinction between its passengers of having a stool or box to shorten the distance between the step of the coach for white passengers and not having the same appliance for the safety of its colored passengers. It was clearly the duty of the porter, Frank Pursell, to have been present at his post when the car stopped at Junction City, and to have aided the appellee in alighting; that it was his duty to do so he admits in his testimony, and while he denied that he was absent from his post at any time when his duty required him to be there, this was an issue for the jury to decide under all the testimony bearing upon it. The verdict of \$300 is not excessive, and we can not say that it was contrary to the weight of the evidence.

Wherefore, the judgment is affirmed.

SCHMIDT v. CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS.
RY. CO.

(Filed May 22, 1903—Not to be reported.)

1. Breach of contract—Refusal to issue tickets—Appellant had purchased a mileage book by the terms of which he was entitled to demand and receive tickets in exchange over designated roads between points designated as stopping points on the time tables of the road. At North Vernon, Ind., he demanded of the agent a ticket to Louisville, which he refused to give, but stated that he could arrange it with the conductor; that he got on the train, but the conductor refused to accept his mileage and refused to permit him to ride by paying the same rate per mile as allowed by the book, and on his refusal to pay the cash fare demanded the train was stopped and appellant was put off. He instituted this action for damages, and the court gave a peremptory instruction to find for defendant. Held—That appellant was entitled to recover damages, but he had no right to enhance his damages by getting on the train without a ticket. He was in the attitude of one who gets on a train without a ticket.

2. Measure of damages—Plaintiff may recover as damages for time lost, any expense he thereby incurred, or any loss that he thereby directly sus-

tained, as he was entitled to a ticket at North Vernon, although appellee does not own the road between the two points.

W. W. Thum and E. C. Underwood for appellant.

Humphrey, Burnett & Humphrey for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Hobson.

Appellant bought a mileage book issued by appellee and other railroads. The provisions of the contract here material are as follows:

"1st. The original purchaser is entitled to receive one thousand miles of transportation in exchange tickets over the lines named on the back cover under the local regulations, and subject to all the conditions of the contract.

"2d. This mileage exchange order will not be honored on the train, nor in checking baggage, but must be presented at the ticket office, and there exchanged for a continuous passage ticket, which will be honored in checking baggage and for passage when presented in connection with this mileage exchange order.

"9th. The exchange ticket issued hereon entitles the owner to passage only on trains advertised and designated to carry passengers, and only to and from stations at which such trains are scheduled to stop.

"* * * The mileage coupons of this exchange order will be accepted in exchange for continuous passage—local tickets by the following lines, with the exceptions indicated by clause 2 of the contract printed hereon."

(Then follows a list.)

On April 21, 1900, appellant presented his mileage book to the ticket agent of the appellee at North Vernon, Ind., and asked for a ticket to Louisville.

The agent refused to issue the ticket, but told him that if he could fix it with the conductor it would be all right. Shortly afterward the train came, and appellant entered the train. After the train had gone about half a mile the conductor called on appellant for his ticket. He presented his mileage book: the conductor refused to accept it because appellant did not have an exchange ticket. He explained that the ticket agent had refused to give him an exchange ticket, and offered to pay cash at the rate allowed by the mileage book. The conductor refused to accept this, but offered to carry him for the full cash fare. He refused to pay the full cash fare, and in consequence the train was stopped, and he was required to leave the train. He then filed this suit to recover damages. At the conclusion of the evidence the court instructed the jury to find for the defendant.

It is contended for appellee that as it does not own the track between Louisville and North Vernon, therefore, that portion of the route is not a part of its line within the meaning of the contract, although its trains run over it, there being a contract with the owner of the roadbed that it will not do local business between the two points. In answer to this contention the judge before whom the case was originally tried well said: "It is shown by the time table of defendant, filed in evidence, that it advertised trains between Louisville and North Vernon, and made no distinction between those points, admitted to be on that part of the route owned by it. The map, forming a part of time table, likewise makes no distinction. So far as the general public is concerned it is not at all concerned as to whether

or not the track is used by right of absolute ownership, leasehold or special permit. It has a right to presume that such a ticket as that purchased by plaintiff is good upon any portion of route, or line, advertised by any of the associated companies, as a part of their respective system, unless expressly excepted in clause 2, which must, as between the purchaser of such ticket and such railroad, be conclusively held to embrace all portions of its line, or advertised route, over which the ticket is not good. The qualification as to 'local regulations' manifestly did not contemplate that the traveling public would have to inquire into conditions of private contracts between different roads using part of the same right of way, but had reference to such regulations as to separate coaches, baggage liabilities, etc., as the particular road, over which the ticket was, for the time being, used, was required by law to observe, or as it saw fit to exact of its passengers."

We, therefore, conclude that by the terms of the contract the plaintiff was entitled to the exchange ticket from North Vernon to Louisville, and that the agent should have issued it to him. But although this is true, he had no right to ride on the train without the exchange ticket, and he understood when he got on the train that he took the chance of fixing the matter with the conductor. He stood exactly in the same position as if he had gotten on the train without any ticket, for he knew by the term of his contract the conductor was not authorized to accept his mileage book. When the agent refused to deliver him the exchange ticket he could not enhance his damages by getting on the train wrongfully, and forcing the conductor to eject him. This is not a case of a passenger acting under an honest mistake as to his rights, as where the agent sold him by mistake one ticket for another, and he got on the train without discovering the difference. But it is simply the case of one who, with full knowledge of the facts, got on the train without a ticket.

But although the plaintiff can not recover for the expulsion from the train, still he has a cause of action. By the terms of his contract he was entitled to ride on the train upon an exchange ticket which it was the duty of appellee to furnish him when he demanded. By its wrongful refusal to comply with the agreement he was prevented from traveling on this train. As the petition sets out the whole transaction, the plaintiff may recover for the refusal of the defendant to issue to him the exchange ticket and carry him on the train, the measure of damages being the time he thereby lost, any expense he thereby incurred, or any loss that he thereby directly sustained.

Judgment reversed and cause remanded, with directions to grant appellant a new trial.

THOMAS v. SCOTT, &c.

(Filed May 22, 1908—Not to be reported.)

McMillan & Talbott and T. N. Lindsey for appellant.

H. C. Howard and Buckner Clay for appellees.

Appeal from Bourbon Circuit Court.

The court delivered the following response to petition for rehearing:

Per Curiam: The court erred in stating in the opinion that Mary Turner died in 1891. She died 1901. The apparent error did not enter into the consideration of the case; it only occurred in the preparation of the opinion.

HALL v. GRAZIANA.

(Filed May 22, 1903—Not to be reported.)

Jury—New trial—In this action appellant asks a reversal on the ground that one of the jurors was a client of appellee, and when examined as to his qualifications denied that he was a client. Held—That while the proof does not establish the truth of the charge, yet such relation would not disqualify him as a juror, although it might be sufficient as a ground for challenge. Appellant also urges as error the refusal of the lower court to grant him a new trial on the ground of newly-discovered evidence. Held—That the grounds are not sustained by affidavits as to their truth, and will not, therefore, be considered.

Walker C. Hall for appellant.

H. D. Gregory for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is the second appeal in this case. The facts and the substance of the pleadings are fully set out in the former opinion, reported in 23 Ky. Law Rep., 2351. A jury trial of the issues raised by the pleadings resulted in a verdict for the plaintiff, Graziani, for the amount sued for. Thereupon the defendant, Hall, filed a motion for judgment notwithstanding the verdict, on the ground that this was an action for contribution by one cosurety against another; and that in the absence of an allegation and proof of insolvency of the joint principal defendant was entitled to a nonsuit. He also filed grounds and motion for a new trial. The trial judge sustained the motion for judgment non obstante verdicto, and dismissed the petition. Upon the former appeal it was held that the trial judge erred in sustaining this motion, and the case was remanded for judgment upon the motion for a new trial. Upon the return of the case the defendant, in addition to the numerous grounds for a new trial previously filed by him, filed the additional one that one of the jurors who rendered the verdict, when interrogated as to his qualifications as a juror in the case, had falsely stated in response to a question propounded to him by the defendant, that he was not a client of the plaintiff; and that but for such false statement by the juror he would have been excused. He also claimed that he had discovered new and material testimony not within his reach before the trial.

Upon this appeal the chief ground relied on for a reversal is that upon the former appeal this court held that the plaintiff and defendant, by the execution of their joint obligation to the bank for the debt of Schmitz, became as to each other joint principals, and not mere cosecurities of the former principal in the obligation, and that it was, therefore, unnecessary for the plaintiff to have proved the insolvency of Schmitz before he was entitled to recover in this suit. The defendant has failed to suggest, and we are unable

to perceive, how the ruling of the court on this point could have in anywise changed the defenses relied on by appellant when sued upon the theory that both he and plaintiff were cosureties of Schmitz. The plaintiff alleged that he had paid the whole of the joint obligation, and defendant admitted it, and set up by way of defense that the plaintiff had violated his agreement to apply the salary of Schmitz to the payment of the note; and, second, that he violated his agreement not to convey to Schmitz certain lots until this note was paid. The allegations were specifically denied, and the issues of fact were submitted to the jury under instructions more favorable to the defendant than the law warranted, and the jury found in favor of the plaintiff.

The charge that one of the jurors was a client of the plaintiff at the time the case was tried appears from the affidavits filed on this point not to be true. But even if true, it would have furnished no sufficient ground for setting aside the verdict of the jury, although it might have been sufficient ground for a challenge. The motion for a new trial on the ground of newly-discovered evidence was not sustained by affidavits showing their truth, as required by section 343 of the Civil Code, and seems to have been abandoned by the defendant; but in any contingency, we do not think the court would have been justified in setting aside the verdict of the jury on the grounds recited.

Upon the whole case we have been unable to discover any error prejudicial to appellant's substantial rights, and the judgment is, therefore, affirmed.

BOARD OF INTERNAL IMPROVEMENT FOR LINCOLN CO. v.
MOORE'S ADM'R.

(Filed May 22, 1903—Not to be reported.)

1. Damages—Continuance—One of the grounds relied on by appellant for a reversal is the error of the court in refusing to grant it a continuance in order to obtain the attendance of witnesses. Held—That the court did not err in refusing a continuance as the absent witnesses were without the jurisdiction of the court, and there was no probability of securing their attendance at any future trial.

2. Evidence—Appellee having testified on the motion for a continuance as to the residence of a witness, his wife was a competent witness on the trial before the jury.

3. Misconduct of attorney—The argument of counsel for appellee before the jury was not improper in connection with the particular evidence given.

4. Verdict—On the first trial a verdict for \$17,000 damages was set aside as excessive and a second trial resulted in a verdict for \$15,000, which was reversed by this court on the ground of its being excessive and evidently resulting from passion and prejudice. The verdict on the last trial was for \$13,000, which this court is asked to reverse because of its being excessive. Held—That under section 341, Civil Code of Practice, as well as under the precedents of this court, the verdict will not be disturbed as the jury are the triers of the facts, and after a third verdict this court will not interfere, as it is the policy of the law to terminate litigation at some point, and this is considered reasonable.

W. G. Welch, C. R. McDowell and Breckinridge & Breckinridge for appellant.

Robt. Harding, J. W. Rawlings, Stone & Stone and Emmet V. Puryear for appellee.

Appeal from Casey Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the Lincoln Circuit Court by the appellee to recover damages from the appellant for the death of his intestate, caused, as it was alleged, by the negligence of appellant's agents and servants.

The appellee is a corporation, owning and operating a turnpike road in Lincoln county, Kentucky. Della Moore, a girl of some fourteen years of age, in company with her mother, was driving a phaeton along the turnpike road; while in the act of passing under the tollbar of one of appellant's toll-gates, the top of the phaeton was caught by the bar, and before the horse could be stopped the front wheels of the vehicle were raised from the ground some two feet, whereupon the girl either jumped, because of fright, or was thrown out of the phaeton to the ground, receiving injuries from which she shortly thereafter died.

The case, after the issues were made up, was transferred on motion of the appellant to the circuit court of Casey county, this action of the court being based upon the claim that there was great prejudice existing against turnpike companies in Lincoln county. The first trial resulted in a verdict by the jury in favor of appellee, awarding him damages in the sum of \$17,000. The verdict was set aside, and appellant awarded a new trial by the circuit judge. A second trial was had, resulting in a verdict for appellee in the sum of \$15,000. Appellant's motion for a new trial having been overruled, the case was appealed to this court, and reversed, alone upon the ground that the verdict was so excessive as to indicate that it was the result of prejudice or passion. The opinion of the court referred to is found in 23 Ky. Law Rep., 1885, and recites the facts of the accident so fully as to render it unnecessary to reproduce them here at any great length or detail. Upon the return of the case a third trial was had, in which the jury returned a verdict in favor of appellee for the sum of \$13,000. Appellant's motion for a new trial having been overruled, the case was again appealed to this court. The grounds relied upon by counsel for reversal are as follows:

1st. That the court erred in overruling appellee's motion for a continuance, and forcing it to trial in the absence of important witnesses.

2d. That the court erred in permitting both John J. Moore, the appellee, and his wife, Mrs. Mattie Moore, to testify in the case.

3d. Because of misconduct of appellee's counsel in making the closing argument to the jury.

4th. That the verdict was palpably contrary to the evidence, and excessive.

Appellant's motion for a continuance ought not to have been sustained under the circumstances. It clearly appeared that nearly all the witnesses of whose absence it complained were without the jurisdiction of the court, and there was no reasonable probability that their presence could be had by a continuance, and their depositions had been taken prior to the trial. The question of continuing a case because of the absence of witnesses is one addressed to the sound discretion of the court, as was held in the case of McClurg v. Iglehart, 17 Ky. Law Rep., 913, and we do not think that the

trial judge abused his discretion in overruling appellant's motion for a continuance.

The record does not bear out the contention of appellant that both John J. Moore and his wife, Mattie Moore, testified. It is true that on the motion for a continuance appellee introduced John J. Moore to show that one of the witnesses, of whose absence appellant was complaining, lived without the jurisdiction of the court. This was a matter happening before the trial, and his testimony was addressed alone to the court. Mrs. Mattie Moore testified upon the trial of the case, which she had a right to do, under the rulings of this court upon the former appeal.

The misconduct of counsel for appellee, complained of, consists in the following statement made by him at the close of his argument to the jury: "It was necessary to introduce this cap, not for the purpose of wringing a heart-rending cry from the mother, as stated by you, Judge Denton, but for the purpose of showing the blood on the inside of it, made four years ago (shows spot to the jury). The cap is introduced in evidence, that is, the cap; I expect the best evidence is the blood spot itself. Remember, four years ago, gentlemen of the jury, this happened, right on that pure child's head. We tell you over and over that she had a blow there (displaying the cap). There is the evidence of the blow, the blood spot on the cap as it struck."

We do not think that this statement, considering the evidence in the case, was entirely unwarranted. The cap which was introduced in evidence was shown to be the one used by the little girl at the time she was injured. There was evidence for appellee conducing to show that she had been struck on the head by the careless pulling down of the tollbar by appellant's son, and there was no dispute as to the fact that the injuries she received caused profuse bleeding about her head, the difference in the evidence being as to whether this blood came from a cut on the scalp, or from the cavity of the ear. There was, doubtless, blood on the cap, and we can not see why counsel for appellee should not have referred to it in the argument in the manner that he did; certainly we can not say that, in so doing, he was guilty of misconduct.

The verdict complained of in this case is the third one rendered, and we are now asked to reverse the same because the verdict is contrary to the weight of the evidence, and excessive. Section 341 of the Code contains the following: * * * "No more than two trials be granted to a party upon the ground that the verdict is not sustained by the evidence." In the case of the Louisville & Nashville R. R. Co. v. Graves' Ass'ee, 78 Ky., 74, this court held that where there had been three verdicts for the plaintiff, the case would not be reversed because the third verdict was contrary to the weight of the evidence. Judge Cofer, in delivering the opinion of the court, said: "As before remarked, there is some evidence conducing to sustain the verdict. Questions of fact belong, under our judicial system, to the jury, with a discretionary power in the court to set aside their finding when clearly against the weight of the evidence; but the court does not then take the case from the jury and decide the questions of fact, but must refer it to another jury; and so long as there is some evidence to sustain the cause of action or defense the case must, after each reversal, go again to a jury. If counsel is right in his position, that when the court reverses once because

the verdict is against the evidence, it must continue to do so as long as the evidence is the same, there can be no end to litigation, unless the jury will give way to the court. This might render the litigation in a case interminable, and would sap the very foundation of the jury system. Questions of fact belong primarily to the jury, and the court only interferes to prevent injustice from haste, inadvertence, or prejudice; and as the court has no authority to decide questions of fact in a case properly triable by a jury, if there be any evidence proper to be considered by the jury, if the jury will not give way the court must, that there may be an end of litigation."

To the same effect is the case of the Louisville & Nashville R. R. Co. v. Adams, 10 Ky. Law Rep., 713, and the Louisville & Nashville R. R. Co. v. Ballard, 88 Ky., 150.

Perceiving no error in the record we feel constrained to affirm the judgment.

SISK v. GARDINER.

(Filed May 23, 1903—Not to be reported.)

Injunction—Schools—Validity of vote authorizing issue of bonds and election of trustees—This appeal involves the validity of an election by which an issue of \$25,000 was authorized to build a school house for a graded common school in Madisonville, a city of the fourth class; also the validity of an election for school trustees for said school under and by virtue of section 4489, Kentucky Statutes. It is insisted that an injunction was improperly refused because the election should have been held on a regular election day, and was void because the vote was not taken by secret ballot and because women were permitted to vote. Held—That under section 4464, Kentucky Statutes, the election was not required to be held on a regular election day, and under section 4467, Kentucky Statutes, such elections are required to be held viva voce. Said election was not void because women were permitted to vote. As section 4458, Kentucky Statutes, permits women possessing certain qualifications to vote in such elections, it will be presumed that any women that may have voted were qualified to do so.

Ruby Laffoon and W. C. Hopewell for appellant.

C. J. Waddill and Lee Gibson for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Barker.

Appellees are the school trustees of the city of Madisonville, Ky., and appellant is a male white citizen, residing and owning property and being a lawful voter therein. This action was instituted in the Hopkins Circuit Court for the purpose of enjoining the appellees from issuing \$25,000 of bonds for the purpose of raising money sufficient to erect a graded common school building, under and by virtue of an election held for that purpose.

The petition of appellant sets out, with great particularity and minuteness, all of the proceedings, upon the regularity and validity of which is based the right of the appellees to issue the bonds in question. A general demurrer was filed by appellees to the petition, and was sustained by the circuit court. Appellant declining to amend his petition, the court thereupon dismissed it; and from this judgment he has appealed.

Madisonville is a city of the fourth class, and on the second day of December, 1902, under and by virtue of the provisions of section 4489 of the Kentucky Statutes, there was submitted to the qualified voters of the city the following question: "Shall the city of Madisonville, Ky., accept the provisions of an act of the general assembly of the Commonwealth of Kentucky, entitled 'An act to provide for an efficient system of schools throughout the State,' approved July 6, 1893, being article 10, chapter 113 of the Kentucky Statutes, and establish a graded common school therein?"

At the election so held the qualified voters of Madisonville, by a large majority, accepted the provisions of the act in question, and authorized the establishment of a graded common school in the city. Afterwards, on the 14th day of April, 1903, an election was held by the qualified white voters of the city of Madisonville, for the purpose of taking their sense on the proposition as to whether or not the city should establish and maintain a graded common school for white children, and should purchase, erect and equip a suitable building therefor, to cost not exceeding \$25,000, by the levy and collection of an annual tax of 50 cents on each \$100 worth of property in the city owned by white persons and corporations, and by the levy and collection of an annual head tax of \$1.50 on each white male inhabitant over the age of twenty-one years residing in the city of Madisonville, and for the election of six school trustees. At the election so held the qualified voters, by largely more than a two-thirds majority, voting viva voce, pronounced in favor of the proposition submitted to them, and it was, therefore, carried; and the appellees were elected school trustees for the district of Madisonville.

A comparison of the allegations of the petition with the provisions of article 10, chapter 113 of the Kentucky Statutes, shows that all the provisions of the statute were carefully and faithfully performed in holding both of the elections referred to above. Appellant contends that the judgment dismissing his petition should be reversed, first, because the election should have been held on a regular election day; second, it was void because the vote was not taken by secret ballot third, it was void because women were permitted to vote.

Section 4464 authorizes the elections involved in this litigation to be held either upon a regular election day or on any other day fixed in order. Section 155 of the Constitution is as follows: "The provisions of sections 145 to 154, inclusive, shall not apply to the election of school trustees and other common school district elections. Said elections shall be regulated by the general assembly, except as otherwise provided in this Constitution."

As the elections under discussion were common school district elections, they were not required to be held on a regular election day, and the case of Belknap against the city of Louisville has no application to the question at bar. A secret ballot was not necessary. Section 4467 of the Kentucky Statutes requires that elections such as those under discussion be held viva voce, the provision in this regard being as follows: "On the day set apart for the election the officer shall open a poll, and shall propound to each voter who may vote the question: 'Are you for or against the graded common school tax?' and his vote shall be recorded for or against the same, as he may direct."

The record does not show that women were permitted to vote at the elections in question; but if they were, the elections would not have been, for that reason, void. Section 4458 of the Kentucky Statutes provides that any widow or spinster residing in any school district, who is a taxpayer, or who has children within the age fixed by the common school law to be educated shall be deemed a qualified voter under this statute. (Chapter 113.) If women were allowed to vote at the elections in question, the presumption will be indulged that they belonged to the class which the statute declares to be legal voters in matters relating to common schools. All the provisions of the statute regulating and concerning the elections involved in this litigation, having been scrupulously followed by the officers having them in charge, we conclude that the elections so held were legal and valid; that the appellees were duly and legally elected as school trustees for Madisonville; that the tax submitted to the qualified voters was legally carried, and that the issue and sale of the bonds complained of may be lawfully made by the trustees and this having been the conclusion reached by the chancellor, his judgment, dismissing appellant's petition, is affirmed.

COMMONWEALTH v. CANTRILL, JUDGE.

(Filed May 22, 1908—Not to be reported.)

Mandamus—Refusal of circuit judge to vacate the bench—A circuit judge, who had by a former decision of this court been adjudged to have improperly refused to vacate the bench on the trial of a case, who refuses on a return of the case to vacate the bench will be compelled by mandamus of the court to obey the mandate issued on the former appeal.

R. B. Franklin, Commonwealth's attorney, for appellant.

Opinion of the court by Judge Hobson.

In *Powers v. Commonwealth*, 24 Ky. Law Rep., 1007, decided December 8, 1902, it was held that the affidavit filed by the defendant was sufficient to require the circuit judge to vacate the bench. After discussing the question at some length the court said: "We conclude that the trial court erred in not vacating the bench upon the motion and affidavit discussed."

For this reason, and others indicated in the opinion, the judgment was reversed and cause remanded "for a new trial under proceedings not inconsistent" with the opinion. After the mandate was filed in the circuit court the defendant entered a motion that the circuit judge vacate the bench, and his attorneys being unable to agree with the Commonwealth's attorney upon the selection of a judge to try the case, moved the court to direct the clerk to certify the facts to the governor in order that he might appoint a judge to try the case.

The court overruled the motion. The Commonwealth's attorney thereupon entered a motion in this court, to which the circuit judge entered his appearance, asking a rule absolute, requiring him to vacate the bench in order that such steps may be taken as are required by law for the commission of a special judge to try the case.

The opinion in the case of *Powers v. Commonwealth*, above referred to, is binding on the circuit court and no less on this court. On the return of the

case to the circuit court it was incumbent on the circuit judge to vacate the bench in obedience to the mandate of this court. No further showing was required. It had been finally determined that the regular circuit judge could not properly preside in that case.

Mandamus will, therefore, issue.

DAVIS, JR., & C. V. WILLSON.

(Filed May 26, 1908.)

Wills—Trusts—Mortgages—Estoppel—Lis pendens—ChamPERTY—A. by his will devised to his son B. a large estate in fee simple; also real estate in trust worth about \$30,000, which was given to B. for life, and the remainder to the children of B. living at the time of his death. His guardian, under authority of a decree of the chancellor, applied a portion of the property belonging to B. in fee to the improvement of the trust property. After reaching his majority B. became dissatisfied with the investment made by his guardian; instituted an action against all parties in interest except his two daughters, C. and D., who were infants, for the purpose of reimbursing him out of the trust estate for the amount of his fee-simple property invested in same. The court directed that a certain house and lot belonging to the trust estate should be conveyed to him. Afterwards B. improved this property and sold it to appellant, and appellant instituted an action to quiet his title. Upon the institution of this action C., a daughter of B., employed appellee, an attorney at law, to defend the action for her, and executed a promissory note for a \$1,500 fee and a mortgage on her remainder interest in the property to secure same. This mortgage was duly recorded. The lower court granted the prayer of the petition, but said judgment was reversed on appeal and it was held that B. had only a life interest in the property, and, therefore, no right to dispose of the remainder interests of C. and D. in the property. After the return of the case to the lower court appellant purchased the interests of C. and D. for \$1,000, and an agreed judgment quieting the title was entered. Appellee instituted this action to enforce his mortgage lien against said property. In defense appellant urged that the mortgage to appellee was champertous, as appellant, at the time same was executed, was in the adverse possession of said property. Held—That appellant only held the life interest of B. under his purchase as a life tenant does not hold adversely to the remainderman within the meaning of chapter 15, Kentucky Statutes. Under section 2341, Kentucky Statutes, she had the right to mortgage her remainder interest and appellant had constructive notice of said mortgage from the time of the recording in the clerk's office. Appellant also claims that appellee can not recover as he was a pendente lite purchaser. Held—That the general rule is that a pendente lite purchaser is bound by the judgment rendered in the case pending at the time of the purchase, but this rule only applies to the cause of action pending at the time of the purchase and is not affected by a cause of action set up subsequent to his purchase. The transaction with C. and D. was nothing more than the purchase of a quit-claim deed from them and did not affect appellee's rights. The court properly fixed the value of C.'s interest at \$500, which she had fixed in her contract, and adjudged a lien to that extent in favor of appellee.

Smrall & Doolan for appellants.

Stanley E. Sloss for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Barker.

John I. Jacob, by his last will and testament, devised to his son, Charles D. Jacob, a large estate in fee simple, and also real estate in the city of Louisville, Ky., worth the sum of \$30,000, in trust to him for life, with remainder to his children living at the time of his death. At the time of the death of his father Charles D. Jacob was an infant, and his guardian, in order to improve his trust estate, instituted an action in the Louisville Chancery Court, and therein obtained a decree authorizing the sale of a portion of his ward's fee-simple estate, and the right to invest the proceeds in improving the trust estate in order to increase its productiveness. Under this decree about \$13,000 worth of the fee-simple estate was sold, and invested in improving a part of the trust property situated at the corner of Fourth and Main streets, in Louisville, Ky.

After reaching his majority Charles D. Jacob became dissatisfied with the investment made by his guardian, and instituted an action in the Louisville Chancery Court against all parties in interest, except his two daughters, Mrs. I. P. Caldwell and Miss Lucy D. Jacob, who were then infants. In this action a decree was rendered, refunding to the fee-simple estate the sum that had theretofore been taken from it to improve the trust estate; and for this purpose a house and lot at the corner of Third and Main streets, belonging to the trust estate, and which was supposed to be about equal in value to the sum taken from the fee-simple estate to improve the trust property, was conveyed to Charles D. Jacob, in fee simple, by the commissioner of the court. This lot he afterwards improved by building a new business house thereon, at an outlay of \$27,000 from his fee-simple estate, and later conveyed the lot and improvements to W. Y. Davis for the sum of \$36,000, with covenant of general warranty.

Subsequently W. Y. Davis, learning that the children of Charles D. Jacob were claiming to be owners of the reversion of the property sold to him, instituted an action in the Louisville Chancery Court against them for the purpose of quieting his title. Upon the institution of this action Mrs. I. P. Caldwell, and her husband, employed the appellee, A. E. Willson, who is an attorney of the Louisville bar, to defend the action. The sum of \$1,500 was agreed upon as a fee for his services to be thereafter rendered, for which they executed and delivered their promissory note, to secure which Mrs. Caldwell and her husband, I. P. Caldwell, executed, acknowledged and delivered a mortgage upon her interest in the property involved in the litigation, which was recorded by the clerk of the Jefferson County Court in his office.

Upon the trial of the case in the court below the chancellor rendered a decree sustaining the prayer of the petition, and quieted the title of W. Y. Davis to the property. From this judgment an appeal was taken, and the case reversed in an opinion to be found in the 16 Ky. Law Rep., 21-24, inclusive. In this opinion it was decided by this court that the life tenant, Charles D. Jacob, had no right to have refunded to him out of the trust property the money which his guardian had taken out of his fee-simple estate to improve the trust estate, and that as his daughters, Lucy D. Jacob and Mrs. I. P. Caldwell, were not parties to the action in-

stituted by him for the purpose of obtaining the decree by which this re-funding was authorized, they were not bound by it. The court further said that if it could be made to appear that the trust estate had not been injured by the whole transaction, and that there still remained to the contingent remaindermen the \$30,000 worth of property devised to them in remainder by their grandfather, with its natural increase in value, then W. Y. Davis would be entitled to a decree quieting his title.

After the case returned to the lower court no further steps were taken for several years, W. Y. Davis making no effort to establish the fact that the trust estate had not been depreciated by the action of Charles D. Jacob in taking from it the house and lot at Third and Main streets. After the lapse of three or four years, without notice to appellee, W. Y. Davis made a settlement with the contingent remaindermen, by which he paid to them the sum of \$1,000, in consideration of which sum they signed and delivered to him an agreed judgment quieting his title to the property in question, in accordance with the prayer of his petition. Subsequently Charles D. Jacob died, and A. E. Willson instituted this action in the Jefferson Circuit Court, Chancery division, for a judgment on this note, and an enforcement of his mortgage lien, by which its payment was secured. In bar of the action W. Y. Davis pleaded, first, that at the time of the execution of the mortgage he was in actual, adverse possession of the property, claiming it as his own adversely to all the world, and, therefore, the mortgage was champertous and void; second, that appellee was a pendente lite purchaser, and consequently bound by the judgment rendered in the action to quiet the title to the property mortgaged; third, that appellant had no notice of appellee's mortgage at the time he settled with the contingent remaindermen, and that appellee's mortgage being a chose in action was not a recordable instrument, and, therefore, did not give constructive notice of its contents, or existence, to appellant.

Under the deed from Charles D. Jacob, W. Y. Davis took such estate as the grantor had power to dispose of, which was a life estate. The life tenant's holding is not adverse to the remaindermen, but, on the contrary, is amicable to them, the possession of the life tenant being the possession of the remaindermen. At common law a remainder could not be created without a particular estate to support it, the reason being that an estate of freehold of inheritance could not be created without livery of seisin, or delivery of possession; and, therefore, it was necessary that there should be a tenant of the particular estate to whom livery of seisin could be made, the possession of the tenant of the particular estate being the possession of the remainderman. That the life tenant does not hold adversely to the remainderman is so elementary as hardly to need citation of authority. (Smith v. Shackelford, 9 Dana, 475; Gregory v. Ford, 5 B. Mon., 475; Phillips v. Johnson, 14 B. Mon., 140; Thurman v. White, 14 B. Mon., 450; Simmons v. McKay, 5 Bush, 31; DeCoursey v. Dicken, 1 Ky. Law Rep., 260; Mays v. Hannah, 4 Ky. Law Rep., 50; McIlvaine v. Carter, 9 Ky. Law Rep., 899; Gudgell v. Tydings, 10 Ky. Law Rep., 787; Tucker v. Price, 17 Ky. Law Rep., 11; Berry v. Hall, 11 Ky. Law Rep., 30; Mays v. Scott, 13 Ky. Law Rep., 248; Davidson v. Kelley, 23 Ky. Law Rep., 248; Davidson v. Kelley, 23 Ky. Law Rep., 1011.)

As appellant's holding was amicable to the remaindermen, the contract by which Mrs. Caldwell conveyed her interest in the land, by mortgage to appellee, was not champertous under the provisions of chapter 15 of the Kentucky Statutes. She had the right to mortgage her contingent interest. Section 2341 of the Kentucky Statutes provides: "Any interest in, or claim to, real estate may be disposed of by deed, or will, in writing." In construing this section this court, in the case of the Bank of Louisville v. Baumeister, 87 Ky., 6, said: "And that the right to dispose of such interest or claim was intended to include the right to mortgage, as well as to sell absolutely, is unquestionable. For it is well settled that every kind of interest in real estate may be mortgaged, if it be subject to sale and assignment." (Jones on Mortgages, section 136.)

The court then held that an option upon real property was such an estate as was subject to sale and mortgage. In the case of Overton v. Means, 2 Ky. Law Rep., 211, this court said: "Whether an interest, by devise, in lands is vested or contingent, it is vendible, and subject to sale for the satisfaction of debts." In the case of White's Trustee v. White, 86 Ky., 603, it is said: "It is contended that by the common law the contingent remainder could not be sold by a decree of court, for the reason that the decree could operate on the title only, and as no title passed to the contingent remaindermen until the happening of the contingency, there could be no sale in the interim by a decree of court. But section 6, article 1, chapter 63 of the General Statutes (section 2341 of the Kentucky Statutes), provides: 'Any interest in, or claim to, real estate may be disposed of by deed, or will, in writing.' This provision clearly embraces a contingent remainder interest in the land." To the same effect is McAllister v. Ohio Valley Banking and Trust Co.'s Ass'ee, 24 Ky. Law Rep., 1807.

As the interest of the remaindermen was subject to mortgage, appellant had constructive notice of the existence of appellee's lien from the time of the recording in the county clerk's office. Undoubtedly the general rule is that a pendente lite purchaser is bound by the judgment rendered in the case pending at the time of purchase, but this rule is subject to this modification, that the rights of the purchaser is subservient only to the cause of action pending at the time of his purchase, and is not affected by a cause of action set up subsequent to his purchase.

VanFleet, in his work on Former Adjudication, volume 2, section 586, page 1116, declares the rule as follows: "A lis pendens purchaser is not affected by a decree made on new matter incorporated into the bill by way of amendment after his purchase." (Freeman on Judgments, sections 199 to 202, inclusive.)

In the case of Stone & Warren v. Connelly, 1 Metcalfe, 652, in discussing the precise question involved here, it was said in the opinion: "It is argued, on the part of the appellants, that a lis pendens was created by the filing of the original petition and the service of the process thereon; and that as the object of the action, from its commencement to its conclusion, was to subject to sale the house and lot in the pleadings mentioned, for the payment of the debt due to the plaintiffs, the alienation of the property during the pendency of the action was unauthorized, and that the purchaser is affected in the same manner as if he had actual notice of the proceeding,

and in every respect occupies the attitude of a pendente lite purchaser. The general rule is that a person who purchases during the pendency of a suit is bound by the judgment that may be rendered against the person from whom he derives title. The rule, however, does not operate to annul the conveyance, but only to render it subservient to the rights of the parties to the action. The original petition was a proceeding in rem to subject real estate to the payment of the plaintiffs' demand. The jurisdiction of the court, to furnish the relief sought for, was based and depended upon the allegation that the debtor intended to make a fraudulent disposition of the attached property. As that allegation was not sustained by proof, the court had no power, on that ground, to order a sale of the property, nor were the plaintiffs entitled to any relief on their original petition.

"The purchase was made during the pendency of the litigation, under the original petition. The purchaser held subject to the result of that litigation, and subservient to the rights of the plaintiffs arising out of it. As, however, the plaintiffs were not entitled to a judgment upon the matters then in litigation, are the rights of the purchaser to be affected by another distinct ground of equitable relief, which was subsequently asserted by them in an amended petition? An entirely new *lis pendens* was created by this amendment. By it the plaintiffs' right to come into a court of equity was placed upon a different and distinct ground. It did not operate as a continuance of the original equity which had been relied on, but asserted an additional and independent ground of equitable relief. It presented an entirely different state of case, and amounted, subsequently, to a new cause of action. The *lis pendens* which it created can not be permitted to relate back to the commencement of the action, so as to affect intervening rights."

The judgment obtained in this action was not based upon the ground for equitable relief set up by appellant in his action against the remaindermen; on the contrary, this court decided adversely to him on the issues raised by his pleadings. It is true that the court in the opinion, said that if, when the case went back to the lower court, it could be shown that the trust estate of the remaindermen was in statu quo (that is, that it remained intact with its natural advancement in value) then, in that case, a judgment quieting the title might be rendered; but this state of facts was never set up by amended pleading, nor was it attempted to be shown by the evidence; instead of doing this, appellants purchased the interest of the remaindermen by the payment of money, and the agreed judgment entered in pursuance of this contract was, in effect, nothing more than the purchase of a quit-claim deed from them.

This newly-purchased title to the land of the remaindermen can not be allowed to relate back, so as to defeat the claim of appellee acquired years before. We think the chancellor adopted the correct basis in estimating the value of the interest of Mrs. Caldwell. Appellee could not acquire a greater interest than his mortgagor, and as the parties, by their own agreement, fixed the value of the interest of both the remaindermen at \$1,000, Mrs. Caldwell's interest was justly placed at \$500. It does not alter the status of matters to show that Mrs. Caldwell actually got the whole sum of \$1,000 paid for the outstanding interest: as a matter of law she was only entitled to one-half this sum, and this must be considered as the real value of her

interest, and the value of her interest must limit the right of appellee's recovery under his mortgage.

Wherefore, the judgment of the chancellor, both upon the original and cross appeal, is affirmed.

BOND v. BRAND'S TRUSTEE, &c.

(Filed May 26, 1903.)

Judicial sales—Liability of purchaser to taxes—The question presented on this appeal is whether or not a purchaser of real estate at a sale made by a commissioner of the court on September 15, 1902, is liable for all taxes that may be assessed against said property on that day. Held—That upon the acceptance of his bid by the commissioner the purchaser becomes the holder of the equitable title to said property within the meaning of section 4023, Kentucky Statutes, and subject to taxes on said property assessed on the 15th of September.

Walton & Rives for appellant.

Morton & Darnall for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 2d day of August, 1902, the appellant, C. E. Bond, became the purchaser of a lot and storehouse, situated thereon, in the city of Lexington at a decretal sale made by the master commissioner of the Fayette Circuit Court, at the price of \$22,420, and executed bonds therefor to the commissioner. The report of sale was filed on the 15th day of September, 1902, and was confirmed and possession awarded to appellant on the 18th day of October thereafter. In the judgment of confirmation the question of appellant's liability for taxes against the property, assessed as of the 15th day of September, 1902, was reserved, but it was subsequently adjudged by the court that appellant, as purchaser, took the vested equitable title to the property on the day of sale, and was liable for all taxes that might be assessed on the property as of September 15th, 1902. To this ruling of the court the purchaser excepted, and has appealed to this court.

Sections 4023 and 4052 of the Kentucky Statutes, which are substantial re-enactments of similar provisions, contained both in the General and Revised Statutes, on the same subject, read as follows:

"Section 4023. The holder of the legal title, and the holder of the equitable title, and the claimant and bailee in possession of the property on the 15th of September of the year the assessment is made, shall be liable for taxes thereon; and as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment.

"Section 4052. All taxable estate shall be assessed and valued as of the 15th of September in the year listed, and the person owning or possessing the same on the day shall list it with the assessor and remain bound for the tax, notwithstanding he may have sold or parted with the same."

The sole question to be decided is whether appellant, on the 2d of August, 1902, acquired the equitable title to the property, by reason of the acceptance

of his bid and bonds for purchase money by the commissioner making the sale; if so, he became liable for all taxes which accrued against the property after that date. This is not a new question in this State. In *Vance's Adm'r v. Foster & Ray*, 72 Ky., 889, it was decided that an accepted bidder at a judicial sale could be compelled to comply with the terms of his purchase, notwithstanding the accidental destruction of the property by fire before the sale was confirmed or actual possession changed, upon the theory that he held the equitable title to the property. In that case, in discussing the same contention made for appellant, the court said: "If it be true, as contended for the appellee, that their bids for the several parcels of machinery and their acceptance by the commissioner were not effectual for any purpose until approved by the court, and could have only operated to transfer the title as from the time of confirmation, we readily concede that the loss sustained in this case should fall on the estate of Vance, and not on the appellees. But, in our opinion, both the rights which the appellees acquired and the responsibilities they incurred by becoming accepted bidders for the property greatly exceeded those resulting from mere proposals or offers to purchase subject to the approval of the court. The principle, we think, can not be questioned that where at the time a sale is made no valid ground for setting it aside exists, the accepted bidder is entitled to his purchase, however much the property may appreciate in value between the sale and time for confirming it. This being so, why should he not be held bound by his purchase, although from accidental causes the property in the meantime may become impaired or depreciate in value?"

This case was followed by *Clasby v. Barnett*, which involved similar facts and the identical question made by appellant on this appeal. On the 29th of December, 1870, the master commissioner of the Fayette Circuit Court sold pursuant to a judgment of the court a tract of land to Clasby. The sale was reported and confirmed in February thereafter. The date then fixed by the statute for assessing property was on the 10th day of January. The taxes were assessed against the former owner, Barnett, which she paid under protest, and then sued the purchaser for the amount thereof. It was decided that she was entitled to recover. In the manuscript opinion confirming the judgment of the lower court Judge Lindsay used the following language: "Whilst it is true that in one sense the purchaser at a sale made by the commissioner of a court of equity is only a preferred bidder, and that his rights thereunder do not become absolutely perfect until the sale is confirmed by the chancellor, it is also true that he occupies a position similar to, and possibly as favorable to, that of any other purchase under an executory contract. The chancellor can not arbitrarily refuse to confirm the sale. It is not with him a mere matter of discretion, but a duty or power regulated by fixed rules, and unless there exists some reason which, according to the principles of equity practice, authorizes the sale to be set aside, a purchaser is not only a prior bidder, but one who under his bid can demand, as a matter of right, that the sale shall be confirmed. He was from that time forward the equitable owner of the land, and the order of confirmation, instead of vesting him with a new and original claim, was a mere determination by the chancellor that such claim had existed from the day of sale. (*Strump v. Kenn, &c.*, manuscript opinion 1873; *Vance's Adm'r v. Foster, &c.*, quoted supra.)

Being the owner of the land on the 10th day of January, 1871, he was bound to list it for taxation, notwithstanding the fact that the legal title had not been vested in him by a conveyance. The statute required the owner or possessor of an estate, and not the holder of the legal title, to assess it for taxation, and pay the taxes due upon it."

This case was followed by *Hughes v. Swope*, 88 Ky., 254, in which it was expressly announced that the purchaser at a decretal sale was vested with the equitable title to the land purchased from the day of sale until the confirmation thereof by the court. These decisions are in accord with public policy, which requires that there should be stability in judicial sales, and that every reasonable presumption should be indulged in favor of sustaining them, although courts of equity have a general supervision over sales made by their decrees, and may for sufficient reasons set them aside and order re-sales.

We are cited to the opinion in the case of the *German Bank v. City of Louisville*, 22 Ky. Law Rep., 9, as an authority supporting the contention of appellant. That case was decided under a provision of the charter of the city of Louisville in force in 1890 and 1891, regulating the assessment of lands in the city, and which provided that the assessment of such property might be either against the owner or holder. No reference is made by the learned and able judge who delivered the opinion in that case to the sections of the statute quoted *supra*, and which, in our opinion, must control the determination of this question. The charter under which that assessment was made has been superseded by another, and if the opinion had rested solely upon its provision, it is possible the case might have been distinguished from the case of *Clasby v. Barnett*. But the opinion reviews the case of *Vance's Adm'r v. Foster & Ray*, 72 Ky., 889, and *Hughes v. Swope*, 88 Ky., 257, and other decisions of this court, and holds that the doctrine as therein stated must be taken with some limitations," and in effect holds that the legal and not the equitable title holder of the property must pay the taxes, upon the ground that he acquired by his purchase no right to the possession of the property, nor the rents or profits thereof until after the confirmation of the sale. As conceded in the opinion in that case, the question is one in the main of statutory construction, and must be decided by section 4023, which makes it the duty of the holder of the equitable title to list the property.

After a very careful consideration of the whole question, we have concluded that the safer and better rule is to adhere to the construction of the statute given in *Vance's Adm'r v. Ray & Foster*, *Hughes v. Swope* and *Clasby v. Barnett*. And in so far as the decision in the case of the *German Bank v. City of Louisville* conflicts with this conclusion it is overruled.

Judgment affirmed.

KENTUCKY FURNACE CO.'S TRUSTEE v. CITY NATIONAL BANK OF PADUCAH, KY.

(Filed May 26, 1903—Not to be reported.)

Liens—Pledge—The Kentucky Furnace Co. leased a lot to H. and piled 118 tons of pig iron, for which H. executed his warehouse receipt to said company, which it pledged to appellee for money loaned. The pig iron was

ricked up in a pile separate from any other, and H. agreed to hold it for appellee. Said company afterwards became bankrupt, and this action involves the rights of appellee to said property as against the claim of the trustee. Held—That the transaction was in legal effect a pledge of the iron to secure the bank debt, and the trustee is not entitled to same until said debts are paid.

J. D. Mocquot for appellant.

Greer & Reed for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

The Kentucky Furnace Co. leased to J. P. Holt a part of its ground and then placed upon the ground so leased its pig iron, and Holt issued to it warehouse receipts therefor. These warehouse receipts it pledged to appellee for money loaned. The pig iron was stacked on the ground and was marked by Holt with chalk marks "C. N. B.," after the pledge of the certificates, to show that it belonged to the appellee, the City National Bank. The bank officers saw Holt, who told them that the receipts were all right and they also examined the iron. The arrangement was in perfect good faith; the property on which the bank held a lien was separated and marked, and the lien of the bank was recognized by the furnace company. After all this, on August 6, 1900, the furnace company became bankrupt, and appellant was elected trustee of the bankrupt estate. At the time of the adjudication in bankruptcy the bank had brought a suit in the McCracken Circuit Court to enforce its lien, and the court had taken possession of the property. Appellant, after this, brought the suit before us, alleging that he had demanded the possession of the property from the bank that he might administer upon it as part of the bankrupt estate, and praying judgment against it for the property.

The two suits were consolidated. The property was sold under an agreed order, by which the proceeds were to be held subject to the judgment of the court, and on final hearing appellant's petition was dismissed.

It is insisted for appellant that the warehouse receipts issued by Holt were not warranted by section 4771, Kentucky Statutes, on the ground that he was not a warehouseman within the meaning of the statute. We do not deem it necessary to decide this point, and no opinion is intimated thereon. The evidence clearly shows that appellee was given a lien on the 118 tons of pig iron in controversy, and that it was set apart and identified beyond question. Holt had charge of it as the agent of the bank. He held it for the bank. It was placed in his possession for this purpose, and the evidence is undisputed that he informed the bank that he held the iron for it, and the bank instructed him to keep it safely. This was a valid pledge, and the circuit court properly enforced it. The property was cumbrous, and in regard to heavy property like this the rule as to things easily carried off or concealed does not apply, and it is not a badge of fraud that the 118 tons of iron was ricked up on that part of the furnace company's lot which had been rented to Holt.

POWERS, &c. v. HAMBRICK.

(Filed May 26, 1903—Not to be reported.)

Bills and notes—Consideration—The question involved in this appeal is whether two notes which were executed in compromise of a pending suit were based on a sufficient consideration, and whether a note for \$500, with security, was intended by the parties as a satisfaction of a former note for \$1,000. Held—That a compromise of litigation is a sufficient consideration to uphold the notes based on same, and the two notes were valid, and the \$500 note was not intended as a satisfaction of the \$1,000 note.

Victor F. Bradley and Nat S. Offutt for appellants.

Montgomery & Lee and Jas. F. Askew for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Hobson.

Appellee Hambrick executed to B. M. Perry the following note:

"\$1,000.

Georgetown, Ky., January 8, 1896.

"One day after date I promise to pay to the order of B. M. Perry \$1,000, without defalcation, for value received, bearing 5 per cent. interest. The endorsers waive presentment, protest and notice of dishonor.

"Witness our hands.

"N. W. HAMBRICK."

Perry assigned the note to appellants Power, & Miller, who filed this suit upon it. The defendant, Hambrick, filed answer, in which he pleaded that there was really no money at all due from him to Perry when he executed the note, and that after the note had been delivered, and on the same day it was settled by the execution of a note for \$500, signed by him and by his father, Wilford Hambrick, as his surety, he being insolvent. The \$500 note is in these words:

"\$500.

Georgetown, Ky., January 8, 1896.

"One year after date we promise to pay Benj. Perry the sum of \$500, without interest until after maturity. This note is given in final settlement between N. W. Hambrick and Benj. Perry.

"N. W. HAMBRICK,

"W. HAMBRICK."

The plaintiff then pleaded that the \$500 note was not given in settlement of the \$1,000 note, but that both notes were given in settlement of a suit then pending in the Scott Circuit Court in which B. M. Perry was plaintiff and N. W. Hambrick was defendant, pursuant to a written contract of settlement, which is as follows:

"B. M. Perry, Plaintiff

"v.

"Norman Hambrick, &c., Defendants.

"Scott Circuit Court.

} Agreement.

"This cause has been settled this day on the following terms: First, Norman Hambrick and Wilford Hambrick, his father, executed their joint note to said Perry for \$500, payable in twelve months from its date; that it is of date January 8, 1895; second, Norman Hambrick executed to said Perry his individual note for \$1,000, of date January 8, 1895, payable one day after

date, with 5 per cent. interest from date. There is a writing evidencing said settlement, which states that the consideration for the settlement of the suit is the joint note of Norman Hambrick and Wilford Hambrick for \$500, but the real consideration is this \$500 note, together with the \$1,000 note above set out.

"This 8th day of January, 1895.

"N. W. HAMBRICK."

Hambrick admitted signing this writing, but pleaded that it was obtained by fraud and duress, and that the note sued on was without consideration. On motion of the defendant the case was transferred to equity, and on final hearing the court dismissed the petition. It is clear from these writings taken together that the \$500 note was not given in settlement of the \$1,000 note, but that both were given in settlement of the suit in the Scott Circuit Court. Perry and Hambrick had been partners in the stock business; Perry charged that Hambrick had used a large amount of the firm money in his personal matters, and that something like \$2,700 was due to him from Hambrick on this account. The suit he had brought in the Scott Circuit Court to recover this money was settled by the giving of the two notes. The words in the \$500 note, to the effect that that note was given in final settlement between them, were used to deceive Wilford Hambrick. He did not know that his son had given a \$1,000 note in addition to the note that he signed, but this is no defense for the son when sued upon the note, for he was as much responsible for the deception of his father as Perry. The settlement of the suit is a sufficient consideration to uphold a note. The law presumes in favor of a sufficiency of the consideration of a written promise, and the evidence before us utterly fails to overthrow this presumption. The proof is very vague as to the particulars of the matters involved in the suit that was settled, and the burden of proof being on the defendant to show a want of consideration, to refuse to enforce the note on such evidence would be to give no effect to a written contract deliberately made. The evidence that the note was obtained by fraud or duress is equally unsatisfactory. Hambrick seems to have understood perfectly well what he was doing. The settlement was made by him in person. If Hambrick owed Perry more than \$1,500, Perry can not now show this; and for the same reason Hambrick can not now show he owed less, if the settlement was valid. It was the result of considerable consultation; and so far as we can see from the evidence there was nothing amounting to duress in the transaction. The evidence shows that the note was assigned by Perry to Power & Miller, on a debt that he owed them, and whether they took it absolutely or as collateral security for the debt they can sue on it in their own name, under section 19 of the Civil Code, although any defense which would be good against Perry may be made against them. But the evidence not showing any sufficient defense to the suit in the hands of Perry, the court erred in dismissing the petition.

The judgment is reversed and cause remanded, with directions to enter a judgment for the plaintiff on the note.

ALDERSON v. COMMONWEALTH.

(Filed May 26, 1903—Not to be reported.)

1. Criminal law—Murder—Impanneling jury—Appellant was charged by indictment with the murder of H., his neighbor, who was assassinated in his house after night by shot from a shotgun fired through his window. The evidence was purely circumstantial, and the trial resulted in a verdict of conviction and sentence to the penitentiary for life, from which this appeal is prosecuted. It is insisted that the court erred to his prejudice in impaneling the jury. Held—That under section 281, Criminal Code of Practice, that an error in the manner in which the jury were selected can not be considered on appeal.

2. Evidence—Although the court may have committed an error in allowing the witnesses for the Commonwealth to state the contents of a letter written by the accused without accounting for its absence, he cured this error by showing that he destroyed the letter and testified to its contents. The rulings of the court in the admission or rejection of evidence was fair to the accused. The evidence adduced by the Commonwealth conduced to prove appellant's guilt, and this court will not reverse a conviction in a criminal case on the ground that it is contrary to the weight of the evidence, if there be any evidence to support the verdict. While the evidence constitutes but a slender foundation for depriving one of his liberty during his natural life, but it is not for this court to invade the province of the jury and set aside their verdict in such case.

3. Argument of Commonwealth's attorney—The argument of the prosecuting attorney to the jury was not prejudicial.

Geo. C. Harris, James C. Sims and Sims & Grider for appellant.

L. B. Finn, Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Geo. B. Alderson, was indicted by the grand jury of Simpson county, charged with the willful murder of P. D. Hall. A trial of the case resulted in his conviction and sentence to confinement in the penitentiary for the term of his natural life. To reverse this judgment he has appealed to this court.

On the 4th of January, 1902, about 8 o'clock at night, P. D. Hall was assassinated, as he sat by the fireside of his home, in his family circle. The murder was committed by firing a double-barreled shotgun, loaded with slugs, through the window of the sitting room, blowing out the brains of the victim. No one saw the assassin, but upon the following morning the sheriff, with a posse, made an examination of the premises, and found what they thought to be tracks of the murderer, leading from the yard of the murdered man across several fields, and into a path leading from appellant's stable to his dwelling house, where they were lost. At one point along the trail the tracks, by reason of the softness of the ground, were made quite plain, and these were carefully measured by the officers of the law. Suspicion pointed toward appellant, because of the fact that some six months before the murder he had had a difficulty with the decedent, which resulted in a complete estrangement of the men who had theretofore been friends.

The sheriff, on the morning after the murder, went to the house of appel-

lant and inquired of him whether he had seen any one pass through his place the night before; to which he responded that he had not. Upon request, he readily produced his every-day shoes, which were carefully compared with the tracks the officers had found, by applying to them the measurements they had taken. These measurements were thought by the officers to show that appellant's shoes corresponded with the tracks. Appellant also, upon request, without any hesitation, produced his double-barreled shotgun, which, being carefully examined, was found, in the opinion of the officers, to have been quite recently fired, the inside of the barrels being moist, and upon the loads being twisted out, the paper wadding was moist and discolored with the damp black of recently exploded gunpowder. This paper wadding, upon examination, was found to have been torn from a copy of a newspaper which was lying on the floor of appellant's room when the sheriff entered. The percussion caps on the tubes of the gun were quite bright and new, exhibiting no evidence of corrosion.

It was sought to be shown that the gun, with which the murder was committed, was a muzzle-loading, double-barreled shotgun, by the fact that two shots were fired through the window almost simultaneously, and the gun was loaded with paper wadding which was picked up inside the room where the murdered man was sitting at the time he was killed. There was evidence conducing to show that the appellant had traded for the shotgun he exhibited to the sheriff within a month or two before the killing; that within a short while before the murder he had one of the locks of the gun fixed by a gunsmith in the city of Franklin, the county seat of Simpson county, and also that he had, about the same time, attempted to purchase buckshot from a merchant in Franklin, but without success, as the merchant had none in stock. He did, however, purchase a package of No. 6 shot, saying that the shot he had was No. 8, and too small to kill anything.

It was shown by the testimony of one Perry Stamps that appellant and the decedent had a serious quarrel in July, 1901, which, however, did not result in blows; that after the murder the appellant asked him if anybody but himself knew of this difficulty, to which the witness replied: "Yes, your wife knows about it." Stamps also testified that in this conversation appellant said to him, "If they were to prove that I bought buckshot, they would mighty nigh have me, wouldn't they," and asked him not to say anything about what he had said.

E. V. Bogan, the sheriff of Simpson county, testified that while he was guarding appellant during the examining trial he had a bullet in his hand, and that appellant said to him: "If any one found where I bought, or tried to buy, buckshot they might hang me, or I would plead guilty." This is a substantial outline of the evidence adduced by the Commonwealth upon the trial.

The appellant denied his guilt, or that he had offered to buy buckshot, or made the statements above set forth, as given in the evidence of Stamps and Bogan. By his father-in-law, W. A. Wallace, he sought to establish an alibi, by showing that Wallace stayed at his (appellant's) house on the night of the killing, and knew that he was there at the hour of 8 o'clock, the time at which the murder was committed. Appellant, through his counsel, complains of, first, error of the court in impaneling the jury; second, error of

the court in admitting incompetent evidence to be introduced by the Commonwealth; third, in overruling the motion by appellant for a peremptory instruction; fourth, error of the court in misinstructing and refusing to properly instruct the jury; fifth, the verdict of the jury, and the judgment was contrary to the law and evidence in the case; sixth, error of the court in permitting the county attorney, who made the concluding argument for the Commonwealth, to state and argue facts to the jury not based upon the evidence in the case, and which were prejudicial to the substantial rights of appellant.

Section 281 of the Criminal Code provides that "the decision of the court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motion for a new trial, shall not be subject to exception;" and in construing this section we have uniformly held that errors in the manner in which the jury were selected, or that a juror lacked the statutory qualifications, shall not be considered on appeal. (Curtis, alias A. J. Randall v. Commonwealth, 23 Ky. Law Rep., 267.)

An examination of the evidence complained of as incompetent, which the court admitted over the exceptions of appellant, and that which was excluded contrary to his objections, convinces us that he has no just ground to complain of the court's rulings. One of the most serious objections made to the admission of testimony by the Commonwealth was in permitting Perry Stamps to detail the contents of a letter written by appellant to P. D. Hall, upon the day following their altercation in July, 1901. It is contended that this testimony was incompetent, because the absence of the letter was not accounted for, and the court should not have permitted the witness to state the contents of the writing until its absence was explained. Counsel for appellant earnestly insist that this testimony was not introduced to show a threat on the part of appellant toward the decedent, but from a desire to show that appellant was an infidel, and to enable the attorney for the Commonwealth to use this fact as an argument to the jury against appellant.

The learned counsel overlook the fact that appellant shows that the letter in question was returned to him by Stamps, and destroyed. In answer to a question by his counsel, as to what became of the note, he said: "I don't remember what disposition was made of it; destroyed in some way. Mr. Stamps returned the note to me after reporting that he had read it to Mr. Hall."

"Q. When was it destroyed?"

"A. The same day it was sent."

"Q. Just state, if you recollect, the exact language of the note."

"A. Can't be exact in many words, some few words can give the exact language; I can state in substance all the note; I did not date the note or address the note. It began this way. 'I shall not interfere with you or your business; I shall not say anything of you or your affairs; I shall not say anything to interfere with you in your business nor in your affairs, nor the good will and esteem of your neighbors; I require the same treatment at your hands. Our account is now settled forever if there be no God. If there is a God, which probably you and I both doubt, I leave the final balancing of our account in His hands.'"

Conceding it to have been error to have allowed the Commonwealth's wit-

ness to have detailed the contents of the foregoing letter without accounting for its absence, and that the letter itself was incompetent, appellant clearly cured these errors by showing that he had destroyed the letter, and by testifying to its contents with more elaboration than did the witness for the State. Although counsel complain in their brief that the Commonwealth's attorney used the contents of this note in his address to the jury to show that appellant was an atheist, the bill of exceptions does not show that such argument was made. They also complain that the witness, Stamps, was allowed to testify as to the effect produced on Hall when the letter was shown or read to him, although the record shows that the court excluded this testimony.

It is not necessary to set forth, or discuss, the objectionable evidence at any great length or detail. We are satisfied that the rulings of the court were in accordance with the law of the case; were entirely just to appellant, and afford no ground for reversal. The third and fifth errors complained of may be considered together. There was certainly evidence adduced by the Commonwealth, which, if true, tended to establish appellant's guilt; and while it was entirely circumstantial, and we think meager, it was competent; and this court has uniformly held that a criminal case will not be reversed on the ground that it is contrary to the weight of the evidence, if there be any evidence to support the verdict. (*Vowells v. Commonwealth*, 83 Ky., 198; *Patterson v. Commonwealth*, 88 Ky., 315; *White v. Commonwealth*, 96 Ky., 180; *Travers v. Commonwealth*, 96 Ky., 77.)

The court instructed the jury as follows:

"No. 1. The court instructs the jury that if they believe from all the evidence, beyond a reasonable doubt, that the accused, G. B. Alderson, before the finding of the indictment in this case, did, in Simpson county, Kentucky, unlawfully, willfully and maliciously, feloniously and with malice aforethought, kill D. B. Hall, by shooting and wounding the said Hall upon his body and person, with a gun, a deadly weapon, loaded with a leaden ball or balls or other hard substance, and of the effect of which shooting and wounding the said Hall did die within one year thereafter, they shall find the accused guilty and fix his punishment at death or confinement in the State penitentiary for life, in the discretion of the jury.

"No. 2. The court instructs the jury that in arriving at their verdict they shall consider all the facts and circumstances in evidence, and unless they shall believe from all the facts and circumstances in evidence, beyond a reasonable doubt, arising out of such facts and circumstances, that the accused is guilty of the killing of B. D. Hall, they shall acquit the accused.

"No. 3. The court instructs the jury that the defendant is presumed to be innocent until his guilt has been shown by the evidence in the case beyond a reasonable doubt; and if from all the evidence the jury have a reasonable doubt of the defendant's guilt, they shall acquit him.

"No. 4. The court instructs the jury that before they can convict the defendant on circumstantial evidence alone every material fact necessary to show the defendant's guilt must be proven beyond a reasonable doubt, and that if any material fact necessary in this case to show the defendant guilty as charged in the indictment has not been proven to the exclusion of a reasonable doubt, they should acquit this defendant.

"No. 5. The court instructs the jury that if from the evidence they have a reasonable doubt as to whether any material fact given in evidence in the case is true or untrue, it is the duty of the jury to give the defendant the benefit of such a doubt, and if from all the evidence in the case the jury have a reasonable doubt of the defendant's guilt, they should acquit him."

These instructions contain the whole law of the case, and this was all to which appellant was entitled. There was no error in refusing the two instructions offered by appellant as all that was proper in them was contained in those given. Conceding that we could consider on this appeal the incident complained of as to what took place in the presence of the jury at the hotel while they were in charge of the sheriff, we do not think that the interest of appellant was injured thereby. What was said in the presence of the jury by Mrs. Duncan and Mrs. Harris was favorable to him. The affidavit of these ladies on this point does not show that what sheriff Bogan said was heard by the jury, and the sheriff's affidavit shows that what he said was not in their hearing, and could not, therefore, have been prejudicial to appellant's interest. Nor are we able to see that the argument of the Commonwealth's attorney to the jury constitutes misconduct. The objectionable language, as shown by the bill of exceptions, is this: "Said attorney argued that if one of the jurymen was guilty of a crime, and on a trial eleven should be shown to be innocent, the conclusion would be inevitable that the twelfth one would be guilty, and then turned to the defendant and his counsel, daring them to arraign all the men in the community where deceased Hall lived, all men in Simpson county, and in Kentucky, and their innocence would appear." This was a mere hypothetical illustration, made for the purpose of reinforcing the Commonwealth's position as to the guilt of appellant, and while it may be admitted that it was inconsequential logic, we do not think it was improper.

We have not undertaken to give all of the evidence adduced in the case in detail, but only such outline as will serve to illustrate the principles of law necessary to be adjudicated. There was much that is omitted, but, with it all, we are deeply impressed with the fact that it constitutes but a slender foundation for depriving one of his liberty during his natural life. However, it is not for us to invade the province of the jury, and to set up our opinion against theirs on the merit of the testimony. The appellant was tried for a most heinous crime, the assassination of his neighbor; for this, he was tried in the county of his residence, among his friends and neighbors, by a jury of the vicinage. Necessarily the effectiveness of the evidence against him depended on the character of the witnesses for the Commonwealth and his own standing and that of his witnesses in the community where they lived; of these things, the jury who tried the case were far more competent to judge the very truth than the court whose province it is to decide the law.

Wherefore, the judgment is affirmed.

Whole court sitting.

Chief Justice Burnam and Judges O'Rear and Nunn dissenting.

Chief Justice Burnam delivered the following dissenting opinion:

After carefully reading and considering the testimony in this case I have reached the conclusion that there is nothing in the record to justify the verdict of the jury finding the defendant guilty; and that it was in the main

brought about by the impassioned appeal of the representative of the Commonwealth to the passions and prejudices of the jury in his closing argument. The only motive for the killing of the deceased by the defendant, as shown by the record, was the fact that they had had a sharp difference about some business matters some six months before, and that as a result of the difference the defendant had addressed deceased a note, inclosing the balance which he owed him, and in which he informed him that he would not in the future interfere with him or his affairs, or seek to lessen the good will and esteem of his neighbors, and that he would require similar treatment at his hands. The note closes with these words: "If there be a God, which probably you and I both doubt, I leave the final balancing of our accounts in His hands."

The county attorney, over the objection of the appellant, was permitted to use these words in the trial before the jury (and also in his brief in this court), to assault the defendant as a man who doubted the existence of a Supreme Being, and was, therefore, not deterred from taking vengeance in his own hands for any real or imaginary affront. The history of the world shows that religious prejudices are the strongest and most easily aroused passions of the human heart, and when once aroused, the most unreasoning. The able county attorney very correctly reasoned that if he could impress the jury with the idea that defendant did not believe in the doctrine of future rewards and punishments at the hands of a Supreme Being, that it would be easy for them to believe that he would not be subject to moral restraint in the commission of any crime. Under our system of government the religious convictions of a man charged with crime can not be called in question to his prejudice. Whether he be a christian, atheist, deist, buddhist, Mohammedan, or follower of Confucius, he is entitled to be tried upon the evidence of his guilt of the particular crime for which he is arraigned.

The county attorney, over the objection of the defendant, was also permitted to make use of another argument which in my mind is equally reprehensible in the prosecution of this case. Realizing, perhaps, the weakness of the facts on which he asked a conviction of the defendant at the hands of the jury, he challenged the defendant and his attorney to point out the guilty man, if the defendant was not. In substance saying to the jury that if the defendant failed to make such proof, it was evidence of his own guilt. There was no greater duty imposed upon the defendant and his attorneys to discover the real assassin than upon any other citizen, and this was not a legitimate argument for counsel in his closing argument to the jury, and was highly prejudicial, especially in view of the fact that the trial court had refused, at the instance of the defendant, to give instruction B.

There are several other facts developed by the record which satisfy my mind that the defendant has not had a fair and impartial trial. The chief witness against him was put in charge of the jury, and there is testimony in the record to the effect that he expressed the opinion in the presence of the jury that defendant was guilty. The sheriff admits that he made use of this remark, but claimed that it was in response to a suggestion of some ladies that he was innocent, made in the presence of the jury, and that his answer was not heard by the jury. Whether the remark was heard by the jury or not, it clearly indicated a strong feeling on his part against the de-

fendant, which we have no doubt was communicated to the jury in some form, perhaps unintentional. The defendant previous to this charge seems to have been a citizen of good character. He served the country as a soldier in the recent war, and after its conclusion had returned to a delicate wife, who has since died, and five small children. He had every incentive to good citizenship and this presumption should not be taken away from him by irrelevant appeals to the prejudices of the jury.

For the reasons indicated I think the judgment should be reversed.

Judges O'Rear and Nunn concur.

ILLINOIS CENTRAL R. R. CO. v. VINSON.

(Filed May 26, 1903—Not to be reported.)

Railroads—Negligence—Instructions—Appellee was a passenger on a passenger car which was attached to a freight train, and what is known as a mixed train. The injury was caused by a sudden jerk of the train which threw appellee against the iron railing at the end of the car. The defense relied on was contributory negligence, and appellant insists on appeal that the court improperly instructed the jury as to the degree of care necessary to be exercised by a railroad company in the operation of a mixed train to avoid injury to passengers; also the care that a passenger should observe on such a train. Held—That the court should have instructed the jury that while it was the duty of the railroad company to exercise a high degree of care in protecting its passengers, that its duty was different where the passenger is traveling on a mixed train, owing to the inconvenience and lack of proper appliances to avoid jerks and concussions, and that a corresponding degree of care is required of a passenger while riding on such a train.

Reed & Oliver, W. Mike Oliver, J. M. Dickinson and Pirtle & Trabue for appellant.

Hendrick & Miller for appellee.

Appeal from Marshall Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is a suit for damages resulting from personal injuries. The plaintiff, James Vinson, alleged that he purchased a ticket for transportation over defendant's road from Cairo, Ill., to Gilbertsville, Ky., and that while endeavoring to alight from the defendant's train at his point of destination he was by the gross negligence of defendant's servants thrown violently against the iron railing in front of the platform, thereby receiving serious injuries. The defendants in their answer deny that plaintiff's injuries were due to the negligence of their servants in charge of the train, and alleged that when plaintiff purchased his ticket he was informed that he would have to travel on a mixed train from Paducah to Gilbertsville, which were more dangerous to travel upon; that plaintiff's injury was received at a time when defendant's agents in charge of their train were exercising the highest degree of care that could be exercised in operating trains of that character; and they also rely upon a plea of contributory negligence. Plaintiff in his reply denies that defendants were exercising the highest degree of care in

the operation of the mixed train on which he was traveling, or that his injuries were due to contributory negligence on his part.

The testimony for plaintiff conduces to show that after defendant's train had stopped at Gilbertsville he arose from his seat and went forward to the front platform of the car on which he was traveling, for the purpose of alighting therefrom, and that the train unexpectedly to him started forward, and then suddenly stopped, which resulted in a violent concussion between the passenger coach and the platform on which he was standing and the freight car in front of it, which threw him against the iron railing surrounding the platform with great violence, thereby inflicting serious injury. The testimony of the defendant conduces to show that the plaintiff was informed at Cairo, Ill., when he purchased the ticket for Gilbertsville, that if he went on a particular train it would be necessary for him to travel on a freight train with a passenger coach attached from Paducah to Gilbertsville, in order to reach his destination on that day; that owing to the great number of cars on trains of this character they were much more difficult to handle than regular passenger trains; that when defendant's train approached its destination, immediately after the conductor had announced the name of the station of Gilbertsville, and while the train was still in motion, the appellee negligently left his seat and walked to the front of the coach on which he was riding, and that when the train was stopped the necessary and unavoidable concussion of the car in which he was riding with the freight car in front caused him to lose his balance and fall against the iron railing; that if he had remained in his seat until the train had stopped he would have escaped injury.

The trial resulted in a verdict and judgment for plaintiff, and defendant has appealed. The principal ground relied on for a reversal is that the trial court erred in instruction No. 3 given to the jury, and in refusing instruction U, offered by the defendant. Instruction No. 3 reads as follows: "The court further instructs the jury that when plaintiff went on board defendant's train to go to Gilbertsville it was then the high duty of the defendant company for its said cars to be free from defects, which endangered the lives of passengers, or their safety, and to have had competent men on board to operate and manage the train, and for the safety of the passengers. The defendant company was bound to exercise the highest degree of care and diligence in the management and operation of its train in transporting plaintiff to Gilbertsville and landing him safely upon the depot platform of the company at that place. But the court further instructs the jury that the defendant was not liable for casualties, if any, which human sagacity could not foresee, and against which prudence could not provide."

There is no claim in plaintiff's petition of any defects in the defendant's cars which endangered the lives or safety of its passengers, or that they did not have competent men on board to operate and manage the train. No such issues as these were made either by the pleadings or the proof, and it is one of the fundamental rules of jury trials that the instructions should be based upon the issues raised by the pleadings and supported by the evidence, and should not divert the attention of the jury to questions not relied on by the parties. (En. of P. & L., volume 11, page 158.) This instruction was an invitation to plaintiff's counsel to discuss questions not made by the

pleadings or raised by the proof, and was, therefore, calculated to divert the attention of the jury from the real issues in the case. Travelers take the risks incident to the character of conveyance which they select; and the party furnishing the conveyance is only required to adopt the care, vigilance and skill necessary to the management of the particular mode of transportation. Mr. Elliott in his work on Railroads, volume 4, page 1629, in discussing this question, says: "In a general sense it may be said that where a railroad company carries passengers on freight or mixed trains, it must exercise the same high degree of care for the safety of its passengers as in other cases. But we do not mean that its duty and the precaution it must take are absolutely the same with respect to the operation of such trains as with respect to regular passenger trains, as to its roadbed, bridges, and the like. It would seem that the duty is absolutely the same, but it is obvious that the risk is greater in riding on freight trains; that the same appliances can not be used, and the same speed and comparative freedom from sudden jerks attained. The duty of the company is, therefore, modified by the necessary difference between freight and passenger trains, and the manner in which they must be operated. And while the general rule that the highest practicable degree of care must be exercised holds good, the nature of the train and the difference in its mode of operation must be considered, and the company is bound to exercise only the highest degree of care that is usually and practically exercised and consistent with operation of trains of that nature. So a passenger riding on a freight or mixed train must be deemed to assume all the inconveniences and risks usual and reasonably incident to travel upon such trains. He must exercise ordinary and reasonable care to guard against injuries from such risks, and must not voluntarily take a position where he is likely to be injured by a sudden jerk of the car resulting from taking up slack in the ordinary way, or the like."

The doctrine is also supported by Mr. Hutchinson in his work on Carriers, and in numerous decisions of courts. We are, therefore, of the opinion that the defendant was entitled to an instruction on this point.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

BURTON v. MAGANN-FAWK LUMBER CO.

(Filed May 27, 1903—Not to be reported.)

Negligence—Fellow servant—Pleading—Appellant, a laborer in the employ of appellee, brought this action to recover for injuries alleged to have been received by the negligence of others in the employ of appellee, and the court adjudged said petition was insufficient to charge appellant for injuries caused by a fellow servant. On appeal, Held—That the lower court properly adjudged said petition insufficient for several reasons stated in the opinion.

Thos. T. Hiner and J. B. Marcum for appellant.

G. W. Fleenor and Riddell & Riddell for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, who was a laborer in the employ of appellee, engaged in getting out saw logs from the forest, was injured, he claims, by the negligence of other servants of appellee. His petition, as amended, thus states the negligence which caused his injury: "Defendant, by its agents and employes, other than this plaintiff, recklessly, carelessly and negligently, without regard to the danger or position of this plaintiff, started said logs down the hill, and although plaintiff tried in every way and manner to avoid said logs, they caught him and mangled and mashed his arm," etc.

A demurrer was sustained to the petition as amended, and the plaintiff refused to plead further, whereupon his action was dismissed. It was incumbent upon the plaintiff to state his cause of action by showing not merely that he was injured while in the employ and service of his master, but that the injury was because of the neglect on the part of the master, or some superior servant standing in relation to the master and other servants as a vice principal, to do something which he was in duty bound to do. It is not charged that the master was not careful in the employment of plaintiff's colabcrers, nor that they were not ordinarily careful in doing their work. He does not charge that the servants of the master, whose acts he describes as negligent, and which he says caused his injury, were other than his fellow servants in the same line of employment with him.

Under the familiar rule of pleading, that the allegations of the pleader must, on demurrer, be most strongly construed against him, it would appear that the negligent servants who caused plaintiff's injury were his fellow servants. This was a risk which, under all the cases and general doctrine, plaintiff himself assumed, and for which his master was not liable.

Consequently the demurrer was properly sustained, and the judgment is affirmed.

COMMONWEALTH V. HOGAN, McMORROW & TIEKE CO.

(Filed May 27, 1903—Not to be reported.)

Foreign corporations—License—Constitutional law—This action was instituted to recover the penalty under section 571, Kentucky Statutes, from appellant, a corporation, created under the laws of Indiana for engaging in business in this State without giving the location of its offices in this State and the name of an officer or agent thereat upon whom process may be served. In its answer appellant states that its place of business is Aurora, Ind., and that the only business it does is to send a salesman in this State who solicits orders for shoes of their manufacture from samples exhibited, and that such orders are subject to approval at its place of business in Indiana. This answer was adjudged sufficient on demurrer and the petition dismissed. On appeal, Held—That section 571 of Kentucky Statutes can not be applied to appellee, as same is a violation of the interstate commerce law passed by congress under subsection 3 of section 8, article 1, Constitution of the United States. No question seems to be more firmly settled than that of a manufacturer of goods which are unquestionably subjects of commerce, who carries on his business of manufacturing in one State, can send his agents into another State to solicit orders for the product of the manufactory without being embarrassed or obstructed by being required to take out licenses, establish resident agencies, or file certificates by the laws of the domestic State.

42 COMMONWEALTH V. HOGAN, MC MORROW & TIEKE CO.

D. J. Wood and N. W. Halstead for appellant.

W. B. Stier for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the Commonwealth of Kentucky against appellee, the Hogan, McMorrow & Tieke Co., a corporation organized under the laws of Indiana, engaged in the manufacture and sale of shoes at the city of Aurora, Ind., to recover the penalty denounced by section 571 of the statutes, for engaging in business in this State, without giving the location of its offices in this State, and the name of an officer or agent thereat upon whom process might be served. The petition alleges that the defendant had unlawfully carried on its business of selling and delivering shoes to Wilson & Co., in Bardstown, Nelson county, Kentucky, without having complied with the provision of the statute. Summons issued on this petition and was served on Harvey B. Hobbs, the alleged agent, through whom the sale to Wilson & Co. was affected. The defendant entered its special appearance and moved to quash the service of process upon Hobbs upon the ground that he was not an officer or agent of the defendant upon whom process could be served. This motion was overruled. They then filed answer, in which they admit that they are a foreign corporation, organized under the laws of the State of Indiana, engaged in the manufacture and sales of shoes in the city of Aurora; but allege that the only sales or business ever conducted by it in Nelson county, Kentucky, was that of permitting a traveling salesman to solicit and forward from retail merchants, doing business in Nelson county, from samples exhibited to them, orders addressed to them at Aurora, or its branch house in the city of Cincinnati, Ohio, for shoes so manufactured by them, which orders were subject to the approval of the company at its place of business in Aurora, and if so approved were filled by shipment from its factory in the State of Indiana to Nelson county, Kentucky, and payment therefor made by drafts, check or remittance directed to the defendant, and plead that this was not the character of business contemplated by section 571; but that if this section should be so construed, that it is in violation of subsection 3 of section 8, article 1 of the Federal Constitution, wherein congress is given the power to regulate commerce with foreign nations, and among the several States and with the Indian tribes; that the acts, sales and deliveries of goods sued for were interstate commerce, and deny plaintiff's right to prosecute this action by reason of its having ceded to the congress of the United States the exclusive right to control and regulate such business. The plaintiff filed a general demurrer to the second and third paragraphs of the answer, which were overruled, and declining to plead further, their action was dismissed. Upon this appeal they ask the reversal of the judgment.

Subsection 3 of section 8, article 1 of the Constitution of the United States provides that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

There is nothing in the Federal Constitution which prohibits a State from prescribing conditions on which foreign corporations may transact business within its limits, provided these restrictions do not extend so far as to prohibit

or regulate commerce between the States. This they can not do, for by the express terms of the Constitution of the United States quoted supra this power is conferred exclusively upon Congress. It has been repeatedly decided by the Supreme Court of the United States that interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of person and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities; and that the sole power to prescribe the rules by which it shall be governed is vested in congress. (*Robbins v. Shelby County Taxing District*, 120 U. S., 488; *O'Neal v. Vermont*, 144 U. S., 323; *Adyson Pipe Co. v. United States*, 175 U. S., 211.) And no question seems to be more firmly settled than that a manufacturer of goods, which are unquestionably subjects of commerce, who carries on his business of manufacturing in one State, can send his agents into another State to solicit orders for the product of the manufactory without being embarrassed or obstructed by being required to take out licenses, establish resident agencies, or file certificates by the laws of the domestic State. This subject is so exhaustively treated in *Bennan v. Titusville*, 153 U. S., 289, as to render citation of further authorities unnecessary. These decisions rest upon the theory that orders taken for goods by traveling salesmen in the employ of foreign corporations do not constitute the contract itself; and that the contract has existence only from the time of the confirmation of the order.

In our opinion the trial court properly overruled plaintiff's demurrer to defendant's answer, and dismissed his petition.

Judgment affirmed.

COMMONWEALTH v. HOBBS.

(Filed May 27, 1903—Not to be reported.)

D. J. Wood and N. W. Halstead for appellant.

W. B. Stier for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Hobbs, a traveling salesman, was sued in this action by the Commonwealth of Kentucky to recover the penalty for a violation of section 571 of the Kentucky Statutes. The acts connected with the alleged sale are recited in the opinion this day delivered in the case of the Commonwealth v. Hogan, McMorrows & Tieke Co., ante, 41, and the conclusion there reached, that the company were engaged in the transaction of interstate commerce in the act in question, and that section 571 had no application thereto, renders it unnecessary to recite the reasons for the conclusion reached in that opinion, and it necessarily follows therefrom that the appellee had not, by the acts alleged, subjected himself to the penalty herein sought to be recovered.

Judgment affirmed.

TOWN OF GRAYSON v. BAGBY.

(Filed May 27, 1903.)

Municipal government—Construction of statutes—Constitutional law—Injunction—Appellee was arrested under a charge of violating an ordinance of appellant town, a breach of the peace, and taken before the police judge. Appellee filed his affidavit, swearing him off the bench. W., who was designated by an ordinance as provided by section 3711, Kentucky Statutes, was called in to preside. Appellee applied to the circuit court and obtained an injunction on the ground that said section of the statutes was in violation of section 109 of the Constitution, which prohibits the exercise of any judicial power by any officer except those named in the Constitution, and that the attempt to vest W. with judicial power was void. Held—That the ordinance did not violate the Constitution by attempting to create a court, but only authorizes, in the emergencies therein named, another person to fill the position which authorized him to exercise judicial powers in the particular cases. Nor was appellee entitled to a trial before the county judge or some justice of the peace of the county under section 1126, Kentucky Statutes, as section 3711 was passed after section 1126, and must be construed as repealing same in so far as inconsistent therewith.

Armstrong & Woods for appellant.

Theobald & Theobald for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Nunn.

The appellee was arrested by the legal authorities of appellant, charged with violating an ordinance, a breach of the peace, and was taken before the regular police judge. Appellee filed his affidavit, swearing him off the bench. Samuel Wylie, who had been designated under an ordinance of the town, as provided by section 3711 of the Kentucky Statutes, to preside in such cases, was called in to preside. The appellee objected to Wylie's presiding, for the reason, as he claimed, that the ordinance designating him and that part of section 3711 of the Kentucky Statutes authorizing such an ordinance were unconstitutional, and he filed his petition in the Carter Circuit Court, with the necessary allegations, and asked an injunction restraining him from so presiding. The parties agreed upon the facts to be submitted to the court, and the lower court sustained the petition of appellee, and the case is here on appeal.

The appellant is a town of the sixth class. The only question necessary to be decided on this appeal is whether section 3711 of the Kentucky Statutes, or that part of it, to wit, "the board of trustees shall, by ordinance, provide who shall act in the place of the police judge when he is absent, or when, from any cause, he can not preside, or when he is sworn off the bench," is valid. The appellee contends that this section of the statute is not void if construed to mean that some judicial officer, such as a county judge or justice of the peace, should be designated to act in lieu of a regular police judge, and refers to section 109 and other sections of the Constitution, which establishes the Court of Appeals, circuit court, quarterly courts, justices' courts, police courts and fiscal courts, and claims these provisions of the Constitution are imperative, and no judicial power can be exercised by any officer except those named in the Constitution, and that there is no provi-

sion vesting such power in appellant, and it had no authority to designate Wylie as such judge, he not being a judicial officer at the time.

We agree with appellee that no courts can be established other than those named in the Constitution, for section 135 of the Constitution says: "No courts, save those provided for in this Constitution, shall be established." Section 3711 of the statute, does not undertake to establish any other court; it is to be the same police court, but only authorizes, in the emergencies therein named, another person to fill the position, which authorized him to exercise judicial powers in the particular cases. Appellee refers to the case in 22 Ky. Law Rep., 975, where Roberts sued Hackney for false imprisonment. Hackney was chairman of the board of trustees of London, a sixth class town, and undertook, under authority of the Criminal Code, section 32, to summons witnesses to appear before him to ascertain if an offense had been committed, and Roberts was one of the witnesses summoned. He refused to answer questions, and Hackney committed him to jail for five hours for contempt. The court in the case referred to decided that Hackney was not a magistrate, and had no such power. Prior to the enactment of the present law many, if not all, of the charters of sixth class towns authorized and directed the chairman of the board of trustees to act in place of the police judge in case of his absence or inability to preside. Hackney made the mistake in believing such power existed when in fact the present law, the statute above quoted, was in force at the time. The general assembly had the power under the present Constitution to enact the statute referred to. In section 152 of the Constitution this language is found: "Vacancies in all offices for the State at large or for districts larger than a county shall be filled by appointment of the governor; all other appointments shall be made as may be prescribed by law." And in section 160 this language is found: "Officers of towns or cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the general assembly may, by a general law, provide. * * * The general assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled."

The general assembly, by section 3671, provided that no one should be eligible to hold the office of police judge in a town of the sixth class unless he was a resident and voter therein, and had resided in the town for one year next preceding the date of his election or appointment. It is agreed that Wylie possessed the qualifications of police judge, as required by the statute, but appellee contends that under section 1126 of the statute, that when he filed his affidavit taking the regular judge off the bench, he should have the right to take it to another court; that his affidavit ipso facto took it out of the police court and that he was entitled to a trial before the county judge or some justice of the peace of the county. We can not agree with him in this. The statute he refers to was in existence long before the Kentucky Statutes were published and long before section 3711 was enacted, and if there is any conflict between section 1126 and that section, which it is not necessary to decide, the last act, or that part of it in conflict with section 1126, would repeal the former law.

We conclude that the Constitution authorized the general assembly to

enact section 3711, and that the board of trustees of appellant had the power thereunder to pass the ordinance under which they designated Wylie to take the place of the regular police judge, and he had the legal right to try appellee on the charge, and, therefore, the lower court erred in granting the injunction.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT v.
FRANKFORT SAFETY VAULT AND TRUST CO.

(Filed May 27, 1903.)

Municipal taxation—Pleading—Appellant brought this action to recover of appellee city taxes for the year 1899 on \$160,000 mortgage bonds which it alleges that appellee hold both individually and as trustee for certain persons unknown to plaintiff. A demurrer was interposed to the petition and sustained on the ground that under section 3424, Kentucky Statutes, the action was prematurely brought, as the collector was not authorized under said section to make a return of no property found until the expiration of his term of office. Held—That said demurrer was improperly sustained on the ground stated as said section does not invalidate a return of no property found by the collector before the expiration of his term of office, but the petition was defective for other reasons. It does not state who owned the mortgage or any bond or bonds secured thereby, and there is no allegation that the owners of them had failed to pay the taxes thereon, and it must be presumed, without an allegation to the contrary, that the citizen has complied with his duty in the payment of his taxes. The appellee trust company may have held them for others, but it must be presumed that the owners have paid the taxes. If the trust company owned the bonds, or any part thereof, then it is not liable under an assessment made by the city assessor or tax collector. It is presumed to have been assessed under sections 4077 and 4078, Kentucky Statutes by the State Board of Valuation and Assessment.

Ira Julian, W. H. Julian, John W. Ray and T. H. Crockett for appellant.

T. L. Edelen for Frankfort S. V. and T. Co.

J. B. Lindsey for F. & C. Ry. Co.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

This action was brought by appellant against the appellees to recover taxes upon \$160,000 mortgage bonds. The language of the petition, so far as is necessary to quote, is as follows: "The plaintiff says the Frankfort Safety Vault and Trust Co., both individually and as trustee for certain persons now unknown to plaintiff, is indebted to the city of Frankfort in the sum of \$2,320 city taxes for the year 1899 and interest from August 1, 1899, until paid. The said indebtedness arose as follows: On the 10th day of January, 1899, said company, as trustee for certain persons now unknown to plaintiff, held, owned and controlled in the city of Frankfort property situated in said city of the value of \$160,000 subject to taxation for purposes of said city,

which property has been legally and regularly assessed as of January 10, 1899, for taxation under ad valorem levies of said city for the year 1899. Said property consisted of one certain mortgage executed in trust by the Frankfort & Cincinnati Ry. Co. to the Frankfort Safety Vault and Trust Co., dated December 2, 1898, and bonds and other obligations secured thereby."

The appellant made other allegations, to the effect that the city assessor had failed to assess this property and that the tax collector had reported the property for taxation to the city clerk, and that the council of the city had reported the matter of assessment to the finance committee, which committee, after investigation thereof, after notice to the Frankfort Safety Vault and Trust Co., recommended to the council that the list reported by the tax collector be confirmed, and that the council at a regular meeting confirmed the assessment and the assessment was duly certified by the city clerk to the tax collector for collection; that he made an effort to collect it, but could not find any property upon which to make a levy; that he tendered a tax receipt for same and demanded payment which was refused, and the collector made a return, in substance, of no property found, and on the 24th day of July, 1899, this action was filed.

The appellees demurred to the petition and the special judge agreed on to try the demurrer sustained it for the reason, in his opinion, the action was prematurely brought, and in his opinion stated that the statute seemed to contemplate that the collector shall not make a return of "no property" until the expiration of his term of office. We are inclined to the opinion that the lower court was mistaken in its construction of the statutes.

Section 3424 of the Kentucky Statutes says: "After the collector shall make his return of no property found as to any unpaid taxes, it shall be lawful for the city to institute proceedings by petition, in any court having jurisdiction thereof, against such delinquent taxpayer for the satisfaction of such taxes." * * *

As will be seen there is nothing in this section limiting the time of his making a return of no property found until his term of office expires, and such a construction would be unreasonable. To so construe it would give delinquent taxpayers every opportunity to dispose of or get out of the reach of taxgatherers and courts all the property subject to taxation. The two preceding sections of the statute have reference to and deal with settlements with the collector and his sureties. Section 3422 provides that the collector in all cases in which he shall be unable to find property to pay the taxes, he shall make a return at the end of his official term of no property found, and if this be true, then he shall receive credit for same in his settlement with the council. Section 3423 says if the collector fails to collect all taxes, and to return, in substance, no property found on those he fails to collect, then his sureties shall be liable on his bond to the city for the amount of such tax. From a careful reading of the last two sections it is evident that they have no application to the time when the city may institute proceedings against delinquent taxpayers for the collection of taxes. The court is of the opinion that under the authority of 23 Ky. Law Rep., 908, the lower court should have sustained the demurrer for the reasons in that opinion given.

The petition does not state who owned the mortgage or any bond or bonds secured thereby, and there is no allegation that the owners of them had

failed to pay the taxes thereon, and it must be presumed, without an allegation to the contrary, that the citizen has complied with his duty in the payment of his taxes. The appellee trust company may have held them for others, but it must be presumed that the owners have paid the taxes. If the trust company owned the bonds, or any part thereof, then it is not liable under an assessment made by the city assessor or tax collector. It is presumed to have been assessed under sections 4078 and 4077 by the auditor, treasurer and secretary of state.

Wherefore, the judgment of the lower court is affirmed.

HENSLEY v. COMMONWEALTH.

(Filed May 27, 1903—Not to be reported.)

Criminal law—Continuance—On March 15, 1903, appellant shot and killed S., and four days later was indicted, and on the same day was brought out of jail and his trial entered into, and on the following day a verdict and judgment of conviction was entered, from which this appeal is prosecuted. It is assigned as error that the court refused to grant a continuance of the case on the affidavit of his attorney, and appellant showing a lack of opportunity on the part of his attorney to prepare the case, and the lack of time to procure the attendance of witnesses material to the defense, Held—That the court erred to the prejudice of appellant in refusing to grant the continuance as appellant was deprived of a reasonable opportunity to prepare his defense.

2. Jury—It was also error to keep the jury at the house of an uncle of the deceased.

O. H. Pollard for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Nunn.

On Sunday, March 15, 1903, the appellant shot and killed Bud Spicer. Four days later, to wit, March 19, he was indicted, and on the same day was brought out of jail and his trial entered into, over his protest, and on the next morning, March 20, a verdict was returned by the jury finding him guilty and fixing his punishment at sixteen years' confinement in the penitentiary, and at once the court pronounced judgment upon the verdict. The appellant then filed his motion and grounds for a new trial, and moved the court to set aside the verdict and judgment, which motion the court overruled. The substance of the reasons filed for a new trial are as follows: Because the court refused to grant him a continuance and forced him into a trial on the day the indictment was found, and in the absence of all his witnesses; because the defendant did not have time or opportunity to prepare his defense or to investigate and ascertain what evidence material to his defense was in reach; because defendant's counsel had no opportunity or time to consult with the witnesses or to make any preparation for defense before his trial was begun, or even to ascertain appellant's version of the difficulty; because the jury who tried the case was taken by the officer who had charge of the jury to the home of Bryant Spicer, an uncle of the deceased, and was

there fed, lodged and housed both before and after the case was finally submitted to them.

Courts are to be commended for giving parties speedy trials; but the courts should be careful to see that both the prosecution and the defense should have reasonable opportunity and time in which to investigate and prepare for the prosecution and defense.

In the case appellant's counsel filed the following affidavit in support of the motion for a continuance: "The affiant, O. H. Pollard, says he was employed to defend the defendant, John Hensley, after dinner yesterday; that at the time he accepted said employment he was not aware that there would be an effort to try this case at the present term; that he knew that quite a number of important civil cases had been set down for trial on to-day by special agreement, and that he was engaged as counsel in at least one half dozen of said cases, one of which was a damage suit involving \$5,000, and another damage suit involving \$10,000; that with the expectation and understanding that they were to be tried, witnesses and attorneys were expected from different counties; one of said witnesses living in New York State, and one of said counsel living in Ashland, Ky., and supposing that under these circumstances said causes would have precedence on the docket, and little dreaming or supposing that an effort would be made to have a trial of this indictment at this term, he accepted said employment. He had a professional engagement to be at the Powell Circuit Court at Stanton, Ky., on to-morrow, and that he is bound to keep such engagement; that he has not conversed with any witnesses for the defense nor had an opportunity to see any witnesses, and has made no preparation for this trial, save having subpoenas placed in the hands of the sheriff to secure the attendance of witnesses. He says it is impossible for him to properly present and prepare the defense of the defendant at this term since he can not be present on to-morrow or next day, owing to his aforesaid previous professional engagements, and this court expires by limitation on day after to-morrow; that he can not intelligently present a defense on to-day if defendant's witnesses were all present. In the limited time he has in this court he could scarcely ascertain the facts within the knowledge of the witnesses; that it is now 11 o'clock, and if this trial is to proceed he will either be forced to retire now or before it is finally submitted to the jury, since his engagements will not permit him to remain after to-day. He says he would not have accepted employment in this case had he known that it would conflict with his other engagements, and that owing to the foregoing circumstances he finds himself in this embarrassing position. He does not believe it possible for the defendant to have his case presented at this term under the circumstances; that he has not had time even to acquaint himself with the defendant's version of the difficulty."

This affidavit was sworn to March 19, 1903.

The appellant filed an affidavit to the same effect and giving the name of absent witnesses, and what he expected to prove by them, and in addition stated that just prior to the difficulty that there was a conspiracy formed by the deceased with two of the prosecuting witnesses in a room at the house of one Tharp to take the life of this appellant. He named two of the persons present, or that he understood to be present, and stated that there were

others there whose names he had not been able, and had had no opportunity, to ascertain, and that if given an opportunity he could find out the names of these persons, and be able to prove that the conspiracy was actually formed.

It was said in the case of *Wells v. Commonwealth*, 12 Ky. Law Rep., 113: "It is true one accused of crime may be tried at the term of court when the indictment is found; but it has always been the practice, and it is one in the interest of justice and fairness, to then exercise greater liberality toward a party who asks a continuance than at any subsequent term of court, when he has certainly had ample opportunity to prepare for trial."

This language was used by the court in a case where the offense was committed on the 6th of April, 1890. He was indicted on the 14th and the case set for trial on the 19th.

The case of *Brooks v. Commonwealth*, 100 Ky., 196, was where Brooks killed Gus McKenzie on the 1st day of the June term of the Morgan Circuit Court. The next day, the 2d day of the term, he was indicted, and was brought out of jail and two members of the bar appointed to defend him, and the case set for trial on the 4th day of the term, and on that day Brooks made affidavit stating that he had not had time to prepare his defense, and asked for a continuance until the next term of the court to enable him to prepare for trial. He did not name any witnesses in his affidavit, but stated that he had acted in self-defense, but could not then know nor had he had opportunity to ascertain by whom he could prove these facts. Both of his attorneys made statements in support of the motion for a continuance, showing that they had neither sufficient time nor opportunity to make suitable preparation for the defense, and they thought it impossible to obtain a fair and impartial trial for the defendant at that term of the court, and that they could not do the defendant justice in his defense if forced to try it at that term. The court overruled the motion for the continuance, and on appeal in this case the court said: "It can hardly be said that the facts upon which the motion for a continuance in this case was based, as set forth in the affidavit of the appellant and the statements of his counsel, were technically legal grounds for a continuance. At the same time they were of such character as would have warranted action by the lower court upon the motion favorable to the appellant in the exercise of a sound discretion conferred by the law. Section 185 of the Criminal Code provides that if the defendant is in custody or on bail when the indictment is found 'the trial may take place at the same term of the court, at a time to be fixed by the court.' In every prosecution, before a trial can be lawfully had, the defendant must be 'before the court' in some way or by some process, usually before the commencement of the term of court at which it is proposed the trial shall be had (Criminal Code, section 187); but the condition provided for by the section quoted is where a defendant is 'before the court' on some charge before or at the time 'the indictment is found.' And the object of these provisions is to secure as speedy a trial in all cases as may be consistent with the allowance of reasonable time for preparation, both for the Commonwealth and for the accused."

The court, after acquitting the trial court of any improper motive in overruling the motion for a continuance, used this language: "We are of opinion

that he or his counsel, who were officers of the trial court and had undertaken the burden of defending the accused in obedience to its order, and whose statements ought to have had great weight with the court upon the question of continuance, did not have sufficient time to prepare, and in fact that they could not have made the proper preparation for the trial of the case at the June term of the court. In this view of the case the continuance asked for ought to have been granted by the trial court."

The Brooks case, and the case at bar, are very similar. According to the statements of the appellant and his counsel he did not have reasonable time within which to make the proper preparation and investigation for his defense, and in addition to the affidavits of the defendant and his counsel the record in the case is evidence of that fact. One evidence of it, one Sylvester Tharp, the most important witness for the defense, was permitted to be cross-examined by the Commonwealth's attorney, without objection, and on cross-examination Tharp said: "I don't know how many times I have been indicted. I have been indicted a number of times for selling whisky. I was indicted for murder, charged with killing Pearl Strong, in this court and was acquitted. I have been indicted a good many times. I was engaged in selling whisky at the time defendant shot Spicer. I have also been indicted in this court for hog stealing, but was acquitted." Our Code provides (section 597) that a witness may not be impeached by evidence of particular wrongful acts except that it may be shown by the examination of a witness or record of a judgment that he has been convicted of a felony. It follows that the evidence quoted was incompetent, and that course of examination should not have been permitted. This question has been repeatedly before this court. (5 J. J. M., 622; 18 B. M., 214; 7 Bush, 137; 97 Ky., 184; 19 Ky. Law Rep., 1201, 1778; 21 Ky. Law Rep., 542; 22 Ky. Law Rep., 1543.)

From this record it appears that the jury while kept in confinement during the recesses of the trial were kept at the house of Bryant Spicer, an uncle of the deceased, Bud Spicer. There is nothing appearing in the record showing any improper conduct on the part of Spicer, or the person having the jury in charge, or any of the jurors while at Spicer's house. The officers in charge stated that they were taken there at the request of some of the jurors, who stated that they were expected there, and had made arrangements to spend the night at that place. This ought not to have been permitted. There is a possibility that their presence in the house of the uncle of the deceased might have had some influence upon the minds of the jurors to induce them to avenge the death of the nephew of their host. As this case will have to be tried again, we purposely refrain from commenting upon the evidence, and reverse the case for the reason of the abuse of the discretion of the lower court in refusing to grant a continuance.

Wherefore, the case is reversed and the cause remanded, with directions to grant appellant a new trial and for further proceedings consistent with this opinion.

COMMONWEALTH, BY, &c. v. GRAY'S TRUSTEE.

(Filed May 27, 1908.)

Taxation—Educational institution—Constitutional law—G., by her will, devised the residuum of her estate in trust, the interest to be applied annually to the schooling of four poor children to be selected by the trustee. The question involved on this appeal is the right to tax said bequest. It is claimed on behalf of the trustee that said fund is exempt under section 170 of the Constitution, which provides that there shall be exempt from taxation * * * institutions of education not used or employed for gain by any person or corporation and the income of which is devoted solely to the cause of education. Held—That said fund is exempt from taxation under said section. It is not a complete definition to define "institution" as simply a building or a plant, or a body corporate. It may be all these, but more broadly speaking, it is that which is set up, provided, ordained, established or set apart for a particular end, especially of a public character or affecting the community. So when money or other property is set apart, the exclusive use and income of which is to be applied to the cause of education or pedagogy, the property impressed with that character becomes an institution without regard to the particular form of its investment.

Wm. W. Spalding for appellants.

W. J. Lisle for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge O'Rear.

Jennie (Jane) Gray, of the county of Boyle, devised the residuum of her estate, after certain specific bequests, in trust, the interest to be applied annually to the schooling of four poor children to be selected by the trustee. The fund was not a large one, probably \$5,000 or \$6,000 in the aggregate. Since her death in 1858 it has been applied as directed. The trustee invested all but a \$1,000 of it in national bank stock. This proceeding was instituted by the auditor's agent to require the listing of this fund for taxation for all the years since 1885, and for the penalties provided by statute for failure to list property by the person chargeable with that duty. The county court required the property to be listed. The circuit court reversed that judgment, and the matter is here on appeal for review.

Section 170 of the Constitution provides that "there shall be exempt from taxation * * * institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education."

If this fund is exempted from taxation it is because it is included in the provision above quoted. But appellant contends that it is not so embraced; that it has been set apart and perpetually dedicated to the sole cause of education, without gain to any person, is not questioned. This court had occasion to consider and construe the meaning of the word "institution," as used in the above section in the case of Trustees of Kentucky Female Orphan School v. City of Louisville, 100 Ky., 40. It was argued in that case for the city, claiming the right to tax certain property in which the endowment fund of the orphan school had been invested, that the word institution refers alone to the buildings and grounds used by the schools as a place employed for the purpose of accommodating the pupils and teachers. The court, how-

ever, rejected this narrow construction, and found that word embraced not alone the buildings and grounds so used, but that it included the endowment and other funds of the school or corporation which were dedicated solely to the cause of education. What the convention which framed the Constitution evidently had in mind was to exempt from taxation all property that was dedicated solely to the cause of education, and not used or employed for gain by any person or corporation, whether that property was buildings or money, or owned by natural or artificial persons. Buildings alone and the grounds upon which they stand are not adequate to provide education; in addition money must be used, to employ teachers, provide text-books, etc. Indeed the buildings, so far as ownership by the educator is concerned, could be dispensed with, but not the other means. Nor can we believe that it was the purpose of the convention to require those dedicating their property to this unselfish mode of education to use it in connection with real estate likewise owned and used before the exemption should apply.

It is not a complete definition to define "institution" as simply a building or a plant, or a body-corporate. It may be all of these; but, more broadly speaking, it is that which is set up, provided, ordained, established, or set apart for a particular end, especially of a public character or affecting the community. So when money or other property is set apart, the exclusive use and income of which is to be applied to the cause of education, or pedagogy, the property impressed with that character becomes an institution without regard to the particular form of its investment. When the dedicator in his munificence sets apart property or a fund to this end, the people in a kindred spirit have declared by their organic law that such property, when so used without gain or profit to the giver or owner, shall be exempt from taxation.

It follows that the judgment of the circuit court should be affirmed.

CAMPBELL v. CAMPBELL, &c.

(Filed May 27, 1903.)

Divorce and alimony—After a divorce has been granted a wife from a husband in an action in which she did not ask for alimony, she can not, in a subsequent suit, recover alimony, as section 2122, Kentucky Statutes, evidently means that alimony can only be allowed in the action in which the divorce is granted.

R. B. Flatt for appellant.

N. P. Moss for appellees.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, Alice Campbell, and appellee, B. B. Campbell, were husband and wife. She sued for and obtained an absolute divorce from him on statutory and canonical grounds. In her suit she neither asked for nor was granted alimony. At a subsequent term of the court she brought this suit against her divorced husband (who had become a nonresident), and against his vendee, to whom he had conveyed certain lands in this State, seeking to

set aside the conveyance and subject the land to the payment of alimony in this suit, on the ground that the conveyance by the husband was fraudulent and collusively made with his codefendant to defeat appellant's claim. The question here for decision is, can the divorced wife maintain a separate suit for alimony against her former husband in an independent action begun after the decree of divorce?

While marriage is more than a civil contract in certain of its aspects, so far as the property rights of the parties are concerned they are governed either by the express contract of the marriage settlement, or by the implied contract imposed by law. In the latter is involved the moral and legal obligation of the husband to support his wife. This undertaking is necessarily mutual to a certain extent, for the correlative duty of the wife is to maintain that relation on her part, in chastity and in good faith. She is absolved, at her election, from her marital obligation by his breach of the marriage duties particularized by the statute. But she is not bound to pursue that course. If she elects to do so, to terminate the married state, with its interdependent obligations, she elects thereby to abandon, and to yield her claim to support from her husband implied in their contract of marriage, except to the extent and upon the terms of the statute which she has invoked.

The origin and evolution of the doctrine of alimony need not be discussed now, for, by statute the subject is regulated in this State. Section 2122, Kentucky Statutes, provides that "if the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable, and be restored to the name she bore before marriage, if she desires it."

This section does not deal with the right of the wife to sue her husband for maintenance during marriage, upon proper showing (*Hulett v. Hulett*, 90 Ky., 363; *Steele v. Steele*, 96 Ky., 382), nor for support pendente lite (section 2121, Kentucky Statutes; section 424, Civil Code). But the section does not recognize that the wife's claim for permanent alimony, upon a complete divorce, is not one of absolute right at all. The language of the section seems to indicate that the provision for the wife's future support, by way of alimony, is one to be then determined by the court. The expression "she may, on a divorce obtained by her, have such allowance," etc., suggests that the claim for alimony must be so presented that the court granting the divorce, having all the facts and circumstances before it, may equitably then and there adjust the property rights of the parties. While in this State alimony has not been regarded as an incident of the divorce, this is true only where the marital relation is continued. But where that relation is terminated, without claim or reservation in the judgment of divorce, concerning future support, by way of alimony, all such rights of the parties must be deemed as fixed and settled by the judgment.

The opinion of this court in *Rogers v. Rogers*, 15 Ben Mon., 292, which seems to intimate the contrary, seems to have been rested in the main on the fact that the decree for alimony enforced in that action was allowed because it was the judgment of a court of general jurisdiction of another State, to which our courts were required to give full faith and credit. But whether such is the accurate construction of that opinion we have concluded that the better rule is the one now applied.

The judgment of the circuit court dismissing the wife's subsequent suit for alimony is affirmed.

CENTRAL TRUST CO., &c. v. JOHNSON, &c.

(Filed May 27, 1906—Not to be reported.)

Trustees—Compensation—In this action, where appellant acted as trustee of \$35,000 of city bonds and about \$5,000 of bank stock, the court allowed it as compensation a commission of 5 per cent. on the income and 1½ per cent. on the principal. On this appeal appellants ask that instead of 1½ per cent. on the principal, it should be allowed 5 per cent. Held—That the chancellor has not abused his discretion in fixing said allowances, and his finding will not be disturbed.

Miller & Todd for appellants.

George V. Triplett for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge O'Rear.

The Central Trust Co. was appointed, and for a term acted, as trustee of certain properties, including \$35,000 of city bonds, and about \$5,000 of bank stock belonging to appellees. In the settlement of its accounts it asked credit as commission for its services for 5 per cent. straight upon the principal of the bonds and bank stock referred to. During the years which appellant served as trustee it collected the dividends and interest upon these securities, as well as rents upon certain real estate, aggregating about \$3,300 per year. The court disallowed the claim for 5 per cent. upon the principal of the bonds and stock above named, but allowed instead 1½ per cent. The trustee on this appeal seeks to have the difference up to 5 per cent. allowed it.

The statute regulating the fees of administrators, executors and guardians, fixing the maximum allowance for similar services at 5 per cent. in the absence of special circumstances upon showing made, seems to have been generally adopted by the courts as a rule that might be ordinarily applied in fixing the compensation of trustees of express trusts. However, there is no fixed rule upon the subject, and the matter, from the very nature of such cases, must be left largely to the discretion and judgment of the courts before whom the settlement is made, as the character of the property, the circumstances attending its management, and the fidelity and success of the trustee, should all have a bearing in fixing the allowance. In view of the fact that the trustee was allowed 5 per cent. upon the income; that the corpus of the fund was not changed, and of no particular trouble, we are of opinion that the allowance in this case was an adequate and reasonable one.

Judgment affirmed, with damages.

CHEAP & SON v. JACKSON.

(Filed May 27, 1903—Not to be reported.)

Cancelling conveyances—Fraud—In this action the lower court properly cancelled a conveyance of land made by appellee to appellant through the fraudulent promises of another to pay him \$50 therefor, which transaction was known by appellants, or one of them.

R. Gudgell & Son for appellants.

Alex. Conner for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Nunn.

Appellants, George Cheap & Son, in the year 1893, were brick and drain-tile manufacturers in the State of Indiana. They visited Salt Lick, in Bath county, Kentucky; ascertained that the soil there was suitable for their business, and that much of the land in that section needed drain-tiling; they made a proposition to the citizens in and about Salt Lick that if they would donate to them four acres of land upon which to erect their establishment they would begin operations there. Many of the citizens, including William P. Dickerson, subscribed to a petition gotten up for that purpose to pay for the four acres of land, and in this way about \$200 was subscribed. Three acres and a fraction of this four acres afterwards selected for that purpose belonged to William P. Dickerson, and the balance, a little less than an acre, belonged to appellee, William Jackson, a colored man.

It appears from the record that William P. Dickerson induced William Jackson to enter into this conveyance upon the promise that he would pay him, or see him paid, \$50 as the price of his part of the land. The exact amount of money collected on the subscription the record does not show, but the amount that was collected and the subscription paper were turned over to William P. Dickerson, and the appellee has never received anything. The appellants, Cheap & Son, or one of them at least, was present when the deed was made. They knew the circumstances upon which appellee signed it, and that he had not received anything for his land, and that it was not his intention to donate it, and that he was not able to do so. Appellee had not subscribed anything to the purchase of the land, and appellants knew this fact, and it would be a fraud upon his rights to permit a conveyance made under the circumstances as shown by this record to stand and appellee be deprived of his property without any compensation whatever.

Wherefore, the judgment of the lower court is affirmed.

FORD v. CRIGLER, &c.

(Filed May 27, 1903—Not to be reported.)

Negligence—Instructions—Appellees were carrying on business in a three-story building, where they had been for some time and were renting out the third story for storage of furniture, and the furniture was moved to and from it by means of an elevator, which had fallen before within the knowledge of appellees. Appellant, while in the employment of expressmen, was engaged in loading furniture on the elevator when it fell with him, inflicting severe injuries, for which appellant brought this action against appellees for damages, alleging that the unsafe condition of the elevator was unknown to him before the fall. On the trial the court gave a peremptory instruction for defendant, from which this appeal is prosecuted. Held—That the court erred in giving said peremptory instruction. Appellees are engaged in the storage business and had furnished and directed the use of this elevator in the removal of goods from their building, and if the elevator they furnished

was out of repair and unsafe, and they knew, or by the exercise of ordinary care could have known, that it was unsafe before directing the use thereof, or before the injury to appellant, and appellant did not know of its unsafe condition, then appellees would be liable.

B. F. Graziani for appellant.

D. A. Glenn for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

It appears from this record that appellees, Robert Crigler and Jacob Crigler, doing business as Crigler & Crigler in the city of Covington, were engaged in the wholesale liquor business. They occupied a building three stories high, the upper story of which they used as a storage room where they stored, for all those who desired it, household goods and other articles. They had been conducting this storage house all the time they had been occupying that building. The only way by which they could store goods in or remove goods from the third floor for their customers was by means of an elevator.

One Lieutenant Wetherill had his goods stored in this room and employed expressmen Edmonds and Routt to remove his furniture from appellees' storehouse to his home. These expressmen had the appellant, Charles Ford, employed to aid them in the removal of these goods. They went to the storehouse of appellees and were shown by appellees this elevator, to be used by them in lowering the goods from the third floor. It appears from the record that while using the elevator that Edmonds discovered that it was out of repair and dangerous, and that he notified them of this fact, and they promised to repair it, but failed to do so. The evidence also showed that it had previously fallen while in use with the knowledge of the appellees. All this was denied by the appellees. And it appears that while appellant and an assistant were loading the elevator with part of Wetherill's goods, and appellant was placing a chair on some other goods that they had placed on the elevator, he placed one of his feet upon the elevator, and it suddenly, and unexpectedly to him, gave way and fell to the cellar below, whereby some of his ribs were broken, his face bruised and his person otherwise severely injured. The record shows that he had no knowledge or information of the defect in the elevator, and this is also denied by the appellees. The appellant brought his action against the appellees, the issues were formed and a trial had which resulted in the court giving the jury a peremptory instruction to find for appellees, to which the appellant excepted, and the case is here on appeal.

The court, in granting this peremptory instruction, misapplied the principles enunciated in the case of *Bush v. Grant*, 22 Ky. Law Rep., 1786, decided by this court. In that case appellants had an ash-lifter elevator, used, in raising ashes and cinders from the cellar to the first floor or sidewalk. The appellants contracted with an artificial stone company to make a concrete floor in the basement. It was not understood that this ash-lift was to be used in that work. It was not made, nor intended to be used, for any such purpose. Appellee Grant was an employe of the artificial stone company, and some one representing that company directed him to

load this ash-lifter with sand, or other heavy material, which was done, and he went up to the first floor to receive it. The pan in coming up through the hole caught in some way, and he stepped down on it to unfasten it. The weight it already had, together with his weight added, caused the small cord to break, and he fell and was injured. The court said, in that case, that the appellants were in nowise responsible for his injury. That case is unlike the one before us. The appellees in this case are engaged in the storage business, and had furnished and directed the use of this elevator in the removal of goods from their building, and if the elevator they furnished was out of repair and unsafe, and they knew, or by the exercise of ordinary care could have known, that it was unsafe before directing the use thereof, or before the injury to appellant, and appellant did not know of its unsafe condition, then appellees would be liable. These appellees being in the possession of and in control of this storehouse for their benefit, were bound to use care and diligence, proportioned to the risk, to keep their premises and elevator at least reasonably safe for the access and use of those coming there by their invitation, express or implied, on any business to be transacted or permitted by them, or for any other purpose beneficial to them, and they are liable for injury to any such person, who is himself guilty of no contributory negligence, occasioned by their want of such care and diligence. We are of the opinion that the lower court erred in giving the peremptory instruction.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

COMMONWEALTH v. LASHLEY.

(Filed May 28, 1903—Not to be reported.)

Criminal law—False swearing—Indictment—The sufficiency of an indictment for false swearing is involved on this appeal. Held—That the indictment was not insufficient on the ground of failure to negative by special allegation the matter alleged to have been sworn to by the accused. The allegations of the petition were sufficient.

C. J. Pratt, M. R. Todd and Nat A. Porter for appellant.

J. S. Wortham for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Chief Justice Burnam.

The Commonwealth appeals from a judgment of the lower court sustaining a demurrer to an indictment charging Nancy J. Lashley with false swearing, upon the ground that the indictment did not negative by special allegation the matter alleged to have been sworn to by the accused. The descriptive part of the indictment is as follows: "The said Nancy J. Lashley did unlawfully, wilfully, feloniously, knowingly, corruptly, falsely and fraudulently, after being first sworn by the clerk of the Edmonson Circuit Court to tell the truth, the whole truth, and nothing but the truth, depose, swear, give in evidence, say and state, that one John Farris was upon a certain night at the house, at the time used and occupied and controlled by one Thomas Lashley as a residence; and that Farris stayed during the night,

being the night on which said Tom Lashley was accused of breaking into the residence of J. C. Durbin, and intimidating the inmates thereof, and for which breaking and intimidation the said Tom Lashley was at the time on trial under indictment of said court, and said statements being at the time in a matter judicially pending as aforesaid, and on a subject in which she could be and was legally sworn as aforesaid; and the said Nancy J. Lashley at the time well knew said statement to be false and untrue, and at the time well knew the truth to be that he (Farris) was not upon said night at the said residence of said Lashley, and did not stay at said residence during said night, said oath being administered as aforesaid by T. J. Woosley, the duly elected, qualified and acting clerk of the Edmonson Circuit Court, with full power and authority to administer said oath."

Section 124 of the Criminal Code requires that an indictment should be direct and certain as regards the party charged, the offense charged, and the county in which the offense was committed, and the particular circumstances of the offense charged, if they be necessary to constitute a complete offense. In our opinion the allegations of the indictment are sufficient in each of these particulars.

It is insisted for appellee that the indictment is fatally defective in that it fails to allege that John Farris was not at the house of Tom Lashley on the night when Tom Lashley was accused of breaking into the residence of Durbin. The words of the indictment are that "Nancy J. Lashley well knew the truth to be that he (Farris) was not upon the said night at the said residence of said Lashley, and did not stay at said residence during said night." In *Commonwealth v. Still*, 88 Ky., 275, the indictment charged that Still "did falsely and corruptly testify that he did not, between the 20th day of June, 1881, and the 22d day of April, 1882, see a game or games of cards played in the tavern house, or in the saloon of the said Clark, in which game or games of cards so played, money nor property of value was bet, won nor lost, when T. P. Clark was present, or had any knowledge or information of the same so far as he (Still) knew. Nor did he testify before the grand jury of this county, when R. W. Shellbourne was foreman of the same, that he (Still) saw a game of poker played in Clark's hotel, at Wickliffe, when T. P. Clark, proprietor of the house, was engaged in the game upstairs in said building, where money or property was bet, won or lost, or when Clark was present. All which statements were false, and known to be by said Still to be false at the time, and was willfully and corruptly made and testified to, said Ballard Circuit Court having jurisdiction and authority to examine into said charge against said T. P. Clark."

It was held that this indictment was not good because it did not specifically allege that the accused did see the game of cards played at the time and place mentioned; and that the accused did know Clark had knowledge or information of the game. The indictment in the case at bar is not liable to a similar criticism, as it does specifically charge that Farris was not upon the night in question at the residence of Lashley; and that the defendant well knew her statement that he was to be false and untrue.

In our opinion the trial court erred in sustaining the demurrer to the indictment.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

WHITE HOUSE CANNEL COAL CO. V. WELLS, &c.

(Filed May 28, 1903—Not to be reported.)

1. Trespass—Pleading—In this action of trespass *quare clausum fregit* to recover for the value of timber cut and removed from plaintiff's land, where the plea of *liberum tenementum* was interposed, plaintiff can not recover for timber cut and removed from the land of another, although he may have bought and paid the owner therefor.

2. Boundary—Evidence—In locating the boundary of a patent the line should be located by beginning at the conceded beginning corner and follow the calls of the patent, and when it is necessary courses and distances called for in the patent should be made to yield to the marked boundary made at the time the land was surveyed for purpose of obtaining patent.

G. V. Segraves and Alexander Lackey for appellant.

John P. Wells for appellees.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Paynter.

The appellees brought this suit against the appellant, alleging that it forcibly and without right entered upon the land and committed a trespass, by cutting and removing timber therefrom, and by injuring the growing timber on it. The appellant pleaded *liberum tenementum*. On the trial of the case it was developed that part of the timber had been removed from the land claimed by Aaron Wells, not from the land which they owned. The appellee, M. L. K. Wells, admitted this to be true, but claimed that he had bought the timber from Aaron Wells after the appellant had cut it, and, therefore, was entitled to recover its value in this case.

This being an action of trespass *quare clausum fregit*, the plaintiff had no right to a recovery for the timber which had been cut and removed from the land of another, although he may have paid Aaron Wells its value. The court erred to the prejudice of the appellant in allowing this issue to be in this case. The principal part of the timber which the appellant cut was within the boundary of the William G. Wells patent for fifty acres as claimed by the plaintiffs, and they claim to own the land embraced by that boundary.

The description of the land conveyed by the patent is as follows: "Beginning on a beech and mulberry on a conditional line between said Wells and William Meek; thence north 7 east 26 poles to two hickories; north 25 east 18 poles to persimmon and rock; north 4 west 14 poles to a black oak and hickory; north 38 east 124 poles to a pine; north 1 east 85 poles to a locust; north 27 east 52 poles to a double chestnut; north 41 east 48 poles to three chestnut oaks; north 83 east 38 poles to three hickories; south 49 east 46 poles to a chestnut oak; north 71 east 35 poles to a locust; south 53 east 80 poles to a chestnut oak; south 62 west 170 poles; south 26 west 284 poles; north 70 west 18 poles to the beginning."

The appellant claims that the land from which the timber was cut and removed was covered by R. M. and W. A. Wells' patent, and that the fifty-acre patent does not cover the land; that the division line between them runs on the top of the dividing ridge, between the Long branch of Grassy creek and Lick creek. The plaintiffs claim that the division line runs beyond the top

of this ridge. Both parties agree that the mulberry called for in the patent is still standing, and that it is the beginning corner of the survey. So there is an agreement of the litigants as to the exact location of the beginning corner of the fifty-acre patent. To begin at the mulberry and run the calls of that patent several corner trees are reached, although the patent so run will not close. The plaintiffs claim that the patent should be run by commencing at the mulberry tree and reverse the calls of the patent, and to do so a certain pine tree which they claim as a corner to the survey will be found to be in the line of the survey. To commence at the Mulberry tree and run this reverse course the distances called for in the patent will not reach the pine tree by sixty poles. To continue the survey from the pine tree on the reversed calls no line or corner trees are found, and the patent will not close. The appellant contends that the pine tree claimed by plaintiffs to be a corner tree is not one. As the mulberry tree is agreed to be the beginning corner by both parties, we are of the opinion that to ascertain the location of the boundary of the fifty-acre patent the survey should be located by beginning at that corner; thence follow the calls of the patent and when it is necessary courses and distances called for in the patent should be made to yield to the marked boundary made at the time the land was surveyed for purpose of obtaining the patent. The court erred in instructing the jury, because it submitted both the law and the facts for its determination. The question should have been submitted to the jury as to whether the patents under which the plaintiffs claim cover the land from which the timber was taken. On another trial the court should direct the jury as to the beginning corner of the survey, and as to the effect of marked lines on the courses and distances called for in the patent.

The judgment is reversed for proceedings consistent with this opinion.

LOUISVILLE INSURANCE CO. v. TATE, &c.

(Filed May 28, 1908—Not to be reported.)

Assignment for benefit of creditors—Compromise—Surety—Appellant had loaned a bank \$50,000, for which it had executed its note. As collateral security two certain notes for \$5,000 each were delivered to it. The bank afterwards became insolvent, and made a deed of assignment for the benefit of its creditors and appellee. T. was made its assignee. An arrangement was made by the assignee by which he transferred the assigned estate to G., a title company, which assumed to pay the debts of the bank. This arrangement was made with the knowledge and consent of the creditors, including appellant, and was also approved by the court. In the written agreement of compromise it was stipulated by appellant that it released the assignee from any and all liabilities and responsibility as assignee, and agreeing to look alone to T. and the collateral held by appellant for the payment of their debt. In transferring the assets to the title company the assignee turned over to it money which was realized from sale of lots on which liens existed to secure certain notes, and the question involved on this appeal is whether or not the surety of the assignee is liable to appellant for the money so paid over to the title company. Held—That by accepting the agreement of compromise appellant released its liability against the assignee and his surety; besides, the agreement having become a judgment of court, it is binding on appellant and estops it from recovery.

Barnett & Barnett, Jas. C. Poston and Chas. K. Stewart for appellant.

R. C. Kinkead, St. John Boyle and Bodley, Baskin & Flexner for appellees.

Appeal from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Judge Paynter.

The Westview Savings Bank borrowed \$50,000 from the appellant, Louisville Insurance Co., for which it executed its note. As collateral securities two certain notes for \$5,000 each was delivered to it. Subsequently the bank became insolvent, and made an assignment to W. B. Tate for the benefit of its creditors. Tate, as assignee, instituted a suit in the Jefferson Circuit Court to settle the estate, to which appellant was made a defendant. In that action the court entered an order enjoining all creditors from suing or maintaining actions against the assignee. The appellant and two or three others held all the debts against the estate except a few thousand dollars. Negotiations began between the assignee and the German-American Title Co. looking to the settlement of the estate. The latter proposed to take the assets of the Westview Savings Bank and pay its debts. So the president of the German-American Title Co. addressed Tate, as assignee, the following letter:

"Dear Sir—In order to bring about a definite understanding as to our proposition concerning our purchase of the assets and assumption of the liabilities of the Westview Savings Bank and your costs and expenses in the administration of the assigned estate, we make you the following proposition: We will buy from you all the assets of the Westview Savings Bank, consisting of personal notes, lien notes, mortgage bonds, title bonds, real estate, cash on hand, iron safe, and in all and general everything belonging to said assigned estate of the Westview Savings Bank, and we will assume to pay in full all of the debts of the Westview Savings Bank, which debts are approximately as follows:

Louisville Insurance Co.....	\$58,965 66
Louisville Banking Co.....	40,551 54
Mrs. Caroline Brown.....	25,515 65
Louisville Building Association, about.....	10,700 00
Other depositors, about.....	4,796 79
Kentucky Title Co.....	1,000 00
George A. Newman.....	100 00
John Rauchenberger.....	25 00
Helen Bruce.....	100 00
Total.....	<u>\$140,858 64</u>

"We will also pay all costs and expenses incurred by you in the administration of the trust, including \$7,500 to R. C. Kinkead, \$5,000 to Simrall, Bodley & Doolan, and \$8,130 to you in full of your compensation as such assignee.

"It is understood that if you desire to accept this proposition an order shall be obtained from the Jefferson Circuit Court, Common Pleas division, in action 3456, brought by you against said bank and others, settling all accounts up to the date of the order, and granting you a full discharge from

all duties and obligations as such assignee except for the purpose of enabling you to finally wind up your accounts, should you have to take any steps in relation to this contract in the event of a failure on our part to fully comply with its terms, approving the sale by you and ordering you to convey, and also to deliver to this company, or its order, all of the assets then in your possession as such assignee. * * * The fees of the attorneys and your fee herein to be arranged as soon as you deliver to us all of the assets of the Westview Savings Bank, and as soon as the order has been entered in court and confirmed, you, however, to do this as speedily as possible. All of the debts of the Westview Savings Bank, with the exception of the debt of the Louisville Banking Co., Louisville Insurance Co. and Mrs. Caroline Brown, shall be paid within two years from the date of the delivery by the assignee of the assets to us, excepting the depositors whose claims shall be arranged satisfactory to them or paid within six months from the date of such delivery by the assignee, and the claims of the Louisville Banking Co., Louisville Insurance Co. and Mrs. Caroline Brown shall be paid as per agreement between us and said three last-named parties, they consenting in writing to this arrangement. As a guarantee for the payment by us of the debts of the Westview Savings Bank other than those of the Louisville Banking Co., Louisville Insurance Co. and Mrs. Caroline Brown, you are to retain in your possession real estate lien notes or bonds of sufficient face value to cover them, and we agree to pay said debts to secure which such paper is retained by you out of the first collection made by us from the assets turned over to us. Whenever we shall pay on said debts the sum of \$1,000 or more you are to surrender to us an equal amount of such securities retained by you."

Thereupon the Louisville Banking Co., by its president, Theodore Harris, together with other creditors, addressed Tate a letter, which reads as follows:

"Dear Sir—The undersigned creditors of the Westview Savings bank have seen the proposition made to you by the German-American Title Co. to purchase the assets of said Westview Savings Bank and assume all its liabilities. Believing that the acceptance of the said proposition by you as assignee is for the best interests of the creditors of the said Westview Savings Bank and ourselves, we ask that you accept said proposition, to which we agree for ourselves, and do hereby release you from any and all liabilities and responsibility to us as such assignee, and agree to look alone to the German-American Title Co. and the collateral which we hold as security for our debts for the payment of our indebtedness from said Westview Savings Bank."

Tate, as assignee, addressed a letter to the German-American Title Co., which reads as follows:

"Gentlemen—Your proposition of February 5, to purchase the assets of the Westview Savings Bank, is received, and I hereby accept same subject to the approval of the court, application for which will be made as soon as papers can be prepared. In the meantime I would suggest that you obtain from the Louisville Banking Co., Louisville Insurance Co. and Mrs. Caroline Brown consent to the arrangement which, as mentioned in the proposition, you can obtain, a form of which I send you herewith.

"Please also obtain from the Westview Savings Bank, over signature of its president, by authority of its board of directors, agreement to dismiss

appeal and consent to this arrangement, for which purpose I also enclose form."

After this correspondence such steps were taken in the action which was brought by Tate to settle the assigned estate as resulted in the court entering therein a judgment as follows: "This case coming on to be heard on the petition of the plaintiff for instructions as to the acceptance by him of the proposition made to him by the German-American Title Co. to purchase the assets of said Westview Savings Bank and assume its liabilities, and the court having personally examined the said W. B. Tate, and fully considered the matter not only in connection with the said petition, but also the request and instructions and resolutions of the board of directors of the said Westview Savings Bank and the Louisville Insurance Co. and Caroline Brown to accept said proposition, and believing it to be to the best interests of the creditors of the said bank that the said proposition be accepted, is ordered that the action of the said W. B. Tate in accepting such proposition be, and is hereby, ratified and confirmed, and he is ordered and directed, upon the compliance of the said German-American Title Co. with the terms of said contract, to transfer, convey and deliver to it, the said German-American Title Co., all the assets and property of the said Westview Savings Bank now in his hands as such assignee, except such portion thereof as shall be retained under the terms of said contract in his hands as security for the performance of said German-American Title Co. of its agreement.

"It is further ordered that this action be and is retained for the entry of such orders herein as may be necessary to fully carry out said agreement and for any other purposes."

After this order was entered Tate transferred to the German-American Title Co. the assets as contemplated by the judgment of the court. It appears that the two \$5,000 notes held by appellant as collateral, together with four others for like amounts, had been executed to the Westview Savings Bank by what is known in this record as the syndicate, W. B. Tate being a member of it. These notes were executed by the members of the syndicate to the Westview Savings Bank in consideration of certain parcels of property situated in the city of Louisville. The bank conveyed the property to the syndicate by title bonds. The syndicate proceeded to sell the property and take cash and notes therefor, but during the progress of the transaction the lien which existed for the purchase money on the parcels of land was prorated. Four notes for \$5,000, each due the Westview Savings Bank, were paid, which left unpaid the two notes held by the appellant as collateral. Some of the property upon which a lien existed for them was sold, and notes and cash received therefor was turned over to the Westview Savings Bank, or its assignee. After the agreement with the German-American Title Co. Tate, as assignee, delivered to it the assets in his hands, including the cash notes which had been received for these parcels of land. The legal title to certain of these lots upon which liens existed being in the Westview Savings Bank, Tate, as assignee, conveyed them to the German-American Title Co., or to some one else under its direction. The Fidelity and Deposit Co., of Maryland, was surety on Tate's bond as assignee. The question is, is Tate and his surety responsible on his bond as assignee for the proceeds of certain lots which he turned over to the German-American

Title Co. under the contract with it which was approved by a judgment of the court?

On behalf of the appellant it is insisted that by its letter to Tate it changed the proposition made by the German-American Title Co. to purchase the assets in the hands of Tate, as assignee. It claims that the proposition was qualified, because it wrote Tate that it agreed to look alone to the German-American Title Co. and the collateral which it held for the payment of its debt. It will be observed that the proposition of the German-American Title Co. was to take the assets of the Westview Savings Bank, consisting of personal notes, lien notes, mortgage bonds, title bonds, real estate, cash on hand, iron safe, and in fact, everything belonging to the estate, and in consideration of which it was to assume and pay all its debts. This proposition was accepted by Tate, as assignee, upon the condition that the court would approve it in the action which he had instituted to the estate. The appellant, through its president, fully understood the proposition of the German-American Title Co. He wrote Tate that he had seen the proposition made by it and urged upon Tate the acceptance of its proposition, informing him in that letter that it thereby released him from any and all liability and responsibility to it as assignee of the Westview Savings Bank. There was no suggestion made by the appellant that Tate should have the proposition of the German-American Title Co. changed, or that he should qualify it by the terms of his acceptance.

No new conditions or terms were suggested in the letter to Tate. The language in the appellant's communication to Tate, as assignee, relied upon to show a change of the proposition of the German-American Title Co., does not do so. Its statement is that it would look to the title company and the collateral it held for the payment of its debt. The language was not intended to, nor did it, restrict the right of Tate to transfer to the title company the cash and property which he held as assignee. As an inducement to Tate to accept the proposition, it released him from further liability. By the acceptance of the title company's proposition it agreed that Tate should turn over to it all the money and property in his hands. The court which passed upon the question as to whether the title company's proposition should be accepted, so understood it and directed its acceptance and ordered Tate to transfer, convey and deliver to it all the assets and property of the Westview Savings Bank, except a small portion which has no relation to the question here involved. The appellant expressly released Tate from all liability and responsibility as assignee on the condition that he would transfer all assets in his hands as assignee to the title company, which he did. We think, under the plain terms of the agreement between the title company, Tate, as assignee, and the appellant, no cause of action existed in favor of the appellant against Tate on the bond which he gave as assignee. In addition to this we are of the opinion that, as the judgment unqualifiedly ordered Tate to turn over all assets in his hands as assignee, it precludes plaintiff from recovery, even if the appellant attempted to qualify and limit the terms of the title company's proposition.

The judgment is affirmed.

BROWN, &c. v. TATE, &c.

(Filed May 28, 1903—Not to be reported.)

Barnett & Barnett, James C. Poston and Chas. K. Stewart for appellants.

R. C. Kinkead, St. John Boyle and Bodley, Baskin & Flexner for appellees.

Appeal from Jefferson Circuit Court, Chancery division, No. 1.

Opinion of the court by Judge Paynter.

The facts in this case are substantially the same as in the case of Louisville Insurance Co. v. Tate, &c., ante, 61, opinion this day delivered. Caroline Brown and the Louisville Banking Co. were creditors of the Westview Savings Bank at the time it assigned to Tate. They joined with the Louisville Insurance Co. in the letter to Tate as assignee, advising him to accept the proposition of the German-American Title Co. Whilst the collateral held by the appellants, Louisville Banking Co. and Caroline Brown, is different from that held by the Louisville Insurance Co., yet the facts of the case raise the same question decided in the Louisville Insurance Co. v. Tate, &c., and our conclusions are the same as to the effect of the acceptance of the proposition made by the title company.

The judgment is affirmed.

STEWART, &c. v. ROBINSON, &c.

(Filed May 28, 1903—Not to be reported.)

Conveyances—Where a husband makes a conveyance of real property to his wife and children, the rule of construction well settled in this State is that the wife is only vested with an estate for her life and the husband's children the remainder.

John F. Morgan and John J. Williams for appellants.

Winfield Buckler and J. H. Minogue for appellees.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Hobson.

Mrs. Sarah R. Stewart died on the 6th of March, 1902. her husband, Henry Stewart, having died a few months before. She left surviving her four children by Henry Stewart and two children by a former marriage. After her death her two children by her first husband filed this suit, asserting claim as heirs at law of their mother to an interest in a house and lot conveyed by Henry Stewart to her and her children by him. Their claim is that their mother took the land as joint tenant with her four Stewart children, and that on her death her interest in the land descended equally to all her children. On the other hand, the Stewart children claim that under the deed their mother took a life estate in the land, and they the remainder. This is the only question in the case and depends upon the proper construction of the deed, which is in these words:

“This indenture between Henry Stewart, of the county of Nicholas, and State of Kentucky, of the first part, and Sarah R. Stewart, wife of said

Henry Stewart, and her children by said Henry Stewart, now born, viz., Minnie, Robert, Berry and Nellie, and such other child or children as may be born to her by said Henry Stewart, of the county of Nicholas, State of Kentucky, of the second part, witnesseth: That in consideration of \$1 in hand paid, and the further consideration of the natural love and affection said first party has for his wife and children above named, and such other child or children as may hereafter be born to him by said Sarah R. Stewart, the party of the first part does hereby sell, convey and transfer unto the parties of the second part, and their heirs and assigns, a certain lot or parcel of ground lying in the town of Carlisle, Nicholas county, Kentucky. (Here follows description of land.) To have and to hold the property hereby conveyed with its appurtenances to the parties of the second part and their heirs and assigns forever, with covenant of general warranty of title.

"In testimony whereof the party of the first part hereunto sets his hand this 10th day of January, 1878.

"HENRY STEWART."

Where land is conveyed to a woman and her children, she then having children, and the conveyance is from her father, or some person other than her husband, the rule is that she and the children take as joint tenants, the estate opening up to after-born children. (*Turner v. Patterson*, 35 Ky., 295; *Gill v. Logan*, 50 Ky., 234; *Cesana v. Cesana*, 67 Ky., 516.) But where the deed is made by the husband to his wife and children a different rule is followed. Thus in *Davis v. Hardin*, 80 Ky., 672, the conveyance was "between David W. Jones, of the first part, and Mary E. Jones and William P. Jones, infant child of Mary E. Jones, of the second part." The property was conveyed "in trust for the said Mary E. Jones and William P. Jones and any other child or children of her begotten by said David W. Jones." The court, after saying that the object of all construction is to effectuate the intention of the person whose writing is to be construed and that the words of the instrument to this end must read in the light of the attending circumstances and the relation of the parties, added: "A father making provision for his child and that child's children, may well be supposed to have intended them to take jointly. They are all of his blood, and the natural object of his bounty; but when a husband makes a conveyance to the wife and their children, there is less reason to suppose that he intended they should take as joint tenants, whereby his bounty may, by her death, pass into the hands of a stranger, even as against himself. No doubt Jones desired and intended that his wife should enjoy the property equally with their children, but it would be unnatural to suppose that he intended to invest her with an estate which might pass from her to strangers to his blood. * * * It would be far more reasonable to suppose that he intended to give his wife a life estate, remainder to their children, as was held in *Foster v. Shreve* and *Webb v. Holmes*."

In *Bullock v. Caldwell*, 81 Ky., 566, this rule was approved, and it was followed in *Smith v. Upton*, 12 Ky. Law Rep., 27, where the conveyance was "to Helen Smith, wife of Henry H. Smith, and her children."

It was again followed in *Bodine v. Arthur*, 91 Ky., 53. There the conveyance was "unto said Hettie E. Bodine, wife of the said B. W. Bodine, and to her children by him begotten, forever." It was again followed in *Goodridge v. Goodridge*, 91 Ky., 507, and in *Fletcher v. Tyler*, 92 Ky., 145. The

rule was also approved in *Hood v. Dawson*, 17 Ky. Law Rep., 884, where the court, after pointing out that a different construction is given to conveyances by a husband to his wife and children than to those made by other persons, said: "In such cases the constant and uniform tendency of the court has been, in cases where the language was in substance to the wife and children, or for the use and benefit of the wife and children, or of the wife and the heirs of her body or issue, etc., to hold that the wife takes a life estate only, and that the children take in remainder. The reason assigned by the court for this favorite construction is that otherwise, if the wife was held to take an interest in fee simple, this part of the estate might pass to some stranger in blood to the husband, a possibility not to be supposed consonant to his wishes and intention. This rule has also been applied to cases where the consideration for the conveyance moves from the husband to the grantor."

The cases relied on for appellees do not conflict with those above cited. None of them were conveyances by the husband, and the rule as applied to conveyances by the husband is too well settled in this State to be now departed from. The deed in this case is to the parties of the second part, who are "Sarah R. Stewart, wife of said Henry Stewart, and her children by said Henry Stewart, now born, viz., Minnie, Robert, Berry and Nellie, and such other child or children as may be born to her by said Henry Stewart." It is made "in consideration of \$1 in hand paid and the further consideration of the natural love and affection said first party has for his wife and children above named, and such other child or children as may hereafter be born to him by said Sarah R. Stewart." It is true the conveyance is "unto the parties of the second part and their heirs and assigns" and in the habendum clause the same words are used; but the use of the words "and their heirs and assigns" does not indicate anything more than an intention to pass to the grantees the whole estate. In other words, these are only formal words to show that a fee was conveyed, and they are insufficient to take the case out of the rule heretofore so often laid down, which seems to us just and is aptly illustrated by the facts of the case, for it is perfectly clear that Henry Stewart aimed to provide for his wife and her children by him. He expressly excluded his stepchildren, and in three places in the deed refers to her children by him, then born or thereafter born to her by him. To give the stepchildren an interest in this land would be to violate the intention of the grantor, apparent on the face of the instrument.

Judgment reversed and cause remanded for a judgment as herein indicated.

DRURY'S ADM'X v. NEW YORK LIFE INS. CO.

(Filed May 28, 1908.)

Insurance—Forfeiture of policy—On July 7, 1897, appellee issued and delivered to D. a policy of insurance on his life, which was nonforfeitable after payment of three annual premiums of \$29.70 each. It was also stipulated that at the end of the third and any subsequent year the company would issue a policy of paid-up insurance if demand for same was made within six months after nonpayment of premium. It was also provided that if any subsequent premium is not duly paid and the policy surrendered and a paid-

up policy issued as previously stated, the policy will be extended without request or demand for the full amount during the term stipulated in a table attached to the policy. D. made payment of three annual premiums, but being unable to pay the premium in advance on July 7, 1900, executed his note for same, due in twelve months. D. failed to pay this note with interest when due, or the premium due July 7, 1901, but died in the August following, and this suit was brought on said policy. In its answer the company alleged that no application was made for paid-up insurance, and denied that it was indebted in any greater amount than \$84. In a second paragraph it claimed that the assured waived and surrendered his right to extended insurance by refusing or failing to pay the interest on his premium note, and by failing to pay the premium due July 7, 1901. It also alleged that by the terms of the note D. made a new contract, and it was stipulated that all rights under the policy were forfeited unless said interest and premiums were duly paid, except the right to a surrender value or paid-up policy. Held—That said answer presented no defense to a recovery under the policy as no new contract was made by the note, and under the policy D. was entitled to extended insurance for four years after paying three premiums without any request or demand therefor, which would have kept the policy in force for a period beyond his death, besides the right to a surrender value is saved by the terms of the note, and this includes the right to extended insurance.

Drury & Drury and H. X. Morton for appellant.

Humphrey, Burnett & Humphrey for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Chief Justice Burnam.

On 7th day of July, 1897, the New York Life Ins. Co. issued and delivered to Charles N. Drury a policy for \$1,000 upon the twenty year payment life plan, payable to his executors, administrators or assigns, or such other beneficiary as might be designated by the insured, in consideration of \$29.70, paid in advance, and the payment of a like sum on the 7th day of July in every year during the continuance of the policy until twenty full years' premiums should have been paid. As an inducement to take the policy the company offered certain special advantages in the way of loans and surrender values which were set out in a table on the second page of the policy, and which were made a part of the contract of insurance, and which are as follows:

“TABLE OF LOANS AND SURRENDER VALUES.

“In paid-up insurance or extended insurance, under the conditions specified on the next page.

At the end of	Loans	Surrender Values.	
		Paid up Ins.	Extended Ins. for the term of \$1,000
1st year.....	\$40 00	\$150 00	4 yrs. 10 mon.
4th year.....	55 00	200 00	8 yrs. 1 mon.
7th year.....	72 00	250 00	11 yrs. 4 mon.
10th year.....	88 00	300 00	14 yrs. 8 mon.

On the third page of the policy, under the head of benefits and provisions, the policy contained these stipulations:

"This policy can not be forfeited after it shall have been in force three full years as hereinafter provided:

"1st. If any subsequent premium is not duly paid, this policy will be endorsed for the amount of paid-up insurance, payable at the death of the insured, specified in the table on the preceding page, less the value of any indebtedness on this policy, provided demand is made therefor, with the surrender of this policy within six months after such nonpayment, or,

"2d. If any subsequent premium is not duly paid, and if this policy is not surrendered as provided in the preceding clause, the insurance under this policy will, after the repayment of any indebtedness, be extended without request or demand therefor, for the amount of \$1,000, during the term provided in the table on the preceding page, payable only if the insured dies within said term. At the end of said term, if the insured is then living, this policy shall cease and determine."

The annual premium of \$29.70 was paid when the policy was issued and on the 7th day of July, 1898, and 1899. On the 7th day of July, 1900, the insured, Drury, failed to pay in cash the premium of \$29.70 in advance, and by agreement with the company executed the following note:

"PREMIUM LIEN NOTE.

"\$29.70.

July 7, 1900.

"Twelve months after date I promise to pay to the order of the New York Life Insurance Co., at the office of said company in the city of New York, the sum of \$29.70, with interest in advance at the rate of 5 per cent. per annum (for value received), being for premium due July 7 on policy No. 801,525, issued by said company on the life of Charles N. Drury.

"It is understood and agreed:

"1st. That this note may be renewed if interest thereon and subsequent premiums on said policy are duly paid.

"2d. That unless said interest and premiums are duly paid, said policy and its accumulations shall immediately be forfeited, except as to the right to a surrender value or paid-up policy, which may be provided in said policy or by statute.

"3d. That in the settlement of any claim or any benefit under said policy before this obligation shall have been fully paid, the amount thereon shall be deducted from the amount otherwise payable by said company.

(Signed) "CHARLES N. DRURY."

Drury failed to pay either the principal or interest on this note at maturity, and he also failed to pay any part of the premium of \$29.70 for the ensuing twelve months, which fell due on the 7th day of July, 1901, and departed this life, intestate, on the 16th day of August, 1901. And the appellant, Ann T. Drury, shortly thereafter qualified as his administratrix, and forwarded to the company proofs of the death of the insured, and demanded the payment to her under the terms of the policy of \$1,000, with interest from October 4, 1901, and payment being refused by the company, instituted this suit against appellee on the 11th day of October thereafter.

The company in its answer admitted the issue of the policy and the payment of the premiums for the years '97, '98 and '99; that no application was made by the insured for paid-up insurance, but denies that it was indebted

to the appellant in any amount exceeding \$84, and the second paragraph of the answer reads as follows: "Defendant says that by the terms of the contract above quoted the assured waived and surrendered his right to extended insurance by refusing or failing to pay the interest on his premium note above set out, and by refusing or failing to pay the premium due July 7, 1901. Defendant says that by the terms of the premium lien note quoted supra it was expressly agreed, in addition to the contract set out in the policy, and in conformity therewith, 'that unless said interest and premiums are duly paid, said policy and accumulations shall immediately become forfeited and void, except as to the right to a surrender value or paid-up policy,' that the assured, by the terms of the policy above set out, and by the terms of the premium note aforesaid, is entitled to a paid-up policy only as specified in the policy, less the amount of his indebtedness at the time to the company, leaving a net amount, as of date July 7, 1901, of \$84, for which amount this defendant hereby offers to confess judgment in full of plaintiff's recovery."

A general demurrer was filed by plaintiff to the defendant's answer, and it was overruled, and plaintiff declining to plead further, it was adjudged by the trial court that the plaintiff recover judgment for \$84, with interest from the 16th of August, 1901, until paid, and so much of her petition as sought to recover more than this sum was dismissed, and plaintiff has appealed. It is admitted that the conditions of the policy had all been complied with by the assured up to the time he executed the note of July 7, 1900, for the premium then due, carrying the policy up to July 7, 1901; and that by the express terms of the policy he was on that date entitled to a loan of \$40, or to a paid-up policy of \$150, or to extended insurance for \$1,000 for four years and ten months. It is also admitted that if the appellant had not executed the premium note relied on, or paid any of the subsequent premiums in accordance with the terms of his contract, and had died at any time within four years and ten months from the 7th of July, 1900, that his administratrix would have been entitled to recover the full amount of the policy. But the defendant insisted that the note given on the 7th of July, 1900, contained a new contract between the company and the assured, by which it was agreed that unless the principal and interest of the premium note was paid at maturity the policy and its accumulations were immediately forfeited, except as to the right of the assured to a paid-up policy for \$150, less the indebtedness of the assured to the company growing out of the execution of the note. It does not seem to us that this is a fair construction of the second condition attached to the premium note of July, 1900. While it recites that unless the interest and premiums are duly paid the policy and its accumulations shall be forfeited, it expressly stipulates that the right to a surrender value or paid-up policy, provided in the policy, shall remain intact. Under the head of surrender values, in the table of loans and surrender values, set out on the second page of the policy, we find paid-up insurance and extended insurance both under the head of surrender values; and under the head of nonforfeiture provisions, on the third page of the policy, we find it provided that if any subsequent premium is not duly paid, this policy shall be endorsed for the amount of paid-up insurance, payable at the death of the insured, specified in the table on the preceding page, less the amount of in-

debtedness on this policy, provided demand is made therefor, with surrender of this policy, within six months after such payment. There is no pretense that the insured ever complied, or attempted to comply, with this provision of the policy. It, therefore, follows that his right to a policy for paid-up insurance was abandoned. In the second condition under this head it is provided "that if any subsequent premium is not duly paid, and if the policy is not surrendered as in the preceding clause, the insurance under this policy will, after the repayment of any indebtedness, be extended without request or demand therefor for the amount of \$1,000, during the term provided in the table on the preceding page, payable only if the insured dies within said term. At the end of said term, if the insured is then living, the policy shall cease and determine."

It will be observed that extended insurance for the full amount of the policy is one of the surrender values expressly provided for, and the only one which, under all conditions, is not forfeitable. Paid-up insurance is also a surrender value, but to enable the insured to take advantage of this provision the policy requires that the insured should, within six months after failure to pay a premium, surrender his policy and demand paid-up insurance. If the contention of the company is a sound one, the effect of the failure of the insured to pay the interest and premium note at maturity is to exactly reverse these conditions of the policy. In other words, it forfeits automatically the provision for extended insurance, and revives the provision for a paid-up policy which had been forfeited by the assured's failure to make demand therefor and surrender his policy within six months. The law does not favor forfeitures, and will not assume that the assured intended by the execution of the note of July, 1900, to forfeit the right to extended insurance, which he had already acquired by the payment of three annual premiums on the policy. The only reasonable construction which can be put upon the language of the policy and note is that on the forfeiture of the policy by the nonpayment of interest assured forfeited all right to further participate in accumulations, to receive dividends, to be re-instated after the lapse of the policy, etc., but did not surrender his right to extended insurance for the term earned by the premiums paid.

Nor can we doubt that if the insured had made a demand for paid-up insurance at the time of his default in the payment of the premium note and interest, that the company would have been prompt to claim that he was not entitled to a paid-up policy, as he had failed at the proper time to make demand therefor, but only to such extended insurance as his interest in the policy would purchase after the payment of his indebtedness to the company.

It, therefore, follows, that the judgment must be reversed and cause remanded, with instructions to sustain plaintiff's demurrer to the defendant's answer, and for other proceedings consistent with this opinion.

CITY OF COVINGTON, &c. v. SHINKLE, &c.

(Filed May 28, 1908—Not to be reported.)

Municipal taxation—Injunction—In this action appellee seeks to enjoin the tax collector of the city from selling a piece of real property for taxes, alleging that the valuation fixed by the assessor and board of equalization is excessive. Held—That there in no appeal from action of a board of equalization in fixing the valuation of property, and the courts will not enjoin the collection of a tax on the ground of excessive valuation unless it be shown that the assessment is so excessive as to import fraud in the assessor or amount to spoliation. Neither is shown in this case.

F. J. Hanlen for appellants.

J. W. Bryan for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This suit was instituted by the appellants, Bradford and Sarah Jane Shinkle, against the city of Covington and Edward Zeis, delinquent tax collector, to enjoin the sale of a lot and store thereon, situated at the southwest corner of Madison and Seventh streets in the city of Covington, for taxes due the city for the year 1901 upon an assessment of \$14,000 as fixed by the board of equalization. Plaintiff alleges that the property would not bring at a fair voluntary sale more than \$8,500; and that the valuation of \$14,000 was excessive and oppressive. In their answer the city of Covington say that the valuation placed thereon by the board of equalization was fair and reasonable.

Plaintiff testified that the property was assessed at \$8,500 for 1897, 1898 and 1899; that during the year 1900 the building on the property was torn down and rebuilt and that in addition to the old materials about \$4,000 was expended in rebuilding; that he listed it for taxation for the year 1900, after it had been rebuilt, at \$8,500, but that the city assessor raised the valuation thereon to \$11,500; that he then appealed to the board of equalization for a reduction of the assessment to \$10,000, and that upon the hearing of the case they advanced the assessment to \$14,000; that he received a gross income on the property of \$115 per month. A number of witnesses introduced by the city testify that \$14,000 was the fair salable value of the property. Section 3179 of the statutes, which is a provision of the charters of cities of the second class, to which appellee belongs, provides that "all the real estate in the city shall be assessed at its fair cash value, estimated at a fair voluntary sale, as of the 15th of September in each year."

And section 3181 provides that "there shall be a board of equalization, to consist of three citizens, who shall hear all complaints against the assessment made by the assessor and shall determine the same. They shall increase or decrease assessments on like property to make all assessments as uniform as may be, or to place a true value on the property assessed."

The statute does not provide for an appeal from their valuation to the courts, and courts of equity will not enjoin the collection of a tax upon the ground that the property has been assessed too high, unless it be shown that the assessment is so excessive as to import fraud in the assessor, or amount to spoliation. (Russell, Sheriff, &c. v. Corlish, Litsey, &c., 10 Ky. Law

Rep., 25; Royal Wheel Co. v. Taylor County, '20 Ky. Law Rep., 904. The evidence does not show the assessment complained of to belong to either category.

For reasons indicated the judgment appealed from is reversed and cause remanded, with direction to dissolve the injunction and dismiss plaintiff's petition, and for further proceedings consistent with this opinion.

SUPREME LODGE KNIGHTS OF HONOR v. LAPP'S ADM'X.

(Filed May 28, 1903—Not to be reported.)

1. Insurance—Suicide—Instructions—Evidence—Appellant issued to L. a benefit certificate for \$2,000, provided the death was not produced by suicide, whether sane or insane, except it be committed in a delirium resulting from illness. Three trials were had. The first verdict was in favor of plaintiff, which the court set aside; at the second trial the jury disagreed, and the third trial resulted in a verdict and judgment for plaintiff, from which this appeal is prosecuted. Appellant insists that the verdict is flagrantly against the evidence, and the court should have given a peremptory instruction to find for defendant. Held—That as the facts and circumstances tended to prove that L. took his life while in delirium from illness, the court properly refused to give a peremptory instruction to find for defendant. The rule is settled in this State that a peremptory instruction should not be given if there is any evidence to uphold the contention of the opposing party.

2. Verdicts—The rule in this State is that where there have been three verdicts for the same party, or two verdicts and a hung jury, the court will not disturb the verdict of the third jury on the ground that the verdict is not sustained by the evidence.

Humphrey, Burnett & Humphrey for appellant.

O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 8.

Opinion of the court by Judge Hobson.

Appellant on April 26, 1886, issued to John Lapp a benefit certificate, insuring his life in the sum of \$2,000, in accordance with the laws governing the order, provided death was not produced by suicide. Among the laws of the order was a rule as follows: "The order will not pay the benefits of those members who commit suicide, whether sane or insane, except it be committed in a delirium resulting from illness, or while the member is under treatment for insanity, or after the member has been judicially declared to be insane; but in all cases not within said exception the assessments contributed to the widows' and orphans' benefit fund by such member shall be returned, and shall be paid to the beneficiaries in lieu of the benefit."

John Lapp shot himself with a pistol in August, 1897, and died a few days later. The company offered to pay \$454.90, the amount he had contributed to the benefit fund; but refused to pay the full amount of the policy on the ground that he had committed suicide. On the other hand, the plaintiff insisted that he committed suicide in delirium resulting from illness. The case was tried three times in the circuit court. On the first trial the jury

found for the plaintiff; the court granted a new trial, on the second trial the jury disagreed; on the third trial the jury again found for the plaintiff. The chief complaint on the appeal is that the verdict is palpably against the evidence, and that under the proof the jury should have been instructed peremptorily to find for the defendant. The insured was a butcher. He was seen coming out of the water closet at his residence with a pistol in his hand. The witness caught him by the arm, set him in a chair and took the pistol away from him. He was shot through the head just above the ear. This is the only proof as to how the shooting occurred. No motive is shown for the shooting. His financial condition was satisfactory. For some days before he was shot he had complained of headache, and had been seen by several persons holding his head. He said he was suffering from neuralgia, and was taking quinine for it. His actions for several days were strange. If persons went where he was he would walk away, but if asked a question he would answer it. Ordinarily he was a very jovial person. For some time he was nervous and could not sleep at night. His health was not good and his family observed this. Toward the last he seemed to be wandering; sometimes when persons talked to him he would not answer. He complained a great deal of violent pain in the head, and on the day before his death, while holding his head with his hands, said that he had neuralgia so bad it almost set him crazy. On the morning of his death he was sitting at his desk and a witness walked up to him and spoke to him, and he partly turned around and said "good morning." The witness said: "What is the matter, Johnnie?" He said: "My head has been hurting me." The witness said: "You ought to do something for that," and he said: "I am taking quinine." This is the last proof made in regard to him until he came out of the water closet with the pistol in his hand and the shot through the head. There is some proof that as they were taking him upstairs he said: "Don't tell mother;" but his sister says she said this, not he. And, however this may be, we are satisfied from all the evidence that this time he was, by reason of the wound, in a condition not to be responsible.

The rule in this State is, where there is any evidence, the question is for the jury, and we can not say that there was not some evidence on these facts that the shooting was done in delirium resulting from illness. It would be an extension of the contract to say that the word illness refers only to such a sickness as confined the deceased in bed. It is clear that the deceased was sick and had been sick for some time, and the jury were warranted from the violence of the pain he was shown to have suffered, his abnormal actions and the testimony, that his mind was wandering in concluding that the shooting was done in delirium. Delirium is defined as mental aberration or a wandering of the mind. (Webster.) Illness is defined as a disorder of health, sickness. (Webster.) Under these definitions, where the deceased was suffering from violent pains in the head, which had continued for some time, and seemed to be wandering and distraught, there was at least ground for the conclusion that he was suffering from delirium resulting from illness, and, there being no other reason shown for the suicide, the question was properly left to the jury.

The rule in this State is that where there have been three verdicts for the same party, or two verdicts and a hung jury, the court will not disturb the

verdict of the third jury on the ground that the verdict is not sustained by the evidence. While the evidence of the two physicians introduced as experts was entitled to very little weight, on account of the meagerness of the facts on which their conclusion was based, we do not see there was any material error in its admission. The case of *Manhattan Life Ins. Co. v. Beard*, 23 Ky. Law Rep., 1747, was upon a policy materially different from that before us in its provisions. A case more like this is *Blackstone v. Standard Life and Accident Ins. Co.*, 3 L. R. A., 486.

The court instructed the jury that they might, in their discretion, allow or disallow interest on the amount, if they found for the plaintiff. The jury found for the plaintiff \$2,000, without interest. But the court, on motion, disregarded so much of the verdict as did not give interest, and entered a judgment in favor of the plaintiff for \$2,000, with interest from the time the money was due under the policy. This was correct; it was a suit upon a written contract. The money bore interest from the time it was due, and the court erred in submitting the question of interest to the jury. The finding of the jury in favor of the plaintiff entitled her to a judgment for the amount, with interest from the time at which, under the contract, the money was due. (*Gore v. Buck*, 17 Ky., 209; *Carr v. Robinson*, 71 Ky., 209; *Reynolds v. Powers*, 17 Ky. Law Rep., 1059; *Cook v. Clark*, 21 Ky. Law Rep., 316.)

Judgment affirmed.

LOCKE V. COMMONWEALTH.

(Filed May 28, 1908—Not to be reported.)

1. Criminal law—Local option—Construction of statutes—Appellant was indicted for a violation of a local option law, provided by special statute of 1876, which prohibited the sale of spirituous, vinous or malt liquors in Glasgow, and a conviction and fine of \$100 was imposed upon him, from which he prosecutes this appeal. Prior to the commission of the offense Barren county had, by a vote of the people, adopted the provision of the general election law as provided by chapter 81, Kentucky Statutes, and it is insisted that the special act of 1876 was repealed by the adoption of the general local option law in Barren county. Held—That all special statutes prohibiting the sale of liquors enacted prior to the adoption of the Constitution are unrepealed, except where they have been vacated in the manner prescribed by section 2560, Kentucky Statutes, which is by a vote of the people in the district affected by the statute authorizing the sale of liquor. As this has not been done in Glasgow, the special statute of 1876 and the general prohibition law are both in force there, the former modified by the latter as to procedure, the quantity of liquor constituting the offense and the penalty.

2. Evidence—Proof of the sale of a bottle of beer authorized a conviction, as it is a matter of common knowledge that the word "beer," when used without a prefix, signifies malt liquor, and that wherever malt liquor is not intended to be expressed by the use of this word, some prefix is used, such as root beer, ginger beer, etc.; but when the word "beer" is used alone, it means either common, lager or bock beer.

Herman Morris for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Barker.

The appellant was indicted by the grand jury of Barren county, charged with the offense of keeping a tippling house in the town of Glasgow, Ky., by selling to one Capt. Tom Allen malt liquor by the pint, to be drunk in the town of Glasgow, and which was drunk therein, contrary to the form of the statute in such cases made and provided. This indictment was had by virtue of an act, entitled "An act to prohibit the sale of spirituous, malt or vinous liquors in Glasgow, and within one mile from the outside boundary thereof," approved February 28, 1876.

Upon the trial of the case the evidence of the Commonwealth showed that appellant was the owner and in possession of a drug store in Glasgow; that within twelve months next before the finding of the indictment the witness for the Commonwealth, Capt. Tom Allen, purchased from a brother of appellant two pint bottles of beer, for which he paid, or agreed to pay, 25 cents. This purchase was made in the drug store of appellant, and the brother who made the sale was often seen attending to the ordinary business of appellant in the store. The witness drank one bottle of the beer in the store at the time of the purchase; the other he carried away with him. Nothing was said as to what kind of beer was purchased; witness experienced no intoxicating effect from what he drank. In explaining why he made the purchase he said: "I was quite tired, and thought it would help me, and I got it, as I often do in the cities; I just get a glass of beer and go ahead."

This was all the evidence introduced by the Commonwealth, and thereupon appellant moved the court for a peremptory instruction to the jury to find him not guilty, which was overruled, to which ruling of the court he excepted. The appellant then called the clerk of the county court of Barren county, whereupon the Commonwealth's attorney "agreed that the record in the Barren county clerk's office, showing that an election had been held in Barren county in 1893, to take the sense of the voters of said county as to whether or not spirituous, vinous or malt liquors should be sold in Barren county; also the record showing that said election resulted in the county voting in favor of prohibiting the sale of spirituous, vinous and malt liquors in said county, and the records showing the orders filing said report of election officers and the final order showing that said prohibition law is in effect in Barren county; and it was agreed by plaintiff that said records might be considered as read, but plaintiff objected to the competency of said evidence, and the court sustained the objection, to which ruling defendant excepted, and for the purpose of this appeal the record in the case of *Miller v. Commonwealth* and *Locke v. Commonwealth* be considered and filed as a part of this record, upon the placing of said records by defendant with this record, before its submission in the Court of Appeals, and said defendant need not file a copy of said record as a part of the testimony of N. D. Terry."

The defendant offered no further testimony. Whereupon the court instructed the jury, who returned a verdict of guilty, and fixed the punishment by a fine of \$100. Appellant's motion for a new trial having been overruled, he has appealed for the purpose of reversing the judgment against him.

Appellant now insists that there was no evidence to show that he had sold malt liquors in the city of Glasgow, as charged in the indictment, and that the court should have sustained his motion for a peremptory instruction. This claim is based upon the theory that there was no evidence to support the allegation of the indictment, that he had sold malt liquors; in other words, the contention is that the word "beer," without any prefix, does not warrant the conclusion that the sale was of malt liquor. Respectable authority is cited on both sides of this proposition. We think that it is a matter of common knowledge that the word "beer," when used without a prefix, signifies malt liquor, and that wherever malt liquor is not intended to be expressed by the use of this word, some prefix is used, such as root beer, ginger beer, etc.; but when the word "beer" is used alone, it means either common, lager or bock beer. That the witness in this case used the word in this sense is shown when he said: "I was quite tired, and thought it would help me, and I got it, as I often do in the cities; I just get a glass of beer and go ahead."

The case of *Hurst v. Commonwealth*, 28 Ky. Law Rep., 365, is conclusive of this question. In that case Hurst was indicted for selling malt liquors in violation of a special act of the legislature, prohibiting the sale of liquor in the counties of Bell, Harlan and Leslie. The opinion shows that the evidence for the Commonwealth established "the fact that the defendant sold beer at Mount Pleasant, Harlan county; no prefix to the word "beer" was used; there were other questions in the case, but it was necessary for the court to hold that the word "beer" signified malt liquor, in order to reverse the judgment granting the defendant a peremptory instruction at the close of the Commonwealth's testimony. The court said: "We think the testimony was such that the question of guilt or innocence should have been submitted to the jury under appropriate instructions."

The introduction by the appellant of the record showing that Barren county had, prior to the commission of the offense complained of, prohibited the sale of spirituous, vinous and malt liquors by an election held for that purpose under the provisions of the statute of March 10, 1894, being chapter 81 of the Kentucky Statutes, makes it necessary for us to decide whether the general prohibition law, or the special act of 1876, or both, are in force in the city of Glasgow; in other words, whether the special statute has, or not, been repealed by the election under the general law.

In the case of *Stamper v. Commonwealth*, 19 Ky. Law Rep., 1014, it was held that neither the adoption of the present Constitution nor the enactment of the General Statutes, concerning the prohibition of the sale of liquor in the Commonwealth, set aside, or vacated, an election prohibiting the sale of liquor under a special statute, entitled "An act to regulate the selling, procuring for, or giving of, spirituous, vinous or malt liquors, or any intoxicating drinks in the county of Carter," approved March 18, 1886, and that this special statute remained in force, modified, however, by the provisions of the general prohibition law, so as to make the procedure, amount of sale, and penalty, conform to the provisions of the latter, this being necessary to make the general law comprehensive of the whole subject, and enforced with uniformity throughout the Commonwealth.

In the case of *Thompson v. Commonwealth*, 20 Ky. Law Rep., 397, it was

said: "This case presents for decision the question whether section 61 of the Constitution of 1891, or the act of March 10, 1894, embodied in chapter 81, Kentucky Statutes, adopted pursuant thereto, had effect to repeal a special or local act prohibiting sale or gift of spirituous, vinous or malt liquors, such as the act in force in Rockcastle county at date of adoption of Constitution."

The court then reviewed the opinion in *Stamper v. Commonwealth*, supra, and held that special acts in force prior to the adoption of the Constitution, prohibiting the sale of liquors, were not repealed by the Constitution or the general prohibition law. In response to a petition for rehearing the court said: "This court held that the doctrine announced by Chief Justice Lewis in the *Stamper* case, as applicable to divisions of the State in which a vote had been taken against the sale of liquor in such locality, and was also applicable to localities where the legislature had prohibited such sale without submission to the popular vote, but that all local laws upon the subject were modified by the provisions of the general law as to procedure, amount of liquor permitted to be sold, and penalty. In other words, that wherever a local law was in force, either through vote of the people or by legislative will, the sale of liquor by retail remained prohibited, not according to the terms of the local act, but as if a vote had been had in such locality against the sale of liquor under the act of March 10, 1894."

In the case of *Brann v. Hart*, 97 Ky., 735, it was held that the "manner in which an existing prohibition statute may be repealed or nullified, as well as the manner in which the sale of spirituous, vinous or malt liquors may be hereafter prohibited in any city, county, town or precinct, is expressly provided in chapter 81 of the Kentucky Statutes, entitled local option law, which was intended to, and does, regulate the whole subject as provided for in section 61 of the Constitution. And as it does not appear that the act of March 20, 1880 (special prohibition law), has been repealed or nullified in the manner provided in chapter 81, it must be regarded in full force."

The case of *Raubold v. Commonwealth*, 21 Ky. Law Rep., 1125, involved the act of 1876, prohibiting the sale of liquor in Glasgow, which we have under discussion. Raubold was indicted under this special act, after the general prohibition law had been adopted by the people of Barren county, and it was contended there, as here, that the special act was superseded by the general law, and it was sought to differentiate it from the *Stamper* and *Thompson* cases. To this argument the court said: "The effect of these cases (*Stamper* and *Thompson*) is that the laws which, by section 61 of the Constitution, were not to be repealed by that section were to be considered as continued in force in the territory to which they were made applicable, but modified as to procedure, quantity of liquor which might or might not be sold, and penalty to be imposed for violation of the law, by the general local option law to which, in those respects, they were made to conform. The section provides: 'But nothing herein shall be construed to interfere with, or to repeal, any law in force relating to the sale or gift of such liquors.' And we are of opinion that section 2560, Kentucky Statutes, containing in effect local laws in localities where the sale, etc., has been prohibited by special legislation, applies to the Glasgow statute, which is a prohibitory statute, for it prohibits the sale of liquor to be drunk in the district created

by the act. This is a limitation of the scope of the prohibition, but, so far as it goes, it is still prohibitory."

The court then proceeded to affirm the judgment of conviction had under the special act of 1876, thus holding that the special act was in full force and effect after the general prohibition law had been adopted by the people of Barren county.

In the case of *Locke v. Commonwealth*, 24 Ky. Law Rep., 64, the appellant (the same person who is appellant here) had been indicted by the grand jury of Barren county for violating the local option law, the evidence showing the sale of beer in the city of Glasgow. The court, in affirming the judgment of conviction, held that the local option law, under chapter 81 of the Kentucky Statutes, had been lawfully carried by the people, and was in full force and effect in Barren county.

A review of the cases decided by this court bearing upon the principles involved here leads to the conclusion that all special statutes prohibiting the sale of liquors, enacted prior to the adoption of the Constitution, are unpealed, except where they have been vacated in the manner prescribed by section 2560 of the Kentucky Statutes, which is by a vote of the people in the district affected by the statute authorizing the sale of liquor. As this has not been done in Glasgow, it follows that the special statute of 1876 and the general prohibition law are both in force there, the former modified by the latter as to procedure, the quantity of liquor constituting the offense, and the penalty.

Although the appellant in this case was indicted under the special act of 1876, the procedure and the penalty were in accordance with the general prohibition law, which was right and proper. The question as to the guilt of the appellant was properly submitted to the jury in the instructions, and perceiving no error in the record the judgment is affirmed.

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KENTUCKY COURT OF APPEALS.

COLLINS v. MASDEN, &c.

(Filed May 29, 1903—Not to be reported.)

1. Graded schools—Taxation—Injunction—This action was brought by taxpayers to enjoin the collection of taxes levied in the district to support a graded school. The levy is sought to be enjoined on several grounds.

2. Election—The election organizing the district was not invalid as the record discloses that no illegal votes were received and that no legal votes were refused. The preponderance of the evidence is that the votes of two men who it is alleged voted after the polls closed, voted before the closing hour, but if this were true it did not affect the result. Where the person appointed as clerk of the election upon a valid excuse fails to act, the selection of another person by the judge, with the consent of the voters present, was a sufficient appointment. Although the person selected as clerk was voted for as one of the trustees, this would have only affected his own election had this constituted a disqualification. He was a de facto officer as to the voters in other particulars. The election was viva voce, and no fraudulent conduct on his part is charged. Where the returns were signed by the clerk alone the refusal of the judge to sign them did not invalidate them. An officer of the election will not be permitted to defeat the will of the voters by refusing to sign the returns. The election was not invalid because the notice and order of election included two small parcels of land beyond the two and one-half mile limit.

3. Assessment—The assessment was not invalid under section 4443, Kentucky Statutes, as it was correctly done under direction of the county superintendent and sheriff, who had been selected as district treasurer.

4. Fixing time for payment of taxes—The failure of the trustees to fix a time for the payment of taxes did not invalidate the levy.

5. Tender of tax receipt—The failure of the sheriff to tender a tax receipt before making a levy would not invalidate the levy. As it is the duty of a taxpayer to pay his taxes, he should tender same before seeking an injunction on this ground. It will be presumed that the sheriff did his duty in tendering tax receipts.

Fairleigh, Straus & Fairleigh, J. F. Combs and J. R. Zimmerman for appellants.

Chapeze & Halstead and Ben Chapeze for appellees.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge O'Rear.

An election was held in common school district No. 16, in Bullitt county, embracing the town of Lebanon Junction, to determine whether it should be changed from a common to a graded school district. As the result of the election it was certified that the proposition to change had received fifty votes, while forty-five had been cast against it. The result was certified by the county canvassing board and the county court to the superintendent of schools, who met with the trustees elected at the time the proposition was voted upon (September, 1897), and organized the graded school district. The board of trustees so elected assumed the duties of their office, and, as they were by statute permitted to do, made the sheriff of the county *ex officio* their treasurer to collect the tax imposed by the board for the benefit of the school.

These suits were brought by nine of the taxpayers of the district against the sheriff, seeking to restrain the collection of the tax from them. They allege as grounds for their resistance that the election was illegally held, and was void; that frauds had been committed by the officers of election by which legal qualified voters who were against the change and the tax were refused and not permitted the right to vote; that illegal voters were permitted to vote in favor of the change and tax, and that the officers kept the polls open and received votes in favor of the change and tax after the time fixed by law for the closing of the polls. It is also claimed that the returns were not signed by the officers appointed to hold the election, and that they were not canvassed. In other words, some two years after the election was held, and after all or about all the taxpayers had paid their taxes except appellees, this suit to contest the election, as it were, is brought.

The record discloses that no illegal votes were received; that no legal votes, in fact it does not show that any voters, were refused. There seems to be a question whether two men were not permitted to vote after the hour for closing the polls. The preponderance of the evidence, in our opinion, is that their votes were received before the closing hour. But be that as it may, it did not affect the result.

The person appointed as clerk of the election, upon a valid excuse, failed to act. Another was selected by the judge, with the consent of the voters present, to act in his stead, and did act. This was a sufficient appointment. (*Trustees v. Garvey*, 80 Ky., 163.) He was voted for as one of the trustees. But as he was already a trustee of the common school district, and he and the others elected seem to have been elected without opposition, it does not appear to us that he had such interest as disqualified him from acting as clerk. But if the disqualification had existed, it could have affected his own election only. He was assuredly a *de facto* officer as to the voters in other particulars. The record does not show that he did anything wrong in connection with the election. It was a *viva voce* election, and there does not appear the slightest ground for the charge of fraud.

The judge of the election failed to sign the returns. But the clerk did. The judge's failure was because, as he says, the two votes were received after the polls closed. He does not otherwise attempt to impeach their correctness. An officer of an election will not be permitted to defeat the will of the voters by refusing to sign the returns. He may be compelled to sign them by mandamus, or, if they are verified and identified by the signature of the other officers, they will be considered sufficient. (*Keller v. Ferguson*, 24 Ky. Law Rep., 1205.)

The territory proposed in the notice and order of election included two small parcels of land beyond the two and one-half mile limit. (Section 4464, Kentucky Statutes.) However, no voter lived within the outlying territory, nor does it appear that any part of it is included in the property owned by any of the complaining taxpayers. Besides, the overplus is too insignificant to be material in this case. The circuit court adjudged the election legal, and that the proposition to change to a graded school district and in favor of the tax had been regularly adopted. A question is raised that the assessment was so irregular as to be void.

Section 4443, Kentucky Statutes, requires: "Within ten days after said levy it shall be the duty of the district treasurer, with the assistance of the county superintendent, to make, or cause to be made, from the assessor's book, as equalized for county taxation, and the records of assessments of property as filed by the railroad commissioners or board of assessment in the office of the county clerk, a list of the names of all persons or corporations liable for such taxes, and the amount of property owned by each, and liable therefor, and the total amount of taxes due thereon, and shall file a copy of the list with board of taxation."

The assessment was made as directed by this section. Appellees insist it was not, because the superintendent did not make or act in conjunction with the treasurer's assistant in making the transcript from the county court clerk's records of the assessment for county and State purposes, so far as embraced by the school district. In point of fact the county superintendent and sheriff together directed the doing of this work. It was correctly done, and approved by them. The superintendent was required to do no more than was the sheriff, that is, "to make, or cause to be made," the list of property and taxpayers, which thereby becomes the assessment for the school district for that year.

It seems that the trustees failed to fix the time by which the tax should be paid. The section (4443) required that they should fix such time, which shall not be less than two nor more than four months from the time of making such order. The taxpayer is then required to pay his taxes within that time, or suffer a penalty. No penalty is sought to be collected in this case. The distraint for the taxes was not made till more than four months after the levy. We are of opinion that the order fixing the time for payment above mentioned is for the benefit of the taxpayers, as regarding his liability to penalties upon default. It does not affect the validity of the levy, nor is it meant as a statute of limitation, beyond which no collection could be exacted. It is claimed that the sheriff failed to tender tax receipts to some of appellees before levying upon their property. The sheriff, in his testimony, contradicts this. The presumption of law is that the officer did

make the tender if it was his duty to do so. However, as it was the duty of appellees to pay their taxes, and at least to tender them before enjoining their collection on the ground last discussed, their failure can not help them in this suit.

The circuit court judgment, holding the assessment invalid and enjoining the collection of the tax, is reversed. The cross appeal of appellees from the judgment holding the election to have been legally held is affirmed. The cause is remanded, with directions to dismiss the petitions and dissolve the injunctions.

GOEPPEL & CO. v. PHOENIX BREWING CO.

(Filed May 29, 1903.)

1. Attachment—Liens—Mortgages—Appellants held five notes of appellee for \$2,200 each, due at intervals thereafter, and they held as collateral eleven bonds of \$1,000 each, which were secured by a third mortgage on the brewery plant. These bonds were of a series representing \$94,000, issued to a trustee for debts of appellee. The first mortgage was for \$50,000, and the second mortgage was for \$100,000. The entire value of the brewery plant, etc., covered by the mortgages was about \$210,705. Appellants brought this suit on three of its notes past due and sued out an attachment on the ground that appellee did not have enough property in this State subject to execution to satisfy their debt, and its collection would be endangered by delay; also on the ground that appellee was fraudulently removing its property from the State, not leaving enough to satisfy plaintiffs' debt. Other personal property not embraced by the mortgage was of the value of about \$2,545, not including beer in various stages of manufacture. The chancellor found against appellants on all the grounds of attachment. The finding of the chancellor fixing the value of buildings, ground and machinery (all covered by the three mortgages) at \$210,705 will not be disturbed as this court inclines to follow the rule which gives some weight to the chancellor's finding of fact, and in cases of grave doubt his findings will not be disturbed. The first and second mortgages alone then amounted to \$158,249. Besides, there was owing a purchase money lien of \$3,000, making \$161,249. This would leave an apparent balance of \$49,456 with which to pay a third mortgage debt, then amounting to \$111,000. This would only pay about 45 per cent. of said debts. Of this balance appellants, as holders of eleven of the third mortgage bonds, all of which were pledged to secure all of appellants' notes, were entitled to receive about \$5,841. The chancellor erred in applying this credit to the whole of it to that part of the debt due. It was the privilege of the creditor to collect out of the debtor's estate all of the debt due and not secured, that is, not covered by the value of the security. If a creditor have even more collateral in value than his debt, he will not be compelled to yield any of it to the debtor until the whole of the debt is paid. If we add to the personal property not covered by the mortgage the value of the 100 barrels of beer finished, it would increase same to \$3,085 of personal property undoubtedly subject to execution or attachment. The chancellor erred in fixing the value of 5,465 barrels of beer, in the several stages of manufacture, at \$1.50 per barrel. Unfinished beer in the state of fermentation is not leviable under an execution, because if the sheriff were so minded he could not take it into his actual custody without destroying its nature and value. He can not as to it satisfy the general rule as to what constitutes a good levy, which requires that the officer must do such acts as would subject him to an action

for trespass but for the protection of the execution. Conceding that the value of the unfinished beer should be estimated in fixing the value of appellee's property, the liens of materialmen, labor liens and taxes would more than consume the value of the property, leaving nothing subject to execution.

2. Removal of property from the State—The ordinary and customary sales of manufactured products in not unusual quantities, in the regular course of business, to customers out of the State is not enough to justify an attachment against an insolvent seller on the ground that he has removed his property, or a material part of it, out of the State, not leaving enough therein to satisfy his creditors. There must be some purpose to remove the property from the State, so as to get it beyond the process of the court and the reach of the creditors, or removal in such unusual quantities as to reasonably suggest such a purpose.

Augustus E. Willson and Pirtle & Trabue for appellants.

Phelps & Thum, Zack Phelps and Gibson Marshall for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge O'Rear.

Appellee was indebted to appellants in the sum of \$11,000, besides interest, evidenced by five notes for \$2,200 each, all dated October 1, 1894, and maturing, the first one eleven months after date, the others at intervals of one each year thereafter. They were secured by collateral, eleven bonds of \$1,000 each, which were secured by a third mortgage on appellee's brewery. These eleven bonds were of a series representing \$94,900 issued to a trustee for debts owing by appellee. There was a first mortgage of \$50,000, and a second mortgage of \$100,000. Appellee defaulted in paying three of the \$2,200 notes to appellants.

Appellants brought this suit to recover \$7,822.68, the amount of the three notes and interest past due, and obtained an attachment against appellee's property on the ground (Civil Code, section 194, subdivision 2) that appellee had not enough property in this State subject to execution to satisfy the plaintiffs' demand, and that the collection of the demand would be endangered by delay in obtaining judgment or a return of no property found. Appellants also joined in the suit an action for indemnity under section 288, Civil Code, for the two notes not due, on the ground that the defendant was about to remove, or had removed, its property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiffs' claim, or the claims of said defendant's creditors.

All of appellee's property was not included in the mortgages. Its brewery was. This included all its real estate, consisting of the brewing plant, at Louisville, and much of the personal property. Other personal property, not embraced by the mortgage, was of the value of about \$2,545, not including beer in various stages of manufacture. The chancellor found against plaintiffs on all their grounds of attachment. Their appeal presents three questions for our consideration: First, had defendant enough property in this State subject to execution to satisfy plaintiffs' demand? second, was their demand in danger from further delay? third, was the sale of its beer not in usual quantities to regular customers out of the State by an insolvent brewer a ground for attachment?

1st. The circuit court in fixing the values upon appellee's property has seen fit to adopt the maximum valuations from among those of witnesses materially varying. Whether we are fully justified in following his course, in view of all the evidence, may be doubted. Yet we incline to follow a rule of this court, which gives some weight to the chancellor's finding of facts, and in cases of grave doubt his findings will not be disturbed. The chancellor fixed the value of buildings, ground and machinery (all covered by the three mortgages) at \$210,705. The first and second mortgages alone amounted then to \$158,249. Besides, there was owing a purchase money lien of \$3,000, making \$161,249. This would leave an apparent balance of \$49,456. But it must be remembered that this same property was subject to a third mortgage of \$94,900, which with accrued interest then amounted to, say, \$111,000. Thus we have \$49,456 to pay \$111,000 of lien, or say 45 per cent. of that item. Of this sum (\$49,456) appellants, as holders of eleven of the third mortgage bonds, all of which were pledged to secure all of appellant's notes, were entitled to receive \$5,841. But that at best was only an estimation, which when the practical test of foreclosure sales come to be applied, would, viewed from the evidence, likely fall short of realization in fact. Conceding that appellants' proportion of the \$49,456 equity in the mortgaged property was worth \$5,841 in fact, where in law should it be applied? The learned chancellor applied the whole of it to that part of the debt due. In this we think he erred. Appellants were entitled to payment of the whole of their debt. If partial payments had been made by appellee it would not have released pro tanto any of the collateral, there being no clause in the notes to that effect; but the security would have remained upon the balance of the debt. Without deciding whether appellants might have ignored their security and proceeded at law to collect the whole of their debt, it was certainly their privilege to collect out of the debtor's other estate all of the debt due and not secured, that is, not covered by the value of the security. So if the value of the security was \$5,841, then only a small part of the debt due was really secured, because the part not due and its interest consumed all the value of the collateral except about \$700.

If a creditor have even more collateral in value than his debt, he will not be compelled to yield any of it to the debtor until the whole of the debt is paid. (*Union Bank v. Laird*, 2 Wheat., 390; *Pollock's Adm'r v. Smith*, 21 Ky. Law Rep., 1227; *Aetna Life Ins Co. v. Wilcox Bank*, 48 Neb., 544.)

This is not the case where a payment is made to a creditor holding several debts, in which the law would apply it to the debt past due. There was no payment here. There was no property, or what is the same thing, no value in appellee's property, covered by the mortgages, which it could have applied, or required the application of, to the payment of appellants' debt of \$7,822.68, unless it be the estimated balance of \$700, and whether that could be applied without actual payment so as to defeat their right of action for the whole debt due is not necessary to be decided. The personal property not embraced by the mortgages consisted of horses, wagons, harness, machinery, and goods in bottling department, all valued at \$2,545.81. Added to this was a quantity of beer, 100 barrels of which was finished, having a market value of \$5.40 per barrel, after paying the United States government tax of \$1 per barrel. This would produce \$3,085 of personal property undoubtedly subject to execution.

In addition to this, appellee had 5,465 barrels of beer in the several stages of manufacture, of which 260 were in the fermentation state, 3,125 in the ruh state and 2,080 in the chip state. None of these was a marketable condition. In each of them something must be added, especially in the way of skilled labor and attention, to make the beer worth anything as a marketable commodity. Especially did it require a brewery, with necessary vats, tubs and cold storage compartment, all of great cost, and all necessary to be operated, to complete the process by which this beer would ever become available as a saleable article. The learned chancellor proceeded upon the theory, in estimating the value of this crude beer, that it was a valuable property, and that whatever value it had must be considered in finding whether appellee had enough property subject to execution to pay appellants' debt. In the first place, all valuable property is not subject to sale under execution. For example, certain equitable interest in land, debts owing the execution defendant, choses in action generally, and so on. They may go, and do, toward constituting the debtor's solvency. But neither his solvency nor insolvency are regarded in determining whether he has enough property subject to execution to pay plaintiff's debt. (*McFerran v. Jones*, 2 Litt., 222; *Rich v. Catterson*, 2 J. J. Mar., 135; *Woolley v. Stone*, 7 J. J. Mar., 302; *Russell v. Robinson*, 7 Ky. Law Rep., 361; *Hickman v. Reed*, 11 Ky. Law Rep., 406.)

The question comes down to the point: What property has the debtor in this State subject to execution? Generally speaking, any species of personal property, described as a chattel, is subject to levy and sale under the writ of execution. But it must be in esse at the time of the levy and sale. Formerly growing crops, the product of the labor of the tenant, and raised annually by cultivation, were the subject of execution. (*Craddock v. Riddlebarger*, 2 Dana, 205; *Parham v. Thompson*, 2 J. J. Mar., 159.) This has, however, been changed by statute. (Section 1696, Kentucky Statutes.) It may be argued that in view of the fact that the legislature had not exempted other imperfect and immature things from similar sale, is evidence that the legislative policy is not to exempt them. This argument would have peculiar force if such property had ever been held subject to execution sale, but it has not been, so far as we are advised. We have nothing to do with the argument of inconvenience in the case. The matter comes to whether the property proposed to be sold has a saleable quality. Perhaps that could be best tested after an attempt to sell had been made. But such articles as molten iron, or glass in the furnace, burning charcoal in the pit, and coke in the ovens, or baker's dough, or brick in a burning kiln, hides in the vat, and beer in a state of fermentation, while undeniably having the qualities of chattels, are nevertheless in such imperfect state of transition from one thing to another, that they really can not be said to be either. Without further labor, and generally artistic or skilled labor, and the use of the realty, and the combination or mixture of other articles, they are practically worthless. The officer could not take them into possession, nor could he separate them from the bulk of which they are part without destroying perhaps not only what he took, but probably much in addition of even greater value. While doing the creditor no good, he would be utterly destroying the debtor. There can be no sense in allowing such an act. Al-

though in levying upon unwieldy objects the officer may leave them in the debtor's possession, or in the possession of another (*Hill v. Harris*, 10 Ben Mon., 120), he could not require such person, against his consent, to give them further attention, and to put upon them his labor, time and experience. It has been long since the creditor could force his debtor to involuntarily work for him. The facts of this case fairly illustrate such a situation: 5,000 barrels of beer in the tubs are levied upon. In its then state it will require on an average of four to six weeks' time and attention to perfect it so that it will have any market value, whatever. To give it the necessary attention requires a plant worth \$200,000; the labor and attention of a large and expensive force of workmen, more or less skilled in the trade of making beer, and the addition from time to time of other material than that already embraced in the beer when levied upon. When so completed it would be worth \$5.50 per barrel. In its then state, even allowing the privilege of such use and services, it was worth not exceeding \$1.50 per barrel. Without the privilege of using the brewery, and without the labor and attention mentioned, it would be without any value.

In this State the ancient writ of fieri facias is allowed by statute, subject to but few exceptions in its former operations. One of them is that it can not be levied upon growing crops, as formerly allowed. Another is, it must be first satisfied out of the personal estate of the debtor, if he have sufficient. Certain specified articles are exempted by statute to a debtor who is a citizen with a family from levy and sale under execution and attachment. But these latter are not excepted, as such, from the operation of the writ of execution, so much as that their quantity is exempted from sequestration for debt at all. *Drake on Attachments*, sections 249-250, and *Wapples on Attachments*, sections 285-286, are authority, and cite cases as well in support of it, that such unfinished product as that levied upon in this case is not, and in justice ought not to be, subject to levy and seizure under attachment or execution. As to the similarity of the writs, *Wapples* says (section 228): "The writ of attachment issued at the beginning of a suit is really a preliminary execution, dependent for its ultimate efficacy upon the rendering of the judgment in favor of the plaintiff. * * * It has all the characteristics of an execution in the first stage."

Unfinished beer in the state of intermediate fermentation is not leviable under an execution, because if the sheriff were so minded he could not take it into his actual custody without destroying its nature and value. He can not as to it satisfy the general rule as to what constitutes a good levy, viz: "That the officer must do such acts as would subject him to an action for trespass but for the protection of the execution." (*McBurnie v. Overstreet*, 8 Ben Mon., 308.) While he might leave it with the defendant, yet the defendant may also refuse to be responsible for it, or to give it room or attention. It is not satisfactory to say that the officer would generally wait till the product was so completed as to be marketable. The officer can no more be compelled to wait than can the debtor be compelled to work for his creditor. Nor should the sheriff be required to turn brewer, for which he has provided him neither the equipment nor the necessary means, nor experience, probably, nor help, nor the time, without neglecting all other public duties. So the question must be determined as of any hour before the

product reaches a salable condition. Public policy, which looks to the public welfare, forbids that the law's process, intended for the aid of creditors and not for the punishment of debtors, should be perverted in its use by the creditor to such ruinous ends to the debtor, with no benefit to any one. Such property of a debtor can be reached by the law and subjected, in a proper case, by having a receiver appointed to take charge of it, and perfect it. Adequate authority and means are to be had for such action.

But even had the beer in its unfinished state been subject to seizure, its then value, as fixed by the chancellor, \$1.50 per barrel, making \$8,197, added to the other unencumbered personal property of \$3,065 value, above named, would have yielded but \$11,262 of property *prima facie* subject to execution. Appellee owned at that time overdue taxes of \$10,971, which by statute was a first lien upon all the property. Besides, it owed to laborers and materialmen over \$16,000. Under sections 2487, 2488 and 2490, Kentucky Statutes, whenever the property of a manufacturing establishment in this State assigns for the benefit of creditors, or is taken in custody under execution or attachment for debt, materialmen who furnish it supplies, and the employees of the owner in such business, have a lien upon the whole plant and effects involved in such business, for the whole of the amount due them for their labor and supplies. In the marshaling of liens, the mortgagees, finding the property mortgaged to them insufficient to pay these charges and their mortgages, would have the right to require the holders of the tax liens (which, by express mandate of the statute, must first be satisfied out of the personal estate), and the holders of the materialmen and labor liens who have liens on both mortgaged and unmortgaged property, to apply the unmortgaged property first to the satisfaction of their lien. (*Logan v. Anderson*, 18 Ben Mon., 119; *Hibler v. Davis*, 13 Bush, 21; *Bank of Ky. v. Vance*, 4 Litt., 176; *Swigert v. Bank of Ky.*, 17 Ben Mon., 285; *Glass v. Pullen*, 6 Bush, 349.)

This would have consumed the whole of the personal estate, leaving nothing subject to execution.

2d. The day after the levy of the attachment appellee assigned all its property for the benefit of creditors. It was hopelessly insolvent. Its liabilities were largely in excess of its assets, even when placing upon the latter a very high estimate. It had been losing heavily for several years. The first ten months of 1897 (the year of the attachment) its net loss was nearly \$90,000. Every day saw its liabilities increase, and its prospects growing worse. These circumstances are enough to warrant the finding that the collection of appellants' debt was endangered by delay in obtaining judgment or a return of no property found. (*Johnson's Ass'ee v. Lou. City National Bank*, 29 Ky. Law Rep., 118; *Deposit Bank of Owensboro v. Smith*, 29 Ky. Law Rep., 808.)

3d. We are of opinion that the ordinary and customary sales of its manufactured product in not unusual quantities, in the regular course of business, to customers out of the State, is not enough to justify an attachment against an insolvent seller on the ground that he has removed his property, or a material part thereof, out of the State, not leaving enough therein to satisfy his creditors. There must be shown some purpose to remove the property from the State, so as to get it beyond the process of the court and

the reach of the creditors, or removal in such unusual quantities as to reasonably suggest such a purpose.

The judgment is reversed and cause remanded for proceedings not inconsistent herewith.

TURPIN v. COMMONWEALTH.

(Filed May 29, 1903—Not to be reported.)

Criminal law—Evidence—Appellant seeks a reversal of conviction and sentence for horse stealing, alleging as error the admission of evidence against him. The prosecuting witness had stated that the horse was stolen in October, 1902, and another witness, who was corroborated, stated that he had bought the horse during the fall of 1902 from a man that he recognized as the accused. Appellant stated that he was put in jail on the 22d day of September, 1902, and remained there continuously until the trial. The witness who bought the horse was then recalled, who fixed the date as September 27, 1902, by reference to a memorandum made at the time. He also stated that the man gave his name as Pleas Turpin. Appellant stated that he returned from the Eddyville penitentiary on September 12, and was in a weakened condition and remained about Henderson until September 29, when he was arrested. He denied that he stole the horse, but did not deny that he sold him to the buyer, or that he said his name was Pleas Turpin. Appellant complains that the lower court erred in permitting this testimony to be given by the witness after being recalled; also that the court erred in failing to admonish the jury that the fact that he had been in the penitentiary could be considered only as affecting his credibility. Held—That it was not error to permit witnesses to testify that the man who sold the horse gave his name as Pleas Turpin, nor was it error to permit witnesses to be recalled to fix the date of the sale of the horse after appellant had stated that he was in jail at the time the horse was stolen. The date is immaterial except that it must appear that the offense was committed prior to the finding of the indictment. As appellant had voluntarily stated that he had been confined in the penitentiary, it was not error for the court to fail to admonish the jury that this fact could be considered only as affecting his credibility.

John W. Lockett for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Nunn.

Appellant was indicted in the month of January, 1903, charged with feloniously stealing a horse, the personal property of Mrs. Dennison. He pleaded not guilty, a trial was had which resulted in a verdict and judgment sentencing him to the penitentiary for the term of three years.

Miss Dennison was introduced for the Commonwealth, and stated that her mother's horse was stolen in October, 1903, but by whom stolen she did not know.

George Griffin, who was corroborated by Clarence Dickey and one Royster, stated that he bought the stolen horse at Corydon, Henderson county, Ky., in the fall of 1902, about 9 o'clock in the morning, and that the defendant looked like the man from whom he had bought the horse, and he thought it was, but would not be positive.

The appellant was then introduced in his own behalf, and testified that he had not stolen the horse in question; that he was in jail from the 22d day of September, 1902, up to the time of the trial; that he had been convicted of housebreaking and had served a term in the penitentiary.

W. B. Jennings, the jailer, testified that the appellant was put in jail the 23d day of September, 1902, and had been confined there continuously up to the time of the trial.

The Commonwealth then recalled Miss Dennison, over the objection of appellant, and she testified that it was in the fall the horse was stolen, but that she did not know what time. The court sustained the appellant's objection to this testimony and instructed the jury to disregard it. The Commonwealth then recalled George Griffin, who stated that he bought the horse on the 17th day of September, 1902, stating that he had made an entry of the time in a note book which he had in his hand. In this statement he was corroborated by Clarence Dickey.

Griffin, Dickey and Royster all testified that the man from whom Griffin bought the horse said that his name was Pleas Turpin. The appellant was again introduced in his own behalf, and testified that he returned from the Eddyville penitentiary on the 12th day of September, in a weak and sickly condition, and remained in and about the city of Henderson until after the 17th of September. It is a noticeable fact that while the appellant was put upon the stand as a witness in his own behalf twice, in each instance he swears that he did not steal the horse, but he did not deny that he sold the horse to Griffin on the 17th of September, or at any time, or that he did not give his name to Griffin and others as Pleas Turpin, but only attempts to show by inference that he could not have been at Corydon, nine miles from Henderson, on that day.

Appellant's counsel contends that the lower court erred in permitting Griffin and others to say that the man who sold the horse to him gave his name as Pleas Turpin; and, second, that it erred in permitting Griffin to be recalled in rebuttal and fix the 17th day of September as the day of the purchase of the horse; third, that the court erred in failing to instruct the jury that the fact that appellant had been in the penitentiary only went to affect his credibility as a witness. As to the first objection, it was an immaterial matter. The jury could not have been influenced by that fact except they believed from the evidence that he was identified as the person who sold the horse to Griffin, and, besides, the appellant himself did not deny the fact, except by inference, that he was the man who sold the horse and gave the name of Pleas Turpin.

The second objection can not prevail for the reason that it was not important to the Commonwealth, in chief, to fix any day or particular time when the horse was stolen, except to fix it before the finding of the indictment, and when appellant was put upon the stand and placed himself in the penitentiary until the 12th of September, and in jail from and after the 22d of September, in an attempt to show that it was impossible for him to have stolen the horse, then it was entirely right and proper for the Commonwealth to prove that this sale of the horse took place between the 12th and the 22d of September. The witnesses, Griffin, Dickey and Royster, had only stated in chief that this transaction had taken place in the fall of 1902, without fixing any particular day or date.

As to the third proposition, and as a general rule, appellant's contention is correct. But in this case, where the appellant brought out the fact that he was in the penitentiary voluntarily and in aid of his defense, we are of opinion that the court did not err in failing to admonish the jury that the fact of his having been in the penitentiary could only be considered as affecting the credibility of appellant as a witness.

Perceiving no error prejudicial to the rights of the appellant the judgment of the lower court is affirmed.

BITZER v. CAVER.

(Filed May 29, 1903—Not to be reported.)

Negligence—Damages—Instructions—Appellee brought this action to recover damages for injuries alleged to have been inflicted upon him by appellant, by the discharge of a pistol, either purposely and willfully, or recklessly and carelessly using same. The first trial resulted in a verdict for defendant, and a new trial having been granted, the second trial resulted in a verdict for plaintiff for \$700 damages, which is sought to be reversed on this appeal on the ground that the court erred to defendant's prejudice in refusing to give an instruction on contributory negligence. Held—That as there was no evidence of contributory negligence it was not error to refuse an instruction on this point.

Wirgman & Underwood and Bodley, Baskin & Flexner for appellant.

Kohn, Baird & Spindle and S. A. Bederman for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Nunn.

The appellee, on the 5th day of February, 1900, sued appellant, charging, in substance, that he was a servant and employe of appellant to labor in his grocery and feed store in the city of Louisville in the capacity of porter; that on the 25th day of December, 1899, without his will or consent, and without fault on his part, the appellant, with force and arms, to wit, with a firearm loaded with a leaden bullet, either purposely and willfully, or recklessly and carelessly, discharged the firearm into the left eye and head of appellee; that at the time of the occurrence and injuries the appellee was in the discharge of his duties as the servant and employe of appellant, and that appellant either purposely and willfully, and with intent to injure the appellee, discharged the firearm, or that the appellant, with gross negligence and gross carelessness in the handling and operation of the firearm, discharged the same, and that one or the other of these facts were true, but which one is true he does not know. And then proceeded to relate the extent of his injuries, which were great.

The appellant filed an answer traversing each and every allegation contained in the petition, and by a second paragraph alleged "that the injuries to the appellee mentioned in the petition were caused, in whole or in part, by the negligence of the plaintiff himself, without which negligence on the part of the plaintiff the injury mentioned in the petition would not have occurred." This paragraph of the answer was traversed by the appellee. On these issues a trial was had and the jury returned a verdict on that trial for appellant.

Appellee filed motion and grounds for a new trial, which were sustained by the court. The appellant here objected to the action of the court and filed his bill of exceptions and evidence. On the second trial the appellee recovered a judgment for \$700. Appellant moved the court to grant him a new trial, and filed reasons therefor. The court overruled the motion and the case is here on appeal. The appellant asks the court to reverse the last judgment and direct the lower court to reinstate the first judgment.

The records of both trials are before us. The evidence on each was in substance the same, and in effect shows about the following state of facts: That on Christmas day, in 1899, the appellant and one of his clerks, by the name of Simpson, engaged in a fight and were separated. Afterwards, on the same morning, renewed the fight, and by some means were separated again, Simpson going for a butcher knife and appellant behind his counter to his desk, and obtained a pistol, cocked it and put his finger on the trigger. One of appellant's other clerks had charge of Simpson, and were about sixteen feet from appellant. Appellee was also behind the counter with his broom preparatory to sweeping out the litter from behind the counter. And just at the moment appellant prepared his pistol in the manner named, appellee approached near to appellant and remarked to him: "O Boss, don't shoot!" Appellant immediately remarked "don't crowd me," waived his pistol in the direction of appellee and the pistol went off, shooting appellee just under the left eye, passing through the eye-socket and out the left temple, entirely destroying the left eye. Appellant's evidence in substance agrees with this statement, except he says he did not hear appellee make any remark at all; that he saw him approaching and he did not want to be interfered with at the time; that he feared an attack by Simpson with a butcher knife, and that he undertook to waive him off, and the pistol accidentally fired.

On the first trial the court gave an instruction on contributory negligence by appellee. In our opinion this was error, and the court did right in setting aside that verdict. We have searched the record carefully and have been unable to find one thing said or act done, or attempted to be done, on the part of appellee that was careless, negligent or improper at any time during this difficulty, but, on the contrary, all that he did say or do was to appeal to his boss, the appellant, not to commit a crime.

There is certainly nothing in the evidence upon which to authorize such an instruction. The real objection of appellant to the action of the court on the second trial was because the court failed to give an instruction on contributory negligence of appellee. We have been unable to find any error committed on the last trial to the prejudice of appellant's rights.

Wherefore, the judgment of the lower court is affirmed.

BEST v. BEST'S ADM'R, &c.

(Filed May 29, 1903—Not to be reported.)

Decedents' estates—In this action to settle the estate of a decedent, the finding of the chancellor in favor of a claimant for \$90 for nursing deceased just previous to his death is not disturbed, but the judgment disallowing a claim for \$200 for board is reversed.

O'Neal & O'Neal for appellant.

James T. A. Baker for appellees.

Appeal from Jefferson Circuit Court, Chancery division. No. 2.

Opinion of the court by Chief Justice Burnham.

The Louisville Trust Co., as administrator of Charles Best, deceased, brought this suit against his heirs and creditors for a settlement of his estate. They allege that the appellant, Minnie Best, had filed a claim against his estate for \$810, for board and nursing, and asked a reference to the master commissioner to ascertain the just amount due thereon by the estate of their intestate. The commissioner found from the proof that Charles Best had boarded with Mrs. Minnie Best for four or five years preceding his death at the agreed price of \$4 per week; that the proof failed to show that he had paid his board from the 6th of January, 1901, until his death on the 24th day of December of the same year, and, therefore, allowed her claim for board at the contract price, which amounted to \$200. He also allowed the additional sum of \$350 for services in nursing the deceased, whom the proof shows to have died after an illness, which extended over a period of several years, from chronic tuberculosis.

The trial court sustained exceptions to the \$200 allowed for board, and reduced the allowance for nursing to \$90, and from this judgment Mrs. Best appeals. The proof in the case shows conclusively that the deceased boarded with claimant during this interval of time under a contract to pay her \$4 per week; and that during his last illness he received from her nursing which his condition rendered necessary.

As the evidence is not clear and satisfactory as to the length of time before the death of the deceased when special attention of this character was necessary, we do not feel justified in making any change in the allowance fixed by the trial court. But as the testimony wholly fails to show that the deceased paid his board from the 6th of January, 1901, until his death on the 24th of December, 1901, and burden of showing such payment was upon the plaintiff, the trial court erred in disallowing this claim. The deceased does not seem to have paid his board weekly, but to have allowed it to accumulate for years at a time before paying. It is shown that on the 27th of December, 1898, he paid Mrs. Best \$490 at one time on this score. There is evidence that he gave to the husband of the claimant a check for \$20 some time before his death, and as there is no evidence conducing to show that it was not for board, we are of the opinion that the presumption should be indulged that it was so intended, and that the \$200 should be credited with this \$20, leaving due to plaintiff a balance of \$180, which should have been allowed in addition to the \$90 for nursing for nine weeks between October 18 and December 20, 1901.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

WHITE SEWING MACHINE CO. v. POWELL, &c.

(Filed May 29, 1902—Not to be reported.)

Contract—Guaranty—Surety—Appellees signed a contract which may be termed a continuing guaranty to appellee for all liabilities that it might in-

cur on account of sewing machines that it might sell and deliver to W. This action was brought to recover an indebtedness on said obligation. In defense it is urged that appellees are not liable for failure of appellant to notify appellees of the acceptance of said guaranty. It is further urged they were liable only for a small part of said indebtedness as they had in writing notified appellant that they would be bound no further on said obligation, and the greater part of said indebtedness was incurred after appellant received said notice. A trial resulted in favor of appellant for the amount alleged by appellees as due, from which appellant prosecutes this appeal. Held—That the obligation was binding on appellees without notice of its acceptance. The issue as to receipt of notice by appellant to terminate their liability was submitted to the jury under proper instructions, and their finding will not be disturbed.

Bugg & Wickliffe for appellant.

B. S. Bailey and F. L. Turner for appellees.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Nunn.

On the 13th day of July, 1899, J. S. and Willis Willis, as principals, and the appellees, Ewing Powell and J. M. Gholson, as sureties, executed and delivered to appellant a written obligation by which appellees, Powell and Gholson, agreed to pay appellant any and all sums of money and indebtedness of any kind that said Willis & Willis might become indebted to and owing appellant, either in the form of open account or promissory note or notes for any machine or other property thereafter to be sold and furnished to Willis & Willis by appellant. The petition alleges that upon the faith of this obligation appellant did sell and deliver to Willis & Willis, at their special instance and request, machines and other property to the amount of \$575.60; that Willis & Willis made divers payments and at different times executed notes, and at the institution of this action were indebted to appellant in a balance of the sum of \$284.24.

The appellee defended upon two grounds:

1st. They claimed they were not responsible on this obligation for any amount for the reason that they were only guarantors for Willis & Willis, and that the appellant had failed to give them any notice of its acceptance of the guaranty, or that it would furnish Willis & Willis any machines or other property thereon.

2d. That even if liable to any extent, they were only liable to the extent of about \$43, for the reason, as they allege, that about the last day of September or 1st of October, 1899, they prepared a letter in which they stated that they would not be any longer bound by the contract sued on, and would not be responsible for any machines or other property thereafter sold and delivered to Willis & Willis, and that they addressed said letter to appellant at Cleveland, O., their place of business, placed it in an envelope with a return address written or printed thereon, stamped the same and mailed it at the postoffice at Hazelwood, Ky.; that appellant received the letter and notice, and that all the amount sued for, except the \$43 referred to, was for goods sold and delivered Willis & Willis after appellant had received the letter and notice aforesaid; that they were not responsible therefor. Appellant denied these allegations. A trial was had, the jury returned a verdict in favor of appellant for \$43; the court overruled appellant's motion for a new trial, of

which they complain, and the case is here on appeal. The first defense relied upon by appellees is not good. The writing sued on shows an absolute guaranty on their part.

In volume 14, A. & E. Enc. of Law, 2d edition, 1141, it is said: "An absolute guaranty is an unconditional promise of payment or performance on default of the principal. To bind the guarantor it is not necessary that there should be notice of acceptance of the guaranty or notice of default of the principal, or that any steps should be taken to enforce the contract guaranteed against the principal." (100 Ky., 466; 5 Ky. Law Rep., 770; 90 Ky., 425.)

As to the second defense, we are of the opinion that the appellees had the right upon notice to appellant to stop their liability and to save themselves from further loss, by reason of any further sales to Willis & Willis, after date of notice. In volume 14, A. & E. Enc. of Law, 2d edition, 1150, it is said: "So far as the question of revoking guaranties is concerned, they are divisible into two classes: First, where the consideration is entire, that is, where it passes wholly at one time; second, where the consideration is fragmentary, supplied from time to time, and, therefore, divisible. Guaranties of the first mentioned class are not revokable by the guarantor, and are not terminated by his death and notice of that fact, unless this intention is plainly expressed in the guaranty itself. On the other hand, guaranties of the second class, commonly known as continuing guaranties, may be withdrawn on notice, in the absence of anything in the guaranty to the contrary, and the guarantor will not be affected by any transaction between the principal obligor and the guarantee subsequent to the notice."

The record shows that appellees proved the writing and the mailing of the letter to appellant as alleged in their answer, and that the letter had not been returned to them through the mail. Appellees also introduced one of the firm of Willis & Willis, who testified that while he and his brother were doing business in Hickman, Ky., they received a letter from appellant in which it stated, in substance, that appellees had informed it that they did not want to remain on the bond any longer, and sent them, Willis & Willis, a blank bond to be filled and executed; that they never executed it and they bought the last two items sued on, of \$107 and \$129, after receiving this letter. Appellant's secretary stated that no such letter was ever received by it from appellees.

The court, by its first instruction, told the jury to find for appellant \$56, less an endorsed credit of \$15, and by the second and third instructions told the jury to find for appellant the \$107, with interest, and the \$129 account unless they believed from the evidence the appellees wrote the appellant a letter, in which they notified it that they would no longer be responsible on the contract sued on for the debts of Willis & Willis, and that appellant received the letter, and that after receiving the letter it sold to Willis & Willis the goods for which the note of \$107 and the account for \$129 were made and executed, in which case they should find for appellees as to these two items.

These instructions put the issues fairly and properly, and it was the province of the jury, under the evidence, to determine the fact as to whether or not appellant sold and delivered the goods to Willis & Willis, to the amount of the last two items named, after it had received notice from appellees that they would no longer be responsible for future liability on the contract sued on, and the jury determined that issue against it.

Wherefore, the judgment of the lower court is affirmed.

HARTFORD STEAM BOILER I. & I. CO. v. ASHLAND STEEL PLANT.

(Filed May 29, 1908—Not to be reported.)

Damages—Instructions—This action was brought by appellee to recover damages of appellant on its undertaking to insure appellant against damages that might result from injury or damage that it might sustain from the pressure of steam on any one or more of its boilers, and the damage sued for was injury to one of its boilers, which exploded. On the trial a verdict and judgment resulted in favor of appellee for \$1,259.79 damages. Appellant urges as error that the court erred in its instruction in using the word "tubes" instead of "flues." Held—That as these words were indiscriminately used during the trial in pleadings, by the attorneys and witnesses, the jury were not misled thereby.

Thos. R. Brown and A. R. Johnson for appellant.

Proctor K. Malin for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Nunn.

The appellant appeals from a judgment against it for the sum of \$1,259.79 rendered against it by the Boyd Circuit Court in favor of appellee. The facts upon which the judgment was obtained were in substance these: The appellee being the owner of some twenty-three steam boilers in use at its plant in Ashland, Ky., the appellant, being an insurance company, insured these boilers against all immediate loss or damage, except by fire, caused by the explosion, collapse or rupture of one or all of these boilers, or any parts of same, as particularly described in the policy, caused by the pressure of steam.

Appellee's boiler, No. 5, was injured and damaged to the extent of the recovery, appellee contending that the injury was caused by the explosion, collapse or rupture caused by steam pressure. The appellant denied this, and alleged that the tubes of boiler No. 5, the injured part, were injured by firing the boiler without there being water in it, and by reason of this destroyed fifty-eight of the tubes of the 108 in the boiler.

On this issue appellee introduced two witnesses, who stated that this boiler was full of water when the fire was placed in the furnace for an hour before the injury, one of them swearing that he filled it and the other swearing that he was present at the completion of it; also it introduced experts as witnesses sustaining its contention, or tending to do so. On the other hand, the appellant introduced many experts as witnesses, whose testimony was very strong and convincing, that its contention was correct. Its testimony was solely confined to experts. The court submitted this issue in apt words, and the jury found for appellee. The only complaint made by appellant to the instructions was that the court used the word "tubes" instead of "flues." The court did not err in this. While it is true that the appellee in its petition called them "flues," the appellant corrected this error, if any, by its answer in which it called them "tubes," and alleged that they were burned by fire by reason of there being no water in the boiler when the fire was started. The appellee denied this, and the issue was formed.

We think it immaterial whether the instruction called them "tubes" or
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"flues." The jury could not have been misled by reason thereof. The record shows that in the pleadings of the parties, and by counsel on both sides and the witnesses all through the trial of the case, the words "tubes," "flues" and "pipes" were used interchangeably when speaking of the same thing. The jury, under proper instructions and under the evidence, decided that these tubes or pipes, composing a part of that boiler No. 5, were destroyed by reason of a rupture or collapse occasioned by the pressure of steam, which emptied the boiler of water and caused their destruction by melting, the rupture or collapse, caused by steam pressure, being the proximate cause of the injury.

Perceiving no error prejudicial to the rights of appellant the judgment of the lower court is, therefore, affirmed.

HOFFMAN v. COLGAN.

(Filed May 29, 1903—Not to be reported.)

Husband and wife—Contracts—Conveyances—The husband of appellant conveyed a house and lot to S., who in turn conveyed it to appellant. Appellee made a written proposition to appellant to purchase said house and lot, to which was appended the condition that the title to said land was to be examined and approved by the Kentucky Title Co., and if, in its opinion, the said title is not good or is defective, the title would not be accepted. This proposition, modified as to price, was accepted in writing by appellee. Appellant and her husband afterwards tendered a general warranty deed to appellee, who refused to accept same, basing his objection on a report made by the title company approving the title if the husband was of sound mind when he made the conveyance. This suit was instituted by appellant to compel specific performance of said contract. In defense it is urged that the proposition of the wife, without joining the husband therein, is not enforceable. Held—That this objection is not tenable. Whatever objection may have existed to the proposition of acceptance by the wife can not be urged after she and her husband have made and tendered a sufficient deed. The doctrine that a contract must be mutual, that is, not binding upon either party unless both are bound, obviously can not apply to a case where the party originally not bound has executed the contract. The evidence shows clearly that the husband was of sound mind when he executed the deed of conveyance. It is insisted that as the title company did not approve the title that appellee is not bound on said contract. Held—That the condition in the contract did not mean a whimsical or arbitrary conclusion by the title company as to the title. In sales dependent upon conditions precedent, such as approval by the buyer or of another person, he must act honestly and fairly. So that by correcting the mistake of fact forming the basis of the title company's exception in its opinion the conclusion of the court is that the title company meant to and did in fact approve the title. The chancellor erred in refusing to compel appellee to accept the title tendered.

Pryor & Sapinsky, Thomas Walsh and W. S. Pryor for appellant.

H. H. Nettleroth for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge O'Rear.

February 14, 1893, John Hoffman, being the owner in fee simple of a cer-

tain house and lot in Louisville, conveyed to one Speckert, who conveyed to appellant, the wife of John Hoffman. Thus appellant became the owner of the fee-simple title, provided John Hoffman was at that time mentally competent to contract.

Simultaneously with the transaction mentioned Speckert caused the Hoffmans to execute to the German-American Title Co., a corporation under his management, a mortgage upon this property to secure certain bonds. These bonds Speckert sold to the Louisville Insurance Co., which instituted suit against the Hoffmans to subject the property to their payment. The Hoffmans defended upon the grounds that the bonds and mortgage had been procured by Speckert's fraud, and were without consideration; that they were liable in the hands of the insurance company, by statute, to every defense that could have been made against them in the hands of Speckert or his company; and that John Hoffman at the time was of such mental debility that he was not competent to contract. The circuit court, and on appeal, this court (*Louisville Ins. Co. v. Hoffman*, 20 Ky. Law Rep., 2016) held the transaction was fraudulent, so far as Speckert and his company were concerned, and decreed the cancellation of the mortgage and bonds.

Appellee, on November 1, 1900, proposed to buy the above-named property from appellant and her husband. The negotiations took the form of the following proposition:

"Louisville, Ky., November 1, 1900,

"John Hoffman, Elizabeth Hoffman:

"I will give you for the house and lot situated on the north side of Chestnut street, 29x110 feet, beginning forty-six feet east of Hancock street, \$5,500, one-third cash and balance at one and two years, with interest at the rate of 6 per cent. per annum and a lien be retained to secure purchase price, and title to be conveyed with general warranty, and covenant against encumbrances, and that you have full right and power to convey the same. Title to said land to be examined and approved by the Kentucky Title Co., and if, in its opinion, the said title is not good or is defective, I will not accept said title.

(Signed) "JOHN COLGAN."

"I will take \$5,750 on the same terms and conditions above mentioned, and you must agree to assume taxes for 1901.

(Signed) "MRS. JOHN HOFFMAN."

"My proposition as herein modified by Mrs. Elizabeth Hoffman is accepted. November 5, 1900.

(Signed) "JOHN COLGAN."

On January 9th following appellant and her husband, John Hoffman, executed and tendered to appellee a sufficient deed, embracing all the covenants required by the foregoing proposition. It was rejected by appellee. The reason for his rejection was because, he says by pleading, the Kentucky Title Co. pronounced the title defective. The title company's report to appellee is dated December 27, 1900. When it was delivered to appellee does not appear, nor does it appear that appellee took action on it till after the deed was tendered, when, for the reasons stated in the title company's report, and because of the fact of that report, he declined to accept the deed. This suit was thereupon brought by appellant, her husband joining, to enforce the specific execution of the contract of sale. There were three defenses inter-

posed by appellee, viz., first, he averred that at the time John Hoffman attempted to convey the title to his wife, appellant, he was mentally incompetent to know the effect of his act; was old and infirm, and was, by the fraud and undue influence exercised over him by appellant, induced to execute the deed against his will; that John Hoffman had ever since continued to be without contractual capacity on account of his imbecility; second, that the contract was executory only, and that appellant's husband not having joined in it, it was void. At least, that not being binding on her, it lacked necessary mutuality, and was, therefore, not binding on any one; third, that it was a condition in the contract that the title was subject to the examination and approval of the Kentucky Title Co.; that as it rejected the title, appellee was absolved from his liability on the contract, in every event.

As to John Hoffman's mental capacity, the proof is all one way. It establishes beyond doubt that he had sufficient mind to contract on all the occasions involved by these transactions. The only thing said to the contrary is the plea in the insurance company case referred to. What was there decided was that Hoffman and his wife were old, illiterate Germans, unacquainted with the English language, and the meaning of technical terms used in conveyances, and that they were thereby the more easily imposed on by their attorney, Speckert, in procuring the mortgage from them. But aside from that, this case must rest on the evidence it contains. There is nothing in that evidence to overcome the legal presumption of the sanity of the contracting person. From this it follows that appellant had the fee-simple title to the lot in question when appellee offered to buy it from her.

The second proposition advanced by appellee, that a married woman's executory contract to sell her land is not enforceable against her unless her husband joins in it, and, therefore, that it is not binding upon the other party to it, is not without some force at first appearance. At common law a feme covert could not, except for certain things, bind herself personally by an executory contract. The married women's acts generally enacted have aimed to enlarge the feme's powers with respect to the control, use and disposal of her property. Such limitations as yet remain upon that power are retained not as an obstacle, but as a protection to her and her husband.

The existing statute in this State on this subject is (section 2128 in part): "She may make contracts and sue and be sued, as a single woman, except that she may not make an executory contract to sell or convey or mortgage her real estate unless her husband join in such contract." * * *

This veto power, as it were, is given the husband not so much to hamper the wife as to protect him in his potential property rights in her real estate. We do not decide whether an executory contract by a married woman to sell her real estate, made with the knowledge and consent of her husband, would be obligatory on them. That question is not necessarily presented.

In this case appellee proposed to buy appellant's lot at a certain price. She accepted it by executing the necessary deed, in which her husband joined. So far as she was concerned it may be conceded, for the sake of the argument, that she was not bound by appellee's offer and her parol or insufficient acceptance of it. But while it was open, she did accept it, and so far as it was required of her executed her part of the sale. Her deed made

in conjunction with her husband did bind her to the fullest extent. It was as effectual, so far as the element of time was concerned (which was not made of the essence of the contract), as if it had been delivered the next moment after appellee's offer was made. It was above and better than any executory contract she and her husband could have made. It left nothing for them to do. "The party to be bound" under the statute of frauds (section 470 Kentucky Statutes) was, thereafter, the purchaser—appellee. (*Tyler v. Onsta*, 93 Ky., 331.) The doctrine that a contract must be mutual, that it is not binding upon either party unless both are bound, obviously can not apply to a case where the party originally not bound has executed the contract. (*Gillespie v. Beecher*, 94 Mich., 374; *Chamberlain v. Robertson*, 81 Iowa, 408; *Walker v. Owen*, 79 Mo., 563; *Neef v. Redmon*, 76 Mo. Ap., 198.)

It will be noted that appellee appended a condition as to the sufficiency of the title to his proposition, viz.: "Title to said land to be examined and approved by the Kentucky Title Co., and if, in its opinion, the said title is not good, or is defective," it was not to be accepted. The parties could not have meant this clause to destroy the binding obligation of the contract. It must have been intended that upon the facts affecting the title, as they existed, the legal opinion of the title company as to whether appellant had the fee-simple title to the lot, clear and unencumbered, and that if she and her husband had full right and power to convey the same, should be conclusive upon the parties. In other words, its legal opinion of the title was to be accepted in lieu of a judicial opinion, based upon the state of the title. This did not mean a whimsical or arbitrary conclusion by the title company, for it is provided that there was to be an examination by the company, necessarily that it might have all needed data before it to enable it to form an opinion—such indeed as was necessary to qualify it to form a correct and just opinion. It is the language of appellee, the party proposing to buy; its legal import and effect, if there be doubt of its extent, must be construed most strongly against him. The title company made an examination. It reported in writing. Its opinion was that, barring the fact of John Hoffman's supposed mental incompetency when he made the deed to his wife in 1896, the title was perfect. It further showed that it had certain information on the subject of John Hoffman's mental condition, both in 1896 and at the date of the examination by the company. This information is set out in the report, which stated that he was not then (in 1896) of sound mind. But this was not true. It was clearly a mistake of fact, as much so as if the examiner had overlooked a deed of record forming a link in the chain of appellant's title. The report being that the title was good, barring the facts stated, it must follow that, in the opinion of the title company, if John Hoffman was then of sound mind, the title was sufficient. We can not believe that the title company meant to give an opinion based upon a certain fact, when it knew the fact was not as stated. Nor are we justified in believing that appellant desired, or intended by the insertion of the clause last quoted, to obtain an opinion that was not true, when based upon the facts as they actually existed. To believe either proposition would be to convict the parties of a deliberate fraud upon appellant.

It is to be noted, too, in this connection, that the title company was not authorized to ignore necessary facts, nor to change them. It was merely to form and deliver its opinion on the facts as they were.

In sales, dependent upon conditions precedent, such as approval by the buyer, or of another person, he must act honestly, reasonably and fairly. (*Daggett v. Johnson*, 49 Vt., 345; *Hartford, &c., Co. v. Brush*, 48 Id., 528.) So that by correcting the mistake of fact, forming the basis of the title company's exception in its opinion, we find that it meant to, and did in fact, approve the title. We are consequently of opinion that the chancellor erred in dismissing appellant's petition.

The judgment is reversed and cause remanded, with directions to enter a judgment for appellant decreeing the specific performance by appellee of the contract sued on, and for other necessary proceedings not inconsistent herewith.

KENTUCKY BOARD OF PHARMACY, &c. v. CASSIDY, &c.

(Filed May 28, 1908.)

Pharmacy—Sale of proprietary and patent medicines—Constitutional law—Construction of statutes—This appeal involves the validity of article 2, chapter 85, Kentucky Statutes, which establishes a board of pharmacy and defines its powers and duties. Appellees are engaged in the business of vending at wholesale and retail a certain proprietary medicine in the original bottles or packages; that they have been, for a number of years, engaged in selling proprietary medicines of different kinds in this State. Appellees are not registered pharmacists, nor entitled to be registered as such; they are not druggists, and do not keep, own or conduct a drug store or pharmacy, or a county store in a small place, or rural district, nor do they compound drugs, medicines or physicians' prescriptions, or employ a registered pharmacist in superintendence. The direct question presented is whether or not appellees are prohibited by said act from conducting their business without complying with its provisions. It is urged that said act is unconstitutional. Held—That said act is constitutional. The right of the legislature to enact laws necessary to protect the lives and health of the citizens from the acts of incompetent and unskilled pharmacists, under the police power of the Commonwealth, is well settled. The legislature did not intend by the passage of the pharmacy act to apply its provisions in restraint of sale of patent or proprietary medicines.

T. L. Edelen and Helm, Bruce & Helm for appellants.

J. Embry Allen for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Barker.

This is an agreed case in equity instituted in the Fayette Circuit Court for the purpose of obtaining an adjudication of the effect of an act to "regulate the practice of pharmacy in the Commonwealth of Kentucky, and to establish a board of pharmacy, and define the powers and duties thereof, which constitutes article 2, chapter 85, Kentucky Statutes," upon the business of appellees. The act in question establishes a board of pharmacy, and regulates the sale of drugs and medicines by retail, and the compounding of physicians' prescriptions in the State of Kentucky.

Section 2621 prescribes how the Kentucky Board of Pharmacy shall be appointed and organized. Section 2622 enumerates the duties of the board,

among which is the following: "It shall be the duty of the said board to examine all applicants for registration submitted in proper form; to grant certificates of registration to such persons as may be entitled to same under the provisions of this act; to investigate complaints, and to cause the prosecution of all persons violating the provisions of this act."

The qualifications of applicants, and the manner in which they may receive certificates as registered pharmacists, and their rights and duties after having received certificates, are prescribed in sections 2624, 2625, 2626, 2627 and 2628.

By section 2619 it is provided that "except as in this act provided, it shall hereafter be unlawful, in the Commonwealth of Kentucky, for any person who is not a registered pharmacist, within the meaning of this act, to vend at retail, compound or dispense any drug, medicine, chemical, poison, or pharmaceutical preparation for medical use, or compound and dispense physicians' prescriptions. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be liable to a fine of not less than \$20 nor more than \$50 for each and every offense."

"Section 2620. Any owner of a pharmacy, or retail drug store, who, not being a registered pharmacist, shall fail or neglect to place in charge of such pharmacy or drug store a registered pharmacist, or any such proprietor who shall by himself, or any other person, permit the compounding or dispensing of prescriptions, or the vending at retail of drugs, medicines, poisons or pharmaceutical preparations in his store or place of business, except by or in the presence and under the immediate supervision of a registered pharmacist, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be liable to a fine of not less than \$25 nor more than \$100, and each week that he shall cause or permit said pharmacy or retail drug store to be so conducted or managed shall constitute a separate and distinct offense, and render him liable to separate prosecution and punishment therefor."

Section 2629 forbids the adulteration of drugs, and provides for the prosecution of offenders against the provision.

"Section 2630. No person shall sell at retail any poisons, except as herein provided, without affixing to the bottle, box, vessel, or package containing the same, a label printed or plainly written, containing the name of the article, the word "poison," and the name and place of business of the seller, with the common name of two or more readily accessible antidotes, nor shall he deliver poison to any person without satisfying himself that such poison is to be used for legitimate purposes. A poison, in the meaning of this act, shall be any drug or chemical preparation, which, according to standard works on medicine or materia medica, is liable to be destructive to adult human life in quantities of sixty grains or less. It shall be the further duty of any one selling or dispensing poisons, which are known to be destructive to adult human life in quantities of five grains or less, before delivering them, to enter into a book kept for that purpose the name of the seller, the name and residence of the buyer, the name of the article, the quantity sold or disposed of, and the purposes for which it is said to be intended, which book of registry shall be kept for at least two years, and shall at all times be open to the inspection of the coroner of the county in which the same may

be kept. Oil of tansy, oil of savin, ergot, and its preparations, cotton root, and its preparations, and all other active emenagogues or abortives, shall be sold at retail or dispensed only upon the written prescription of a legally qualified physician. The provisions of this section shall not apply to the dispensing of poisons in not unusual quantities, or doses, on physicians' prescriptions, nor to the sale to agriculturists or horticulturists of such articles as are commonly used by them as insecticides. Every person failing to comply with the requirements of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than \$10.

"Section 2631. Any person, or persons, not a registered pharmacist, may open, own or conduct a drug store or pharmacy if he or they keep constantly in charge of the same a registered pharmacist; but shall not himself or themselves sell or dispense drugs or medicines, except proprietary or patent medicines in original packages.

"Section 2632. Nothing in this act shall be construed so as to apply to, or in any manner interfere with, the sale of the usual nonpoisonous domestic remedies and medicines, and patent or proprietary medicine, by county stores in small places or rural districts. Nothing in this act shall apply to, or in any manner interfere with, the business of any licensed practicing physician, or prevent him from supplying to his patients such articles as may seem proper to him, or with his compounding his own prescriptions."

The agreed facts show that the appellees are engaged in the business of vending at wholesale and retail a certain proprietary medicine known as vitæ-ore, in Lexington, Ky., which is a kind of subacid drink, possessing, as it claims, valuable medicinal qualities; that they are, and have been for a number of years, engaged in the business of vending and selling at retail in this State various patent and proprietary medicines, manufactured and compounded both in and out of this State; that these medicines are sold at retail in the original packages or bottles in which they are put up by the manufacturer and proprietor, without breaking the seal, or in any way changing or adding to the medicine or composition.

Appellees are not registered pharmacists, nor entitled to be registered as such; they are not druggists, and do not keep, own or conduct a drug store, or pharmacy, or a county store in a small place or rural district; nor do they compound drugs, medicines or physicians' prescriptions, or employ a registered pharmacist in superintendence. It is the usual practice or custom of druggists in this Commonwealth, who are not registered pharmacists, to sell at retail patent and proprietary medicines in the same manner with reference to the quantity of the medicine, and the package in which the same is sold, as the appellees carry on their business; the term "original package," as applicable to the sale of patent and proprietary medicines, means, and is so understood by all persons, the small individual package or bottle as prepared for retail, and not the large box or package in which the small packages may have been shipped by the manufacturer.

There are many more agreed facts contained in the written stipulations between the parties to this action which are not thought necessary to be set out therein, the real question for adjudication being whether or not the sale of patent and proprietary medicines in the manner shown by the agreed

facts which are set out violates the provisions of the statute under discussion.

It can not be questioned that the language of sections 2619 and 2620 would include within their scope patent and proprietary medicines unless that conclusion is forbidden by the language of other sections of the statute to be noticed hereafter. Nor can the constitutionality of the act be successfully assailed; the right of the legislature to enact laws necessary to protect the lives and health of the citizens from the acts of incompetent and unskilled pharmacists, under the police power of the Commonwealth, is so well settled as hardly to need either argument or citation of authority to support it; this very act, or similar acts preceding it, have been recognized, approved and enforced in numerous cases by this court. (*Commonwealth v. Fowler*, 96 Ky., 166; *State Board of Pharmacy v. White*, 84 Ky., 636; *Kentucky Board of Pharmacy v. Lodler*, 22 Ky. Law Rep., 621.)

From the case of *State v. Heineman*, 80 Wis., 258, we make the following quotation as containing a most admirable presentation of the right of the State, in the exercise of its police power, to enact laws to preserve and protect the health and lives of the citizens from the consequences of unskilled compounding of dangerous and deadly drugs: "Was it not within the power of the legislature to thus protect the health and lives of citizens throughout the State from improper, dangerous and destructive compounds, put up by incompetent or inefficient persons? All courts agree that the police power of the State extends to all regulations affecting the lives, limbs, health, comfort, good order, morals, peace and safety of society, and hence may be exercised on many subjects and in numerous ways. (*Baker v. State*, 54 Wis., 372; *State v. Ryan*, 70 Wis., 681.) In speaking of such power, Mr. Justice Field, in a recent case, said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed, by the governing authority of the country, essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint, under conditions essential to equal enjoyment of the same right by others.' It is then liberty regulated by law. (*Crossley v. Christensen*, 187 U. S., 89.)

"This principle has been applied in many ways, and to a variety of vocations. Thus it has been held that a State may require locomotive engineers therein to be examined and licensed by a board created for that purpose, and make it unlawful to operate without such license. (*Smith v. Alabama*, 128 U. S., 466; *Nashville, &c., Ry. Co. v. Alabama*, 128 U. S., 96.) So it has been held that a State may lawfully regulate the manufacture and sale of oleomargarine. (*Powell v. Penn.*, 127 U. S., 678, affirming *Powell v. Commonwealth*, 114 Pa. St., 266, 60 Am. St. Rep., 350; *Commonwealth v. Weiss*, 139 Pa. St., 247; 23 Am. St. Rep., 189; *People v. Arensberg*, 105 N. Y., 123, 59 Am. St. Rep., 483.) So it has been held that the State may lawfully require every practitioner of medicine therein to obtain a license from a State board created therefor, as evidence of his qualification to so practice, and make it unlawful to practice without first obtaining such license. (*Dent v. West Virginia*, 129 U. S., 114; *Eastman v. State*, 109 Ind., 278, 58 Am. St. Rep., 400; *Williams v. People*, 121 Ill., 86.) A similar rule has been applied

to dentistry. (*Gosnell v. State*, 53 Ark., 223; *State v. Vandersallius*, 42 Minn., 129; *State v. Creditor*, 44 Kan., 565, 21 Am. St. Rep., 306); also to persons engaged in the business of plumbing. (*Singer v. State*, 72 Md., 464.)

"The case at bar was, in effect, recently decided in New Hampshire, where it was held that a statute of that State, which required the retailers of drugs, medicines, etc., to submit to an examination and procure a license is within the police power of the State, and is not a tax on the business, nor does it deprive of property without due process of law. (*State v. Forcier*, 65 N. H., 42.) In that case, as here, it was claimed that the fee required to be paid by the act rendered the same illegal, but the court said: 'The fee of \$5 to be paid by the applicant for a license to engage in the business of an apothecary and druggist is merely an equivalent for the service rendered by the commissioners in making the examination and issuing the license, and can not be considered as a tax upon the business, or as depriving the applicant of his property without the process of law.' (*State v. Forcier*, 65 N. H., 42; to the same effect is *Smith v. Alabama*, 124 U. S., 465; *Nashville, &c., Ry. Co. v. Alabama*, 128 U. S., 96.)"

Tiedman in his work on Limitations of Police Power, says: "The ordinary police regulations of employments and professions is most certainly within the power of the State governments."

This court, in numerous cases, has upheld laws prescribing the qualifications of persons desiring to practice law, medicine and dentistry. In the case of *Driscoll v. Commonwealth*, 93 Ky., 393, it was said: "We see no reason for denying the right of the legislature to enact laws for the protection of the people, by requiring those who undertake to practice a profession to give evidence of their qualifications and skill by the exhibition of a license from those who, in the legislative judgment, are competent to determine whether or not the applicant has the necessary qualifications to practice the particular profession. The citizen, of necessity, when diseased, must employ the physician, and the lawyer when his right of person or property has been violated. The entire public is interested in knowing, or having the means of ascertaining, whether the physician he desires to employ has a sufficient knowledge of medicine to enable him to practice his profession; and for the welfare and safety of the citizens the legislature may say that you shall not practice medicine unless you have the endorsement of a board, skilled in the profession. The patients of the physician must rely on his knowledge of medicine and the mode of administering it; and the entire public, being interested in having physicians learned in the profession, it is competent for the legislature to prescribe the mode of determining the qualifications of those who propose to embark in the practice. The constitutional question has been raised and decided by many courts, all holding that when the conditions imposed upon the profession by the law-making power before one can enter upon the practice are reasonable, they must be complied with or the penalty imposed will be enforced. The Supreme Court, in the case of *Dent v. West Virginia*, 129 U. S., 114, has determined the constitutionality of such laws in a case where the statute of West Virginia was very much like that of this State. The right of a State to enact such laws proceeds from the inherent power to prescribe such rules as will protect the health

and safety of the people. (State v. Gregory, 83 Mo., 128; same case, 53 Am. Rep., 565; State v. State Medical Ex. Board, 82 Minn., 324; same case, 50 Am. Rep., 575; case of Bauer, 4 Atl. Rep., 918; Harding v. People, 15 Pac. Rep., 737.)'

The question before us is not only the right of the legislature to forbid the sale of patent and proprietary medicines except by registered pharmacists, but whether it has done so in the statute. It is manifest, from an inspection of the language of sections 2619 and 2630 that the protection of the citizens from the acts of unskilled pharmacists in the compounding and sale of dangerous medicines is the primary object of the statute.

It must occur to every one who reflects upon the subject that there does not exist the same reason for requiring the service of a skilled pharmacist in the sale of patent and proprietary medicines as for the ordinary retailing of drugs and the compounding of physicians' prescriptions. Patent and proprietary medicines are put up upon uniform prescriptions, and placed upon the market, ready for use, by the consumer. They are sold upon their known or supposed reputation as curative agents; those who handle and sell them make no change in their composition or ingredients, and there is, therefore, no danger arising from unskilled compounding or mistakes as to ingredients. Undoubtedly, much of it is worthless, perhaps more is harmful, but ignorance in the compounding does not enter into their manufacture. The statute requires no duty of the registered pharmacist in reference to these medicines; he sells them on the call of his customers just as they are prepared by the proprietors for retail, and it requires no more scientific skill to do so than to sell soap or perfumery, or any other like articles usually kept by druggists.

Much was said in the argument at bar, and is said in the brief of counsel for appellants, as to the duty of the pharmacists to apply the provisions of section 2630 to patent and proprietary medicines sold by him. This section forbids the sale of poisons at retail without affixing to the bottle, box, vessel or package, containing the drug, a label printed or plainly written, containing the name of the article, the word "poison," and the name and place of business of the seller, with the common name of two or more readily accessible antidotes, or the delivery of poison to any person without assurance that it is to be used for legitimate purposes. It is insisted that the section relates to the sale of patent and proprietary medicines, as well as other drugs, and this is done to show the necessity for the superintendence of a pharmacist in the matter of their sale.

There is little doubt but the provisions of this section apply alone to such deadly poisons as produce immediate harm, or death, and not to patent or proprietary medicines, which, if harmful at all, do not at once produce disastrous effects on the human system. We think these medicines do not come within the meaning of the pharmacy act, and that this is shown by the language of sections 2631 and 2632, which are the only parts of the statute in which they are mentioned by name. The first of these expressly authorizes owners of drug stores who are not registered pharmacists, but who employ one in their business, to themselves sell such medicines; and section 2632 authorizes the owners of county stores to keep them in stock for sale. The language of these two sections shows that the legislature did not regard

these medicines as coming within the scope of the statute, and seem to have been inserted for no other purpose than to place this beyond question.

There can be no reason for denying to appellees the right to sell the medicines in question, and according to it the owners of drug stores and county stores who possess no greater scientific skill in the knowledge of pharmacy. The lives and health of the customers of the owners of county stores and of the customers of such druggists as are authorized to sell patent and proprietary medicines, by section 2681, are as sacred in the estimation of the law makers as are those of the customers of other drug stores, and if it had been thought necessary for the protection of the latter to limit the sale of the medicines in question to registered pharmacists, undoubtedly the same protection would have been thrown around the former. The learned chancellor below was of opinion that the act does not apply to the sale of patent and proprietary medicines, and in this we concur.

The judgment is affirmed.

Whole court sitting.

ANGEL v. JELICO COAL MINING CO.

(Filed June 2, 1908.)

Master and servant—Negligence—Instructions—Appellant in his petition alleged that he was employed by appellee to keep up the fire in a furnace in its mine, and that servants of appellee engaged in a different employment, by direction of a superior officer, negligently placed dynamite near his furnace, which exploded and inflicted severe, painful and permanent injuries on him, and that the danger from dynamite was unknown to him, and asked a recovery of damages therefor. On the trial the lower court gave a peremptory instruction to find for appellee. Held—That the court erred in giving said peremptory instruction. It was the duty of appellee to furnish appellant, its servant, a safe place to work, and he did not assume any risks outside of the position he assumed, and was entitled to recover damages for the injuries complained of if occasioned in the manner alleged, and the facts should have been submitted to a jury.

C. W. Lester for appellant.

Tye & Denham for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by appellant in the Whitley Circuit Court to recover of appellee damages for personal injuries alleged in the petition to have been sustained by an explosion of dynamite, which servants of appellee in a different line of service to that in which appellant was engaged had negligently placed near and in front of the fire of a furnace in the air shaft of its mine that appellant, as its servant, was required to keep up. It is also averred in the petition that the dynamite was put in front of the fire to "thaw," the heat of which caused it to explode, and that it was a very dangerous explosive, though its dangerous character was at the time unknown to him, but was known to appellee's servants who placed it near the fire.

The answer denies the negligence complained of in the petition, and in addition alleges contributory negligence on the part of appellant, which

latter plea is controverted by reply. Upon the conclusion of appellant's evidence the jury, in obedience to a peremptory instruction from the court, returned a verdict for appellee. Appellant complains of the giving of the peremptory instruction by the lower court, and of its refusing him a new trial, and by this appeal asks relief at the hands of this court. It appears from the evidence that one Gofford was the foreman of the appellee, and in control of its servants charged with the duty of track laying in the mine, and that in the performance of that work dynamite was used in removing slate and other obstructions. It was used for no other purpose in the mine, and was under the exclusive control of Gofford, who sometimes caused it to be placed in front of the furnace fire to "thaw." The furnace fires were kept up by appellant, who testified that he had never used dynamite, or seen it used, but that he was afraid of its exploding in the process of "thawing," and expressed his fear of it to Gofford, and also to John and Howard Jenkins, each of whom had occasionally placed it near the furnace fire. But they assured him that there was no danger of an explosion, and John Jenkins said it could not explode unless there was a cap on it.

It also appears that the dynamite that caused appellant's injuries was placed before the fire by Howard Jenkins, one of Gofford's hands, by the latter's direction. It does not appear that appellant saw, or knew, of its being so placed on that occasion, but it is not material whether or not its presence was known to him. The explosion occurred while appellant, Howard Jenkins, and other employes of appellee then present were eating their noon meal. Appellant's neck and shoulders were wounded, and his hand badly burned by the explosion. In fact his injuries caused thereby were so serious and painful as to compel him to keep his bed for more than a month, and his hand was so injured that he has never since been able to close it, and that member is, therefore, permanently injured.

It is the duty of the master to supply the servant with reasonably safe and suitable tools and machinery to perform the work required of him, and equally his duty to furnish the servant a reasonably safe place to work, and to see that it is kept so. Appellant in undertaking for appellee the work of keeping up the furnace fires in the air shaft of its mine assumed the risks that are necessarily or usually incident to such service, but it can not be contended that danger or risks such as arise from the use of dynamite by other servants of the same master in a wholly distinct department of service were in any way connected with, or incident to, appellant's work as fireman.

In the case of the Ohio Valley Ry. Co. v. McKinley, 17 Ky. Law Rep., 1028, this court applied the principle here announced. McKinley was injured by the premature explosion of dynamite which was then being used by him and other servants of the railway company in blasting rock. It appears that he was furnished an iron rod by his employer for tamping dynamite in the hole drilled for that purpose, and that its use was highly dangerous, because of the violence of the concussion produced thereby, and in fact that the premature explosion resulted from its use. It was alleged in the petition that the danger of using the iron rod was known to the railway company, its agents and the superintendent then in charge of the quarry, but was unknown to McKinley, although he had for several months used the

iron rod for tamping. This court upon these facts held that it was the plain duty of the defendant to have furnished its employes a wooden rod instead of the iron, and that it was clearly negligent in providing only the iron rod, as the evidence all tended to prove that the danger was greatly diminished in tamping with a wooden stick. Continuing the discussion on this point, the court said: "It is hardly accurate to say that the servant so employed assumes the risk incident to his employment. It may be the law to say that he assumes the risks necessarily incident to his employment, when the risk is considered with reference to the primary duty of his employer to furnish tools, and in fact, all other instruments, means and agencies necessary to be used in the prosecution of his business reasonably safe and secure for the purpose used. But this duty of the employer is the first and primary duty, and should at all times by the trial courts be kept steadily in view, and no construction of the law should be tolerated that needlessly exposes the servant to danger in the prosecution of the business of the master. Humanity itself demands this much consideration by the employer for the lives and safety of his servants, and the greater the danger to the servant, the greater should be the care and caution demanded by the law of his employer."

The appellant's only duty was to keep the fire in the air shaft burning. There was no risk whatever in the performance of that duty. He was practically as secure from all danger from injury there as he would have been in his own home, but for the placing of the dynamite in proximity to the fire at his post of duty. He had no control over those who thus placed it, or of the deadly explosive itself, and his apprehension of an explosion had doubtless been removed by the repeated assurances of Gofford and the two Jenkins of the absence of all danger.

Evidence was introduced by appellee to prove that the dynamite would not explode upon being subjected to heat, and that it had even been consumed without exploding. Be that as it may, it did in this instance explode, either from the action of the heat, or by concussion produced by some object striking or falling upon it unknown to those present at the time. But in view of the evidence it is hard to understand how it could have occurred if not from the action of the heat. At any rate, it was the province of the jury to determine the cause.

Howard Jenkins, who is evidently experienced in the use of dynamite, testified upon the trial that a jar or concussion of sixty pounds weight would cause it to explode, and the manufacturer, in order to warn the public of its dangerous character, labels each box of it "Highly Explosive." It must be presumed, therefore, that appellee's servants entrusted with the use of the dynamite knew it to be a highly dangerous explosive, and it was their duty to have provided some place other than the air shaft of the mine where it could be thawed without risk of injury to appellant, or other employes of appellee, and in placing it in the air shaft they were guilty of gross negligence, in that they made the further performance of the duties of appellant's employment dangerous in the extreme, thereby violating the primary duty which appellee owed him to provide, and maintain, a reasonably safe place for the performance of the work required of him.

There is nothing in the evidence conducing to prove contributory negli-

gence on the part of appellant, nor can it be contended that his injuries were caused by the negligence of his fellow servants, as the negligent parties, though servants of appellee, were in a department of its service wholly different from that in which appellant was engaged. But if they were fellow servants it would not relieve appellee of liability in this case, as its duty to appellant required it to provide him a reasonably safe place in which to work, and the negligence of those who placed the dynamite before the furnace fire was, and is, imputable in such a case to it as master. (*Trade-water Coal Co. v. Johnson*, 24 Ky. Law Rep., 1777.)

Being of opinion that the lower court erred in giving the peremptory instruction, the judgment is reversed and cause remanded, with directions to the court to set aside the verdict and judgment and grant the appellant a new trial consistent with the opinion herein.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT v. HOWARD.

(Filed June 2, 1908—Not to be reported.)

Municipal government—Damages—Instructions—Appellee recovered damages against appellant, the city, for injuries resulting from the act of the city in building a wall about eighteen inches high on the outside of the pavement in front of a storeroom and dwelling owned by appellee, which causes water and mud from the street to run into his house, thereby rendering it untenable and greatly depreciating its value. On appeal appellant insists that the court erred in giving instructions. Held—That the instructions given were not prejudicial to appellant. Even though the instruction as to the measure of damages may have been erroneous, appellant did not offer any instruction curing the defect. The jury were authorized from the evidence to find for plaintiff.

Ira Julian, T. H. Crockett and W. H. Julian for appellant.

John W. Rodman and Jas. A. Violet for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

The appellee, Howard, owned a storeroom and dwelling house on Main street in Frankfort. In the year 1899 the appellant, without his consent, as is alleged, erected a stone wall about twenty-eight feet long and eighteen inches high immediately in front of and within eight or ten feet of the front door and front wall of his house, thereby elevating the stone wall eighteen inches above the pavement and above the level of the floor of the house and filled the Main street in front of his property upon the level of this wall, and that this fill and wall deprived him of his free and unobstructed ingress and egress to and from his building, and has caused the water, mud and filth from the street to run onto his pavement and into his house to such an extent as to deprive him of the reasonable use and enjoyment of his property; that before the improvement referred to was made he rented his property for \$40 per month, but that since the erection of the street and wall, thereby throwing the water into his house, makes the same untenable, and it can not be rented; that it has caused his property to greatly depreciate in value to his damage in the sum of \$2,000.

The answer of appellant admits the construction of the street, but denies all the other allegations contained in the petition, and alleges that the improvement was made under an ordinance, and was made in a reasonably safe and proper manner, and without injury to appellee's property.

Each party introduced witnesses to sustain their contention. The court instructed the jury, and the jury returned a verdict in favor of appellee. The appellant filed motion and grounds for a new trial; the court overruled same, and the case is here on appeal. The court gave two instructions, and the appellant offered one, which was refused by the court. The second instruction given by the court was more favorable to the appellant than it was entitled to. By it the court told the jury, in effect, that unless they believed, by the negligence of the appellant's servants in the construction of the street improvements, water was caused to run from the street onto appellant's property to his injury, then they should find for the appellant. By this instruction the court took from the jury the question as to whether or not, by reason of the improvement, his ingress and egress to the property was interfered with. The objection of the appellant to the first instruction given by the court as to the measure of damages is not well taken. Even if the court erred, the appellant did not offer any instruction curing the defect, and, besides, it offered an instruction on this point similar to the one given by the court.

The appellee introduced six witnesses, who testified that appellee's property was damaged to the extent of from \$1,000 to \$2,000. The appellant introduced six witnesses who testified in effect that he was not damaged to any extent. It was the province of the jury trying the case to pass upon this issue of fact, and by the evidence they were authorized to find a verdict either way. We do not feel authorized to disturb their verdict.

Wherefore, the judgment of the lower court is affirmed.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

TROSPER v. COLLINS.

(Filed June 2, 1903—Not to be reported.)

Specific performance of contract—Tax sale—Trusts—Appellee brought this action to obtain a conveyance of a tract of land for which he holds a title bond executed by the husband of appellant. He alleges that appellant holds same without right, claiming same under a pretended tax sale. In her answer appellant alleges that the land was bought and paid for with money belonging to her, but that the conveyance was made to her husband in violation of his promise to have same conveyed to her, and that he subsequently made said conveyance to her in recognition of the trust imposed upon him, and that she purchased the tax title to remove a cloud from her title. The title bond was not filed in the action, nor was any proof taken, and the court refused her claim and ordered a conveyance in accordance with the title bond. On appeal, Held—That the petition of appellant appears to be defective in several particulars, but appellant's answer presents an equitable defense, and a reversal is had to permit preparation of the case if appellee desires to proceed further.

James M. Robinson and James M. Hays for appellant.

James D. Black for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by appellee in the Knox Circuit Court to recover of appellant a tract of land lying in Knox county. The petition, in substance, sets out the following grounds of recovery: That appellee purchased the land in controversy from one W. H. Trospers, who gave him a title bond, which is not filed as an exhibit, wherein he agreed to convey appellee the fee-simple title to the land by sufficient deed, but failed to do so; that appellee took possession of the land under his purchase, and it was listed for taxation as his property in the year 1891, and was sold by the sheriff for the tax thus assessed against it in December, 1891; that the sale was illegal and void for the alleged reason that no tender of a tax receipt was

ever made him by the sheriff, and he had, and owned at the time of the sale of the land, personal property in Knox county of greater value than the amount of the tax, out of which it could have been made, and that the sale of the land was not legally advertised, etc.

One T. B. Disney bought the land at the tax sale for the amount of the tax, \$13.31, and thereafter assigned to Alex. Trosper the benefit of his purchase, but the land was thereafter, and by his direction, conveyed the appellant, Alice Trosper, by deed from the sheriff, although before the expiration of two years from the date of the sale, and before the conveyance from the sheriff to appellant, appellee tendered to Alex. Trosper and to Disney, the purchaser at the tax sale, the amount of the tax for which it had been sold, with the interest and damage allowed by law, which was refused, and a similar tender was made to appellant by appellee in redemption of the land after the conveyance to her from the sheriff, but this tender was likewise refused. This action was then brought to compel the acceptance by appellant of the tax for which the land was sold, together with the interest and damages provided by law, and to effect the redemption of the land and its restoration to appellee, in pursuance of which object a tender was made of the necessary amount with the petition.

A demurrer was filed by appellant to the petition and overruled by the court, and she then filed answer, in the first paragraph of which it is denied that appellee acquired any title to the land in controversy by the title bond from her husband, or that he paid her husband any sum for the land, or that he ever had possession of the land.

In the second paragraph of the answer it is averred that appellant was a married woman at the time of the execution of the title bond to appellee by her husband, and that she was then, and is now, the owner of the land which was bought and paid for with money and property derived by her from her father's estate; that her husband, W. H. Trosper, over her protest and objection at the time, took to himself the legal title to the land, but has since conveyed it to her, and that the title bond from him to appellee was given against her will, and without her consent, which fact was known to appellee at the time he received the title bond, and that her purchase of the tax title was made to remove the cloud cast upon her title by the tax sale, but no claim of title is asserted by her answer on account of the tax sale.

No reply was filed to the answer, and the cause having been submitted upon the pleadings, and without proof, the lower court rendered judgment declaring the tax sale and sheriff's deed void, requiring appellant to accept the sum tendered her by appellee, and directing her to convey the land to appellee by proper deed within the succeeding ten days, and in the event of her failure to do so, that the conveyance be made by the master commissioner.

Appellant refused to execute the deed, whereupon it was made by the commissioner, and appellant prosecutes this appeal to obtain a reversal of the judgment of the lower court. We are of the opinion that the judgment rendered by the lower court was unauthorized by the pleadings. The answer avers that the land in controversy was paid for with money and property of appellant's, which she received from her father's estate, and that the title to the land was conveyed to her husband over her protest and against her ob-

jection, but that he thereafter rectified the wrong done her by conveying her the land. While not so stated, it is perhaps to be inferred that this tardy act of justice was done her by her husband after the execution by him of the title bond to appellee, but if, as averred in the answer, the latter knew that she had paid for the land, and that the title bond given him by her husband was executed without her consent, it can not be true that he was an innocent purchaser; upon the contrary, his conduct in receiving the bond under these circumstances would seem to indicate a probable conspiracy between him and the husband of appellant, the purpose of which was to defraud her.

It is a significant fact that the petition fails to allege that W. H. Trospers at the time of the alleged execution of the title bond held the legal title to the land, and it is not averred either what consideration was paid him by appellee for the land. It is usual in executing title bonds to set out in them the consideration paid, or to be paid, for the land mentioned therein, but we find that appellee, for some unaccountable reason, has failed to make the title bond an exhibit in this case. It is denied in the answer that he paid anything for the land. It is also strange that appellee should have delayed the bringing of this action so long. According to the statements of the petition he received the title bond some time previous to 1890, the tax sale occurred December 28, 1891, yet this action was not brought until April 3, 1902, nor was there any effort made by him in all this time to obtain of his alleged vendor a deed conveying him the legal title to the land according to the terms of the title bond.

In view of the foregoing facts, and of the uncontroverted averments of the answer, we do not hesitate to declare that the judgment of the chancellor should be reversed, and unless it should be the desire of appellee to controvert the affirmative matter of the answer by reply, judgment should be entered declaring appellant to be the owner of the land, and removing any cloud that may have been cast upon her title by the tax sale, for in the present condition of the pleadings enough is shown to indicate that the manner in which appellant's husband acquired title to the land in controversy created a trust in her behalf which he recognized by afterwards conveying her the land, the circumstances of which appear to have been known to appellee when he received of the husband the title bond.

Such trusts have frequently been enforced by this court, as will be seen by reference to the following authorities: *Latimer v. Glenn*, 2 Bush, 535; *Miller v. Edwards*, 7 Bush, 394; *Campbell v. Campbell*, 79 Ky., 395, and *Webb v. Foley*, 20 Ky. Law Rep., 1207.

Upon the return of the cause to the lower court, if a reply is filed by appellee, appellant should be allowed by amendment to make more specific her answer upon any point material to her defense or claim of title.

Wherefore, the judgment of the lower court is reversed, with directions to the lower court to set aside the commissioner's deed to appellee and for such further proceedings as are not inconsistent with the opinion herein.

WARD v. TRIPLE-STATE NATURAL GAS AND OIL CO.

(Filed June 2, 1903.)

Condemnation of land—Compensation—Damages—Appellant, by a written contract with the fiscal court of Martin county, granted an easement to the public to maintain a highway. Afterwards the fiscal court granted to appellee the right to lay a gas main under the roadway. Appellant brought this action to recover compensation from appellee for the taking of his land as well as for damages done to his adjacent property by reason of overflows from an adjacent stream, caused by the construction of said gas main. Held —That the fiscal court, only having an easement in the land for a roadway, could not, by any grant it could give, affect the rights of appellant in the ownership of the land. The laying of the gas main under the surface of the highway in a rural district is an additional servitude, and the owner of the land is entitled to compensation as such, and not as matter of damages. It is not material whether it damaged his other property, or any of his property, for as the property taken was appellants, appellee is liable to him for its value. In addition appellee was liable to appellant for whatever damage resulted to his adjacent premises, if any, caused by its unauthorized use of its pipe line along the roadway. But he is not entitled to compensation for laying the pipe line afterwards in the roadway, to which the fiscal court obtained the fee-simple title, unless it caused special damage to him.

W. R. McCoy for appellant.

Hager & Stewart and Kirk & Kirk for appellee.

Appeal from Martin Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was the owner of certain lands over which he had granted an easement to the public to maintain a highway. This grant was in the nature of a contract made in 1887 with the fiscal court of Martin county. Its material part, so far as the question here is involved, is as follows:

"Whereas, The public road, or a portion of same, running over the land of first parties has washed away, and all parties being desirous of procuring a road for the public, and in order to get a road for immediate use for the public, the first parties this day bargained and sold to Martin county a public road over their lands," etc.

Thereafter the fiscal court of Martin county granted to appellee the right to lay a main as a conduit for its natural gas under the roadway above mentioned. Appellant brought this action to recover compensation from appellee for the taking of his land, as well as for damages done to his adjacent property, because the construction of appellant's pipe line caused his land to wash away by overflows of an adjacent stream. Appellee defended under a claim of right under the license granted to it by the fiscal court of Martin county, asserting that Martin county was the owner of the strip of land over which the road passed, and which it had used.

The language of the above-named contract, in our opinion, granted to the fiscal court of Martin county merely an easement or roadway over appellant's land, he retaining the title to the fee. This being true, it was not competent for the fiscal court of Martin county, as owner of the servient estate, by any conveyance or license it may have granted appellee, to affect appellant's right or title in, or impose an additional servitude upon, the dominant

estate; that the laying of the gas main under the surface of the highway, in a rural district, is an additional servitude, there can be no doubt. (*Kincaid v. Indianapolis Natural Gas Co.*, 124 Indiana, 577.) The action of the fiscal court was competent only to grant such right as the county had in the premises transferred; but neither the county nor other power could appropriate or authorize the taking of the citizen's private property even for a public use without compensation first being made to the owner.

In 1899, about a year after the acts complained of above, the action of the stream had cut away the land over which the road was located, and the fiscal court of Martin county made another contract with appellant, by which it acquired the fee to another strip of land for the purpose of constructing the road over it. Appellee, under the license from the fiscal court, moved its pipe line to the new roadway.

Without quoting the language of the last-named conveyance, it is sufficient to say that, in our opinion, it unequivocally conveys the fee to the fiscal court. Obviously appellant has no legal ground of complaint at the county's allowing the gas company to lay its main under its road, to which the county owned the fee, provided the work had not been done in a negligent manner, to the special damage of appellant. There was nothing shown in this case justifying a recovery for the second construction of the pipe line, made after the washout in 1899. The manner of eliciting the facts by the interrogation of the witnesses upon the trial was not such as to bring out clearly the elements of appellant's damages. The facts shown, however, entitled him to have recovered something for the taking of his land in laying the line in 1898 and January, 1899, and possibly for damages beside to his other land. It was, therefore, error for the court to have granted appellee a peremptory instruction at the close of appellants testimony. Appellant's cause of action set out in his pleadings, and shown by his proof, was to recover first from appellee the value of his estate taken and used by it in the construction of its pipe line under the roadway over his property, and made in December of 1898 and January of 1899. This he was entitled to, not as a matter of damages, but as compensation. It is not material whether it damaged his other property, or any of his property, for as the property taken was appellant's, appellee is liable to him for its value. In addition, appellee was liable to appellant for whatever damage resulted to his adjacent premises, if any, caused by its unauthorized construction of its pipe line along the roadway, and this he is entitled to without reference to whether the laying of the pipe line was negligent or not, for if the appellee had not the right to build the pipe line at that place and time, yet did so, it must answer to the owner of the estate for such damages resulting to his property as were the natural and proximate result of the wrongful act.

The judgment is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

JONES, &c. v. GRIFFIN, &c.

(Filed June 2, 1903—Not to be reported.)

1. Ejectment—Pleading—Improvements—Tax sales—This was an action in ejectment brought in equity by the heirs of G. to recover possession of land which they alleged their ancestor owned and possessed at the time of his

death. Appellants were made defendants and answered, denying the title of G., or the claimants under him. They further allege that they were the remote vendees under a tax title, and had made valuable and lasting improvements on the land, for which they asked to be compensated in the event that their title should be adjudged insufficient. A demurrer was sustained to said answer. Held—That said demurrer was improperly sustained to said answer as it was sufficient in so far as it was a denial of heirship and plaintiff's title, and a judgment for plaintiffs was unauthorized without proof of heirship and title. Plaintiffs, in ejectment, could only recover on the strength of their own title. Appellants should be permitted to amend their answer setting up their tax title; also making more specific their claim for improvements.

2. Warning order—A warning order against nonresidents which does not state the name of an attorney appointed to defend for said nonresidents, and which is not signed by the clerk, is insufficient to bring defendants before the court, and a judgment rendered thereon was premature.

R. L. Ewell for appellants.

A. W. Baker for appellees.

Appeal from Jackson Circuit Court.

Opinion of the court by Judge Settle.

This is an action in ejectment, though brought in equity, it being averred in the petition that appellees, together with Lon Griffin and Lucinda Jones, whom they make defendants and proceed against as nonresidents, are children and grandchildren and the only heirs at law of one William Griffin, deceased, who at the time of his death owned and was in the possession of the tract of land described in the petition, and lying in Jackson county, this State; that by his death the same became their property; and, further, that this land is wrongfully held by and is in the possession of the appellants, against whom judgment was asked for its recovery.

The answer denies the former ownership of the land by William Griffin, deceased, and also the heirship of appellees, and of Lon Griffin and Lucinda Jones, or that they or any of them are the owners or entitled to the possession of the land, and in addition avers that the land was sold by or forfeited to the State for taxes due thereon, and that one Jack Drew became the purchaser thereof for a valuable consideration, and received a deed therefor from the auditor, whereby the title was conveyed in due form, which deed was properly recorded, as shown by the certified copy thereof filed with the petition.

It is further averred in the answer that after his purchase of the land it was by deed sold and conveyed by Jack Drew to John C. Drew, who was the former husband of the appellant, Fanny Jones, but that the deed was never recorded, though John C. Drew was placed in possession of the land by his vendor and continued in the possession of same until his death; that he left surviving him his wife and four children, who have continued in and now hold the possession of the land, claiming it as their own adversely to and with the knowledge of appellees, and that they and the appellant, John W. Jones, who is the present husband of Fanny Jones, formerly Fanny Drew, have in good faith erected and made lasting and valuable improvements on the land, whereby its value has been doubled, and which, together

with the taxes paid by them on the land, will amount to \$200, and to the end that they might recover this sum, in the event the court should hold that they were not entitled to the land, the answer was made a counterclaim against appellees, and a judgment asked against them.

A demurrer was filed by appellees to the answer and counterclaim of appellants, which was sustained by the lower court, and appellants failing to plead further, judgment was rendered declaring appellees the owners and entitled to the possession of the land; also allowing them their costs, and directing the clerk to issue a writ of possession in their behalf, if the land was not surrendered to them within fifteen days after the entering of the judgment. Appellants complain of the judgment of the lower court, and the case is now before this court by appeal.

We are of opinion that the judgment was unauthorized. As already stated, the action, though brought in equity, is one of ejectment, and as the title of appellees' ancestor, as well as their heirship, is put in issue by the denials of the answer, to that extent, at least, it presented a good defense, thereby requiring of appellees proof to establish, first, William Griffin's ownership of the land at the time of his death; and, second, the heirship of appellees.

Where there is a denial by the defendant of the title of the plaintiff in ejectment the latter must recover, if at all, upon the strength and sufficiency of his own title, and not the weakness of that of his adversary, for he may be defeated if it be shown that a title superior to his is held by another, though that person be not a party to the action. From this view of the case, it follows that the lower court erred in sustaining the demurrer to the answer. Furthermore, we are of opinion that the appellants should be given a further opportunity to amend their answer, by specifically setting forth the proceedings whereby the land in controversy was sold for taxes, and how the title thereto became vested in the Commonwealth, in order that it may be determined whether or not the deed from the auditor to Jack Drew, through whom appellants claim title, passed to the latter a valid title to the land. The answer should also by amendment be made more definite in regard to the improvements made by appellants upon the land in controversy, so as to set forth their character, use and value, for if it be made to appear that they were valuable and necessary to a proper use of the land, and were made with the knowledge of, and without objection from, appellees, and with an honest belief upon appellants' part that their title derived through the auditor was valid, we know of no rule that would exclude them from claiming reasonable compensation for the value of such improvements, to the extent, at least, that they increased the vendible value of the land. (*Bell's Heirs v. Barnett*, 2 J. J. M., 520; *Hawkins, &c. v. Brown*, 80 Ky., 186.)

It is disclosed by the record in this case that Lon Griffin and Lucinda Jones, alleged joint owners with appellees of the land in controversy, are not properly before the court. They are, as has been stated, proceeded against as nonresidents, but it will be found that the warning order is defective in that it fails to name an attorney to defend for the nonresident, and, besides, it has not been signed by the clerk of the court in which the action is pending. It is manifest, therefore, that the case was not ready for sub-

mission, and that the rendition of the judgment complained of by appellants was premature, as well as otherwise erroneous.

For the reasons indicated the judgment is reversed and the cause remanded, with direction to the lower court to set aside the judgment and the order sustaining the demurrer to the answer, to overrule the demurrer, and for further proceedings consistent with the opinion herein.

LYTLE v. NEWELL.

(Filed June 2, 1903—Not to be reported.)

Immoral contract—Instructions—On the second trial of this action the court properly instructed the jury that if the contract sued on ostensibly for labor was entered into by the parties with the purpose and understanding by both of them that it was to facilitate or that its object was the sexual intercourse between them, and that if it did, then they should find for defendant. The finding for the defendant will not be disturbed.

A. E. Cole & Son for appellant.

E. L. Worthington and John L. Whitaker for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge O'Rear.

On a retrial of this case since the last appeal (for former opinion stating the facts see 24 Ky. Law Rep., 188) the jury returned a verdict for the defendant (appellee). The instructions submitted to the jury whether the contract sued on, ostensibly for labor, was entered into by the parties with the purpose and understanding by both of them that it was to facilitate or that its object was the illegal sexual intercourse between them; and that if it did, then the jury were told to find for the defendant.

Concerning the plea of limitation, the court told the jury that for all the time previous to the last five years before the institution of the suit the contract was barred, although the jury might believe it was not an immoral contract. Complaint is made of this instruction. But we are unable to see that it was erroneous or prejudicial, for there was no evidence of a promise or recognition by the defendant at any time within five years of his obligation to pay for any services anterior to that date. Furthermore, the jury having found against the validity of the contract, the question of limitation became an immaterial one. If defendant was never bound by the alleged contract, appellant could not be prejudiced by any instruction that might have been given on the subject of limitation.

Complaint is made that appellant was not permitted to be recalled as a witness in her own behalf. There is no avowal in the record showing the circumstances or time when the motion was made, nor the facts which it was proposed to be established by her, if permitted. Upon the whole record we see nothing prejudicial to appellant's substantial rights.

Judgment affirmed.

SEBREE v. COMMONWEALTH.

(Filed June 2, 1903.)

Taxation—Auditor's agent—Omitted property—This proceeding was an information filed in the county court by an auditor's agent to have assessed personal property belonging to appellant which was omitted from assessment. No denial of the statement was made in the county court, and judgment by default was rendered, directing the assessment to be made. An appeal was prosecuted to the circuit court, and no denial of the statement was made there, and that court dismissed the appeal. On appeal from that order appellant insists that the assessment was invalid because no summons was issued on said statement within five days after it was filed. Held—That this objection is not tenable as the statute is merely directory, as the Commonwealth would not lose its right to proceed against the omitted property because some subordinate officer has failed to promptly discharge his duty. He also insists that the rights of the auditor's agent who instituted this proceeding ceased with the term of Auditor Stone, and, therefore, he had no authority to prosecute same. Held—That there is nothing in the record to show that the agent was removed at the end of Auditor Stone's term, or that he is not the present auditor's agent. As the proceeding is for the benefit of the Commonwealth, it is the real party, and the auditor's agent is not an important or material party, and the change in that office can not affect the proceeding.

J. C. B. Sebree for appellant.

Jas. B. Finnell for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge O'Rear.

L. F. Sinclair, auditor's agent under Auditor Stone, began proceedings against appellant to require him to list for taxation certain omitted properties for certain designated years. The statement was filed in the county court as required by statute. For some reason, not explained in the record, the summons was not issued upon this statement within the five days directed by the statute. It is now contended for appellant that as this was not done, although summons was in fact issued upon the statement and executed upon the recusant taxpayer, the action of the county court in listing the omitted property for taxation was void.

We are of the opinion that the provision of the statute requiring the clerk of the county court to issue a summons against the taxpayer within five days after the filing of the statement is directory only to the clerk. It can not, and ought not, to affect the right of the Commonwealth to proceed against the omitted property because some subordinate officer has failed to promptly discharge his duty. The right of the taxpayer is merely to have a summons issued upon the statement served upon him more than five days before the term at which the court may proceed to try and determine the case. (Section 4241, Kentucky Statutes.)

It is also contended for appellant that when Auditor Stone's term of office expired that the terms of all the auditor's agents of the State terminated with it; that, therefore, Sinclair had no right to prosecute the claim. For aught this record shows, Sinclair had not been removed as auditor's agent at the time of the proceedings in this case.

Section 4258, Kentucky Statutes, allows the auditor of public accounts to appoint an agent in each county of this Commonwealth, who shall hold his office and be removed at the pleasure of the auditor. It is made his duty, by section 4260 of the statute, to cause to be listed for taxation, in the manner required by law, all property in the county for which he may be appointed, and which may have been omitted to be assessed by the assessor or other tax officials.

This court held in the case of *Smith v. Coulter*, Auditor, 23 Ky. Law Rep., 2384, that a clerk appointed by the auditor, and whose term of office was the same as that of the auditor, and who by statute continued to hold his office until removed by the auditor, continued to hold after the expiration of the term of the auditor who appointed him, and held until removed by an order or action to that effect. The same principle applies to the question in hand. But we do not deem it material to the rights of the parties to this litigation whether Sinclair continued to hold office as auditor's agent till the final trial of this case. The auditor's agent is not a party to this proceeding, nor is his presence essential. The action is one in the name of the Commonwealth, instituted by, or upon information furnished by, or upon motion of the auditor's agent, or the sheriff of the county. If he had died after the action had been begun it would not have been necessary to have revived it. His successor in office, or the sheriff, would merely have been authorized to have controlled the proceedings so far as the statute permitted such control, nor could the resignation of the auditor's agent have terminated the action. The proceeding is for the State, and on its behalf, and on behalf of the county, to require the listing of property which the taxpayer and taxing officers have omitted.

Appellant suffered judgment by default in the county court. Upon appeal to the circuit court he did not file an answer controverting the allegations of the statement filed by the auditor's agent, nor did he make or offer any defense to the merits of the case. Up to this time the allegation that he had omitted to list his property for taxation for the years mentioned stands confessed. The circuit court dismissed the appeal, which left the judgment of the county court taxing the property in effect. We think it would have been more regular upon the state of the record for the circuit court to have affirmed the county court's judgment, but the form of the order is not material, as the result is the same in either case.

No showing having been made against the right of the State to have the omitted property assessed, the judgment is affirmed.

UNION BOILER AND TUBE CLEANER CO., &c. v. LOUISVILLE RY. CO.

(Filed June 2, 1903—Not to be reported.)

Contracts—Pleading—Exhibits—Appellant made a contract renting to appellee a machine for cleaning boilers, under a written contract, by which appellee agreed to pay a rental of \$300 for the first year, and the rental to continue after first year at appellee's option, with the privilege of purchasing same. This action was brought to recover a balance of \$300 rent, it being alleged in the petition that the company was bound for five years' rent and had

paid only four of them. The lower court sustained a demurrer to the petition, and the petition was dismissed. On appeal, Held—That said petition was insufficient as the contract does not show an agreement on the part of appellees to pay rent after the first year. Where there is a variance between the pleadings and the exhibit filed with it the latter must control.

John J. McHenry for appellants.

Fairleigh, Straus & Fairleigh for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 8.

Opinion of the court by Chief Justice Burnam.

On the 20th of May, 1897, the appellant, the Union Boiler and Tube Cleaner Co., rented to the appellee, the Louisville Ry. Co., a machine for cleaning boilers. The paper evidencing the contract between the parties recites that it is made upon the following conditions:

"1st. That upon the execution hereof the party of the second part will pay to the party of the first part the sum of \$300 per year as rent, said rental payable on delivery of machine.

"2d. If at any time after the payments for the first year shall have been made, the party of the second part decides to purchase the device under a license and agreement for the sale of the device to be duly executed by the parties hereto, any and all payments theretofore made on account of royalty or rental are to be applied on account of the purchase price, namely, \$1,500, and the balance of said sum to be thereon paid cash. Above rental to continue at party of second part's option after first year by paying \$300 yearly in advance until full price of machine, \$1,500, is paid us.

"3d. In case of failure to pay said yearly sums for a period of ten days after any one of them shall become due.

"4th. That this agreement shall be binding upon the party of the second part for and during the term of one year from the date hereof absolutely, and thereafter for and during the full term of the life of the patent as hereinbefore specified, unless sooner terminated under clauses three and eight of this agreement.

"8th. Upon failure of said party of the second part to keep and perform any of the covenants, promises or conditions herein contained, said party of the first part may, at its option, give notice in writing by mail of such failure to said party of the second part, and upon neglect or refusal of said party of the second part, for ten days after the receipt of said notice, to comply with and perform each and all of said covenants, promises and conditions, said party of the first part may at any time after the expiration of the said ten days terminate and annul this agreement by giving notice in writing by mail to said party of the second part of such termination, and upon giving such notice this agreement, together with the rights and privileges granted hereby to said party of the second part, shall become null and void, and thereupon it shall be lawful for said party of the first part to forthwith enter upon said premises and take possession of and remove said machine. But the party of the second part shall not thereby be released from liability to pay all rentals and other amounts due upon said machine under the terms hereof."

The plaintiff alleges that under the terms of the lease as set out supra the

Louisville Railway Co. was liable for five annual rental installments of \$300 each until the full price of \$1,500 was paid; and that it had only made four payments, leaving a balance of \$300, for which they prayed judgment. The trial judge sustained a demurrer to the petition, and plaintiff has appealed. The written contract between the parties clearly stipulates that the railway company shall pay \$300 per year as rent for the machine in advance, and this rental is to be continued after the first year at their option; and if they shall elect to continue to rent the machine for as long as five years, that it shall belong to them. But there is no obligation that they will continue to pay rent after the first year. There is no allegation that the defendant elected to buy the machine, and there is nothing in the contract which makes this obligatory upon them. The written contract filed with plaintiff's petition does not support the allegations thereof, and the rule is that where there is a variance between the pleadings and the exhibit filed with it, the latter must control. (Boyd v. Bethel, 10 Ky. Law Rep., 370; Kentucky Mutual, &c. v. Logan's Adm'r, 90 Ky., 364.)

We are, therefore, of the opinion that the trial court properly sustained a demurrer to plaintiff's petition.

Judgment affirmed.

MADDOX, &c. v. WALKER'S EX'OR.

(Filed June 2, 1903—Not to be reported.)

Limitation, Statute of—New promise—In this action on an obligation which recognizes the existence of a liability to pay debts which were barred by the statute of limitation and a mortgage executed to secure same, defendant interposed the plea of the statute of limitation as a bar. Held—That said obligation contained a sufficient acknowledgment to revive the debt which had been barred by limitation, and the recovery was properly permitted.

Glenn & Ringo for appellants.

J. E. Fogle and R. D. Walker for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Lizzie Walker, as executrix of Dudley E. Walker, brought this suit against the appellant, E. A. Maddox, to enforce the payment of three notes of \$175 each, due respectively on the 1st day of January, 1877, 1878 and 1879. She alleges that on the 2d day of August, 1898, the defendant, Maddox, executed, acknowledged and delivered to her testator the following written obligation:

"We are indebted to E. Dudley Walker in the sum of \$175, due January 1, 1877, with interest; also \$175, due January 1, 1878, with interest; also \$175, due the 1st day of January, 1879, with interest. To secure these I hereby mortgage to him a tract on which I live of forty acres in Ohio county, the same he deeded to me by a conveyance in the Ohio county clerk's office. The land adjoins Walker's land, also Jim Rice's and Hoker land. The condition is, if these notes are paid off in three years, then the obligation will be null and void; otherwise, the obligation will be in force. I owe Walker a bal-

ance of purchase money, which can be ascertained by looking at the notes first mentioned. Notes paid as specified above. This August 2, 1898.

(Signed) "E. A. MADDOX."

This paper was acknowledged by Maddox before the clerk of the Ohio County Court, and duly lodged for record. Appellee admitted the execution of the note and the mortgage in August, 1898, but plead that more than fifteen years had elapsed from the accrual of the cause of action on each of the notes before the institution of this suit, and relied on the statute of limitation in bar of plaintiffs' right to recover in this proceeding. A general demurrer was sustained to the answer, and defendant appeals. The only question for consideration is whether the mortgage of August 2, 1898, was such a promise or acknowledgment of the debt sued for as took it out of the operation of the statute of limitation.

In order to revive a debt which has been barred by limitation there must either be an express promise to pay it, or such unqualified acknowledgment thereof as raises an implied promise to pay. (McRobert v. Hays, 15 Ky. Law Rep., 400; Warren v. Perry, 68 Ky., 447; Gray v. McDowell, 69 Ky., 475; Tillett v. Lindsey, 29 Ky., 337; Schonbachler, &c. v. Schonbachler, &c., 22 Ky. Law Rep., 316.) In this case there is not only a positive and unqualified acknowledgment of the debts sued for by the defendant, but he executed a mortgage on the land on which he lives in Ohio county to secure their payment. Whilst there is no express promise to pay the debt in the mortgage, one is implied from the unqualified acknowledgment thereof, and the trial court properly sustained a demurrer to his answer in so far as it relied upon the defense of limitation.

Judgment affirmed.

SMITH'S GUARDIAN, &c v. HOLTHEIDE.

(Filed June 2, 1903—Not to be reported.)

Fraudulent conveyances—Laches—Trusts—Appellee brought this action to have cancelled a deed of conveyance which was made to her daughter, as she alleges, in violation of her agreement to have same conveyed to her as she paid the purchase money for same. The conveyance was made more than twelve years before the action was brought, and the deed was duly recorded and appellee lived in the property all that time with her daughter, to whom the deed was made, until her death, and afterwards with another daughter until her death. Held—That appellee presents a stale equity, which the court declines to enforce.

John Roberts and Wm. Furlong for appellants.

A. E. Willson and Morris B. Gifford for appellee.

Appeal from Jefferson Circuit Court, Chancery division, No. 8.

Opinion of the court by Chief Justice Burnam.

On the 27th day of September, 1901, the appellee, Eliza K. Holtheide, brought this suit in equity against the appellants to cancel and set aside a deed from Maggie T. Paine and her husband, A. F. Paine, to Lula M. Holtheide to a house and lot on Chestnut street in Louisville, Ky., which was executed and delivered on the 14th day of August, 1889, upon the ground

that she had furnished to her daughter, Lula M. Holtheide, all or a greater part of the money used in paying for the property; and that her daughter had, without her knowledge or consent, and in violation of the trust imposed in her, taken the title to the property in her own name, but which she did not discover until some time during the year 1899. The Louisville Trust Co., as guardian of the infant defendant, Frederick R. Smith, in answer to plaintiffs' petition deny that the title to the property in controversy was taken to Lula M. Holtheide without the knowledge or consent of the plaintiff, or in violation of any agreement, express or implied, on the part of the daughter to have the title to the property taken to the plaintiff. It also denies that plaintiff had paid all of the consideration therefor. In the second paragraph of their answer they plead and rely upon the ten years' statute of limitation as set out in section 2519 of the Kentucky Statutes. The defendant, R. T. Smith, Jr., in his answer, after relying upon the same defenses as the trust company, in addition alleged that he was married to Lula M. Holtheide in 1894; that she then held the legal title to the house and lot in controversy, and had been in possession thereof from the 14th of August, 1889; that after his marriage he and his wife continued in possession thereof, exercising full and complete ownership over it until her death in 1899, and that plaintiff lived with them in the house during this entire period and asserted no claim of ownership thereto; that in consequence of his marriage to Lula M. Holtheide he is entitled to one-third interest in the whole property, and that the plaintiff was estopped from asserting any claim or title thereto. The plaintiff, in reply to the plea of limitation, relied upon section 2543 of the Kentucky Statutes, which provides that "the provisions of this chapter shall not apply in the case of a continuing and subsisting trust, nor to an action by a vendee of real property in possession thereof to obtain a conveyance."

Upon final submission the chancellor decreed a cancellation of the deed in accordance with the prayer of the petition, and the defendants have appealed.

The evidence shows that some time previous to the purchase of the property in controversy the husband of appellee died, leaving surviving him his widow, the plaintiff, and four children, three daughters and one son. Two of the daughters were married, and the son was a grown man. Lula M. Holtheide was unmarried, and the youngest of the children, and resided with her mother. In the division of the estate of the father each child received about \$5,500, and the widow, in addition to her interest in the estate of her deceased husband, was the owner of a considerable amount of property inherited by her from a deceased brother and sister. The house and lot in controversy was purchased on the 14th day of August, 1889, through a real estate agent, for \$5,300. It had a mortgage on it at the time in favor of the Fidelity Trust and Safety Vault Co. for \$3,300. The amount of this mortgage was paid in cash, \$2,000 thereof having been paid by the check of the plaintiff, and \$1,300 of it by the check of Lula M. Holtheide. Two notes for \$1,000 each, due respectively in one and two years, with interest from date, were executed by Lula M. Holtheide and delivered to the vendor, and the deed to the property was made to Lula with reservation of lien to secure the deferred payment. The deed was immediately recorded. When the

purchase-money notes executed by Lula fell due they were paid by checks of her mother. After the purchase the mother and daughter took possession of the house and occupied it as a home until 1894. During this period the taxes and water charges against the property were made out against Lula, but were always paid by her mother. The mother also paid the taxes on a house and lot on Kentucky street, which had been allotted to Lula in the division of her father's estate. She also paid the necessary repairs on the Chestnut and Kentucky street houses. The house in controversy was seriously injured by a cyclone, and was rebuilt by the mother at the cost of about \$2,000. There is no evidence that the mother ever asserted any claim against her daughter for the repairs on either of these houses. When Lula married the appellant, R. T. Smith, in 1894, he moved into the house with them, and from that time forward until the death of the wife, in 1899, he paid the taxes and repairs on the property, and made provision for the support of the family. During the marriage there was born to them the infant, Frederick R. Smith. After the death of Lula the old lady continued to live with Smith and his child in the house until Smith married Mrs. Buckle, a widowed daughter of the plaintiff, and a sister of his first wife. She still continued to live in the house after his second marriage until after the death of Smith's second wife, and shortly after her death this suit was instituted.

In support of plaintiff's contention, her son, Frank Holtheide, testified that his mother during the lifetime of her daughter always spoke of the property as belonging to her, and that he had frequently heard her ask Lula for the deed, but that she had always evaded the question; that at the instance of his mother he had negotiated for the purchase of the property through Brondurant, the real estate agent, and had succeeded in buying the property for some \$200 less than originally asked; and that after Lula's death in 1899 he had, at the instance of his mother, had the records of the deed examined, and found the title was in his sister's name, and that he reported this fact to his mother. The testimony of Mrs. Tierney is not materially different from that of her brother. The lawyer, Everback, testifies that, at the instance of Lula, he examined the title to this property, and she paid him a fee of \$20 therefor, for which he executed to her a receipt in her own name; that Lula was her mother's financial agent, and attended to her business generally, and that her mother had implicit confidence in her, and that he did not know that the title was in Lula's name until after her death, when the defendant, R. T. Smith, and Mrs. Buckle called to inquire into it.

On the other hand, it is shown that during the lifetime of Lula she and Smith executed a mortgage on the property to the Kentucky Title Co. to secure a loan made to them by the company, and the vendor, Paine, being called as a witness, testified that the property was sold for him by a real estate agent named Bondurant, who had since died; that the sale was consummated in the office of Everback, who represented the purchaser; that there were two ladies present looking after the matter, one of them quite young, and the other an old lady; that he had had no previous acquaintance with them, but understood that they were the parties who had purchased the property; that the young lady signed the notes for the deferred payment

in the name of Lula Höltheide, and that the deed was made to her in the presence of the other.

For ten years after the purchase plaintiff lived in the house with her daughter; she saw her marry, give birth to children and die, without any complaint that she had, in fraud of her rights, taken the title to herself. She still continued to live on the property during the married life of her daughter Kate. It was only after both her daughters had died that she seemed to awake to the realization that she had been defrauded some twelve years before. She was at that time sixty-four years old, and an active and capable woman, while her daughter was only twenty-one. She evidently contemplated spending her declining years with this daughter. Her two older daughters were already provided with homes and husbands, and it was not unreasonable that she should have desired to make provision for her youngest child. It seems to us that the decided preponderance of the testimony conduces to show that the title to the property was taken to the daughter with the knowledge and approval of the mother, and that the money advanced by her towards its payment was intended as a gift.

The claim is a stale one, and the principle expressed in the maxim *vigilantibus non dormientibus æquitas subvenit* should defeat recovery. Lord Camden, in *Smith v. Clay*, 8d Bro. Chancery, announces the principle in these words: "The court of equity has always refused its aid to stale demands, where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive and does nothing."

We do not deem it important, in view of the conclusions we have reached on the merits of the case, to discuss the plea of limitations, but for reasons indicated the judgment is reversed and cause remanded, with instructions to dismiss plaintiffs' petition.

Whole court sitting.

PARK v. WRIGHT.

(Filed June 2, 1903—Not to be reported.)

Homestead—Pre-existing debts—Where a married man inherited land in 1898 and created a debt in 1900, and during the same year executed a mortgage to secure same in which his wife did not unite, and they moved upon the land in March, 1901, and held same until 1902, when the debt was sought to be enforced, the wife was not entitled to claim a homestead in same against said debt. She could only claim the value of her inchoate right of dower.

R. Gudgeon & Son for appellant.

C. W. Goodpaster for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Nunn.

The appellant is the wife of Emmet Park, they having married in October, 1896. By her petition against appellee and her husband, who refused to join her as plaintiff, she states in substance that she and her husband

became bona fide housekeepers of Bath county in the year 1897 and continued to remain as such housekeepers; that in 1898 the father of appellant's husband died and left by his will one-half of a 110-acre survey of land to her husband, Emmet Park. This land was in litigation at that time and the case was pending in the Court of Appeals, and it was finally decided in favor of the devisees under the will in the spring of 1899. She and her husband moved into the dwelling house on this land in March, 1901, and resided there until the filing of this action.

In the early part of the year 1902, by proper proceedings had, a division of this tract of land was made between appellant's husband and his sister; that part of the survey upon which the residence was situated having been allotted to her husband, and that they had owned no other land since their marriage. It also appears from the petition that her husband and one James Barnes were engaged in business as partners in the year 1900, and the firm borrowed \$1,500 from appellee on June 28, 1900, and executed the firm note therefor; that afterwards, and on the 20th day of September of the same year, her husband executed a mortgage to the appellee on his undivided one-half interest in this land to secure the payment of the \$1,500 borrowed by the firm and the mortgage was dated back to the date of the note; that she did not join her husband in this mortgage and was not a party thereto, and that it was executed by her husband without her knowledge or consent, and was a fraud upon her marital rights as the wife of Emmet Park, and she prayed the court to adjudge her entitled, together with her husband, to a homestead of the value of \$1,000 in this land. The lower court sustained a demurrer to this petition and dismissed it, from which judgment she has appealed to this court.

It has been decided by this court in the cases of *Dwelly v. Galbraith*, 5 Ky. Law Rep., 209; *Miller v. Bennett*, 11 Ky. Law Rep., 391, and *Jewell v. Clark's Ex'ors*, 78 Ky., 398, and other cases, that a debtor who acquires title to real estate by descent or devise has the right to claim it as a homestead as against pre-existing debts, and has the right within a reasonable time to enter upon it and claim a homestead. The 11 Ky. Law Rep. case, *supra*, was where the debtor claimant of the homestead entered upon it four months after the descent was cast upon him. The court, in that case, used this language: "There had been no abandonment of the right to enter by the appellant, nor was he required to notify them when they levied on or sold his undivided interest that he would claim a homestead. There was no unreasonable delay in asserting the claim, etc."

In the case of *Creager v. Creager, &c.*, 87 Ky., 451, the court, after discussing the case of *Jewell v. Clark's Ex'or*, which was a case where the debt was created prior to the descent of the land to the debtor, used this language: "As, therefore, the land belonged to the cross appellant at the time he created the indebtedness, and as he was not a housekeeper with a family residing on the land, and as the same was liable to his debts at the time they were created, the presumption is that credit was given him on the faith of this land. So it is readily seen that the reason of the *Jewell* case does not apply to this case. In the former case, *Jewell*, by the acquisition of said land, invested neither money nor other thing to which the creditor had the right to look as a means of payment. But in this case, after acquiring the

land, he obtained credit upon the faith of it, and to allow him a homestead simply for the reason that he acquired the land by descent, would entitle a large portion of the landholders in this State to homesteads in the face of the fact that their indebtedness was created after the descent was cast upon them, and while they were not housekeepers with families residing on the land."

This case is conclusive of the case at bar. The petition shows that the descent of the land was cast upon Emmet Park in the year 1898; that the debt to appellee was created in the year 1900 and mortgage executed the same year; that appellant and her husband never at any time claimed or occupied this land as a homestead until March 1, 1901. At the time of the creation of the debt and the execution of the mortgage appellant only owned an inchoate right of dower in this land as against appellee's debt, and as she did not sign the mortgage, she is still the owner thereof, but is not entitled to it as a homestead.

Wherefore, the judgment is affirmed.

ANDERSON, &c. v. PROCTOR COAL CO.

(Filed June 2, 1908—Not to be reported.)

Pleading—In an action to recover possession of an undivided interest in land the petition was sufficient which alleged that the plaintiffs are the owners and entitled to the possession of the undivided interest in land particularly described therein, and that the defendant was wrongfully withholding the possession from them. Under the Code it is not necessary to set out the evidence of the truth of the statements in the petition.

C. W. Lester and N. A. Richardson for appellants.

R. D. Hill for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Nunn.

On the 25th day of July, 1901, the appellants, C. F. Anderson and others, filed their petition in the Whitley Circuit Court, alleging, in substance, that they, together with the defendants, I. K. and E. M. Anderson, both of whom were infants under the age of twenty-one and over fourteen years, were the only children and heirs at law of Jacob Anderson, who died in the year 1885, and that Jacob Anderson was the son of Cornelius Anderson, who died many years before Jacob Anderson; that Cornelius Anderson at his death left surviving him only three children, namely, Jacob Anderson, father of appellants, and I. K. and E. M. Anderson, Shelby Anderson and Mrs. Upton; that at the time of the death of Cornelius Anderson he was the equitable owner of an undivided one-twelfth part of a certain large parcel of land lying in Whitley county, Kentucky, known as the Morgan and O'Bannon tract, containing 8,000 acres, and describing the land in the petition by metes and bounds; that the interest therein of Cornelius Anderson at his death descended to and vested in his children, Jacob Anderson, Shelby Anderson and Mrs. Upton, each taking an undivided one-thirty-sixth part thereof; that at the death of their father, Jacob Anderson, his undivided one-thirty-sixth interest descended to and vested in these appellants and the

two children named, and that they are now the equitable owners and entitled to the possession thereof; that the appellee, Proctor Coal Co., has the possession of about 3,300 acres of this land and is using and controlling it for its own use and benefit, and alleging that it had mined many tons of coal from it and had failed to account to appellants for any part of same, and had wrongfully detained from them their interest in the coal and the land.

The appellee filed an answer and denied the allegations of the petition, and also pleaded in bar the fifteen-year statute of limitation. Appellants then filed a reply [controverting the plea of the statute of limitation, and then alleged that they were joint owners of the land, and that there was an action pending in the Whitley Circuit Court at the time appellee purchased, in which action the vendors, or the remote vendors, of appellee alleged and conceded that these appellants were the joint owners with them of a thirty-sixth interest in the land, and that appellee, by reason thereof, is estopped from interposing the plea of the statute of limitation. Appellants thereafter offered three amended petitions, alleging, in substance, the facts stated in the reply and the evidences of their title; and on demurrer to each, as offered, the court sustained the demurrer to it, and also to the petition. The last order with reference thereto is as follows: "A demurrer to the petition as amended having been sustained at the regular August term of this court, and plaintiffs given leave to this present special term to further amend their petition, and now on this day plaintiffs in open court declined to further amend, it is ordered that their petition and amended petition be, and the same are, now dismissed, and that the defendant, Proctor Coal Co., recover of the plaintiffs its costs herein expended, to all of which plaintiffs except and pray an appeal to the Court of Appeals, which is granted."

It appears from the record and brief of counsel that there was proof taken and filed in the cause, but there is nothing copied in the record except the pleadings filed and offered to be filed and the orders sustaining the demurrers. The only question before this court for its decision is whether or not the petition sets forth a cause of action.

We are of the opinion that it does. It alleges that the appellants are the owners and entitled to the possession of an undivided one-thirty-sixth interest of the land particularly described therein, and that the defendant was wrongfully withholding the possession from them. Under our Code, a statement of the facts in the petition, without setting forth the evidence of the truth of the statements, is all that is required. The only matter attempted to be set up by the amended pleading offered, not contained in the petition and the reply, was the attempt to set up the evidence of their title and its origin, and this they were entitled to prove without pleading it. As this case will have to be reversed for the reasons given, and tried by the lower court, we expressly refrain from expressing any opinion as to the sufficiency or effect of the evidence offered to be filed with the amended pleadings, or the plea of the statute of limitation by appellee, or the plea of estoppel or avoidance by appellants.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

HYATT v. ANDERSON'S TRUSTEE, &c.

(Filed June 8, 1908—Not to be reported.)

Corporations—Double liability of stockholders—Appellant was a stockholder in a corporation, and on November 3, 1897, it leased, by a written contract from P., a storehouse for a term of five years, agreeing to pay therefor rent at the rate of \$2,400 for the first two years of the term, and at the rate of \$3,000 a year for the remaining three years, payable monthly. On August 10, 1898, appellant sold his stock in the company and in January, 1899, the company failed. The rent of the house was paid until after appellant ceased to be a stockholder. The house remained vacant until October, 1899, and was then leased for the remainder of the term for \$2,400 a year, thus entailing a loss on P. of something like \$3,700. He brought this action against appellant within two years after he had transferred his stock to recover said loss, under section 547, Kentucky Statutes, which renders stockholders responsible for all contracts and liabilities of the corporation to the extent of the amount of their stock at its par value, in addition to the amount of the stock, and that no transfer of stock shall operate as a release of any such liability existing at the time of the transfer, provided the action to enforce such liability shall be brought within two years from the time of transfer. Held—That appellant was liable for the amount sued for under said statute. The word "liability" is a very broad one, and the words "liability existing at the time of such transfer" refer to the previous part of the section, and mean the same thing as the words "all contracts and liabilities of such corporation," used just above. The contract of lease was made while appellant was a stockholder. The corporation became liable by the contract for the monthly payment of rent from the making of the contract until its expiration five years later. This liability existed at the time appellant sold his stock. It is true the installments had not matured for the time that is now in controversy, still the liability existed. The fact that the notes were renewed after appellant sold his stock does not alter his liability.

2. Pleading—Exceptions to commissioner's report—An issue as to amount of rent due should have been presented by answer to the petition. It could not be raised by mere exception to the commissioner's report when the allegations of the petition stood admitted.

3. Parties to action—Creditors who did not present their claims or bring suit against appellant within two years after transfer of his stock not entitled to recover, although P. sued for the benefit of himself and all other creditors. No order permitting him to do so was made within two years. There was no common interest involved. The liability of the stockholder to each creditor was several.

Augustus E. Willson and James R. W. Smith for appellant.

Simrall & Doolan for appellees.

W. L. Doolan for appellee Reccius.

Appeal from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Judge Hobson.

Appellant held fifty shares of stock of par value of \$100 each in the John A. Etheridge Furniture Co., a corporation created under the laws of this State. On November 3, 1897, the company made a written contract with appellee Pettett, by which it leased from him a certain storehouse in Louisville

for the term of five years, agreeing to pay rent therefor at the rate of \$2,400 for the first two years of the term, and at the rate of \$3,000 a year for the remaining three years, payable monthly. On August 10, 1898, Hyatt sold his stock in the company to N. N. Etheridge. In January, 1899, the company failed; the rent on the house was paid as long as Hyatt was a stockholder, and in fact until May, 1899. The house remained vacant until October, 1899, and it was then leased for the remainder of the term for \$2,400 a year, thus entailing a loss on Pettet of something like \$2,700. He brought this suit to recover against Hyatt for this under the double liability statute, suing for himself and all other creditors of the company. The first question to be determined is whether Hyatt is responsible, notwithstanding the transfer of his stock. Section 545, Kentucky Statutes, provides: "The shares of stock shall be transferred on the books of the corporation in such manner as the by-laws thereof may direct, and every person becoming a stockholder by such transfer shall, in proportion to his share, succeed to all the rights and liabilities of prior stockholders."

Section 547 also provides: "The stockholders of each corporation * * * shall be individually responsible, equally and ratably and not one for the other, for all contracts and liabilities of such corporation to the extent of the amount of their stock at par value in addition to the amount of such stock; * * * and no transfer of stock shall operate as a release of any such liability existing at the time of such transfer: Provided, The action to enforce such liability shall be commenced within two years from the time of transfer."

Appellee's action was begun within two years from the time of the transfer of the stock by appellant, but it is insisted that the transferee succeeded to all his rights and liabilities, and that the claim for rent under the lease was not a liability existing at the time of the transfer within the meaning of the statute. The argument is, that as Hyatt could not control the corporation after he sold the stock, and the rent monthly was the consideration for the use of the property, he is not responsible. We are referred in support of this view to *Boardman v. Osborne*, 23 Pick, 295; *Middlesex Bank v. McGill*, 5 Conn., 28, and certain other authorities, but they turned on statutes of different purport from ours. In the Massachusetts case, which is more nearly in point than any of the others, Chief Justice Shaw rests his opinion on the meaning of the word debt. Our statute does not use this word, and its meaning can not be so restricted. One rule with us is that our revision is not to be strictly interpreted, but, on the contrary, its provisions are to be liberally construed with a view to promote its objects. (Kentucky Statutes, section 460.) The purpose of section 547, above quoted, was to secure the creditors of the corporation, and with this end in view it was provided that the stockholders should be individually responsible for all contracts and liabilities of the corporation to the extent of the amount of their stock at par value, and that no transfer of stock should operate as a release of any such liability existing at the time of the transfer, if the action to enforce it was commenced within two years. The rule thus declared by the statute was intended by the legislature to take the place of the conflicting rules adopted by the courts in other States, and under the statute the transfer of the stock has no effect on the liability of the stockholder if the suit is commenced

within the time limited. The contract of lease was made while appellant was a stockholder. The corporation became liable by that contract for the monthly payment of rent from the making of the contract until its expiration five years later. This liability existed at the time appellant sold his stock. It is true the installments had not matured for the time that is now in controversy; still the liability existed. Creditors of corporations and stockholders in them took their rights subject to the statute. The creditors were charged with notice that the stockholder might sell his stock at any time, and thereafter would not be responsible for the contracts or liabilities of the corporation unless suit was commenced against him within two years from the time of the transfer. The stockholder was charged with notice that when the corporation made a contract he continued liable therefor, notwithstanding he sold his stock, if the action was begun against him within two years. The word liability is a very broad one, and the words "liability existing at the time of such transfer," refer to the previous part of the section, and mean the same thing as the words "all contracts and liabilities of such corporation," used just above. In *Benge v. Bowling*, 105 Ky., 575, it was held, under section 1702, Kentucky Statutes, providing that the homestead exemption shall not apply if the debt or liability existed prior to the purchase of the land, that where the defendant conveyed land with warranty and afterwards purchased other land, which he occupied as a home, he was entitled to no exemption in the latter tract as against a judgment against him on his warranty, although the eviction was had after he purchased the homestead. So under the Iowa statute providing that transfers of shares in corporations should not exempt the stockholders from any corporate liability created prior thereto, it was held in *White v. Green*, 105 Iowa, 181, that the word liability was much more comprehensive than the term debt. The court said: "The liabilities contemplated by the statute are not merely obligations which are due and payable when the transfer is made. Liability in a legal sense is the state or condition of one who is under obligation to do at once, or at some future time, something which may be enforced by action. It may exist without the right of immediate enforcement." (*Fisse v. Einstein*, 5 Mo. App., 78; *Home Ins. Co. v. Peoria, &c., R. R. Co.*, 178 Ill., 64; *Pittsburg, &c., R. R. Co. v. Clark*, 29 Pa. St., 146; *Cochran v. U. S.*, 157 U. S., 296.)

This seems to us a sound rule, and to be the necessary meaning of the statute fairly interpreted with a view to promote its object. The fact that the notes were renewed after appellant sold his stock, or accounts were thereafter closed by note, does not affect his liability. This was a mere change of the evidence of the debt. The giving of a new note did not change the existing status. The creditor had a right to look to both the corporation and the stockholder. The stockholder was jointly liable with the corporation. He did not stand as surety for it, and continued liable, although a new note was executed, unless the debt was in fact extinguished. (*Morawetz on Corporations*, section 879; *Continental National Bank v. Burford*, 114 Fed. Rep., 290; *Young v. Rosenbaum*, 39 Cal., 646.)

Complaint is made as to the amount adjudged some of the appellees, but no issue was made by the pleadings as to the amount of the debts, or as to whether they were created before August 10, 1898. It was incumbent on ap-

pellant to answer the petition filed by the creditors and raise an issue on this question if he desired to make the point. It can not be raised by mere exception to the commissioner's report when the allegations of the petition stood admitted. But as to the appellees, Frank Reccius and Borgwardt & Ernst, a different question is raised. They did not sue within two years. They filed their claims before the commissioner after the expiration of the two years from the time of the assignment. It is true Pettet sued for himself and all other creditors, or rather asked that he should be allowed to do so; but the court made no order allowing this within the two years. Besides, we do not see that any question of general or common interest was presented, or that the creditors were so numerous that they could not have been brought before the court within a reasonable time. The liability of the stockholder to each creditor was several. No creditor had any interest in the liability of the stockholder to any other creditor. His only interest in the action was to obtain a personal judgment in favor of himself for his own debt.

The judgments in favor of Frank Reccius and Borgwardt & Ernest are reversed. The judgments in favor of the other appellees are affirmed.

DUKER, &c. v. BARBER ASPHALT PAVING CO.

(Filed June 3, 1903—Not to be reported.)

Street improvements—In this action to enforce a lien under an apportionment warrant for paving a street with asphalt against property belonging to appellants, they urge as objections to the enforcement of said lien that the assessment is so exorbitant as to amount to spoliation; that the lands are not subject to the assessment as they are agricultural lands; and, further, that as appellant owns only a life estate in the land the amount for which her interest should be assessed can not be ascertained. Held—That the judgment of the council as to the kind of improvement adopted and benefits to be derived therefrom is generally conclusive, and the courts will not attempt to interfere with their discretion unless the assessment is so great as to amount to spoliation, which is not shown in this case. It is no objection to the assessment that the lands are used for agricultural purposes. The question as to appellant's interest in said land being only a life estate, presents no objection to this proceeding as the lien is against the land alone.

Lane & Harrison for appellants.

F. W. Morancy and Wm. Furlong for appellee.

Appeal from Jefferson Circuit Court, Chancery division, No. 1.

Opinion of the court by Chief Justice Burnam.

On the 21st day of August, 1899, the mayor of the city of Louisville approved an ordinance theretofore passed by the general council of the city for paving with asphalt the carriage way of Baxter avenue from the center of Melrose avenue to the city boundary line. Pursuant to specifications previously drawn by the board of public works of the city of Louisville a contract was made with the Barber Asphalt Paving Co. for the construction of the street under the ordinance on the 26th of October, 1899. The company

complied with its contract, the work was examined and accepted by the city, and the cost of the improvement was charged to the property fronting the improvement, running back to a depth of 192 feet, and apportionment warrants issued therefor. Two of these warrants, for \$3,161.23 and \$201.32, respectively, were charged to lots in the possession of the appellant, Rosina Duker, and she having declined to pay them, the company instituted this suit to enforce their statutory lien against the property. In addition to the usual defenses relied on in proceedings of this character as to the regularity of the passage of the ordinance, the letting of the contract, etc., the defendant pleads, first, that the lands can not be constitutionally subjected to the assessment against them because they are used for purely agricultural purposes, and receive no substantial benefit from the improvement; second, that she only owns a life estate in the land, and is unable to ascertain or determine the amount of the apportionment warrants for which her life estate is liable; third, that the assessment against her property is so exorbitant as to amount to spoliation, and if enforced will deprive her of her property altogether.

It appears from the testimony that the charge against appellant's property for the improvement is slightly in excess of \$5 per front foot, while the testimony conduces to show that its salable value is certainly not less than \$10 per front foot, if subdivided into building lots running back a depth of 192 feet. In considering a similar question as to spoliation, in the recent case of the City of Louisville v. Bitzer and Bitzer v. Fulton's Ass'ee, 24 Ky. Law Rep., 264, this court said: "The rule is that while these assessments rest upon the basis of benefits, or presumed benefits, to the property assessed, it is not essential to their validity that actual enhancement in value or other benefits to each owner should be shown, the judgment of the city council being conclusive as to the propriety of the improvement. On the other hand, it is held that when, owing to the extraordinary facts, the presumption on which the rule rests does not apply, and to force the owner to make the improvement is to confiscate his property without compensation, this is spoliation, and will not be enforced. In other words, the judgment of the legislative municipal authorities is held conclusive in all cases of doubt as to these matters, but where the total value of the property taxed after the improvement is made is less or no more than the cost of the improvement, there is no room for difference of opinion, that to enforce the lien is to take from the owner his property without compensation. In no case decided by this court has this been approved, and while we are unwilling to extend the rule, it has been so often laid down that it can not now be departed from. It may be objected that logically the rule should be to reject all assessments in excess of the benefits received by the property owners, and not to confine its operation to cases where the assessment equals the value of the property when improved. But in every system of taxation exact equality of benefits among those taxed is never attainable."

Tested by this rule, the proof in this case fails to show a case of spoliation, and the fact that land within the city limits is altogether used for agricultural purposes does not exempt it from local assessments for street improvements. In Smith on Municipal Corporations, section 1236, the rule is thus stated: "Property within the limits of a city which is unplatted is liable to

special assessment for local improvements, as if laid off in blocks and lots; and for farming lands within the limits of a town are subject to taxation by the town authorities, and it is not essential that they receive benefits and protection. Urban property may be assessed for local improvement though not divided into lots, and though used for farm purposes, if the surrounding property is urban property. It is sometimes difficult to determine whether the property is city property and liable for local improvements, or whether it is rural and not subject to assessment. But no hard and fast rule on the subject can be laid down. It necessarily depends on the special circumstances of the case."

This rule was approved in the recent case of the Barber Asphalt Co. v. Garr, &c., 24 Ky. Law Rep., 2234. And whilst we may well doubt the necessity for substituting a Barber asphalt pavement for a macadam turnpike road upon the remote outskirts of a city like Louisville, under the law this matter has been left to the sound discretion of the municipal authorities, and the courts, except in case of spoliation, are powerless to afford relief.

Appellant's remaining contention, that she is unable to determine the amount with which her life estate in the property should be charged, presents a vexatious and troublesome question. But when we remember that the lien of the company for street improvement is against the land itself, and not against the owners, it necessarily follows that if the land is subjected the complete fee-simple title should be sold. As between the life tenant and the remaindermen this question must be determined in accordance with the values of their respective interests in the land. But the lien holder is entitled to have his lien enforced against the entire lot, although it may result in this case in depriving the owners of a large part of their property without their consent, and without having received any substantial pecuniary advantage from the improvement, which they are by the law compelled to answer for.

Judgment affirmed.

TRAVELERS INSURANCE CO. v. DUVALL.

(Filed June 3, 1908—Not to be reported.)

Insurance—Instructions—Appellant issued to appellee, a deputy sheriff of Owen county, a policy of insurance, by which it agreed to indemnify him in the sum of \$10 a week for a period of not more than twenty-six weeks during which he should, independently of all other causes, be continuously and wholly disabled and prevented by diabetes from transacting any and every kind of business pertaining to his occupation. This action was brought to recover for disability from said cause for twenty-six weeks. On the trial the court gave an instruction which authorized the jury to find for plaintiff if they believed from the evidence that he was for twenty-six weeks wholly and continuously prevented by diabetes from transacting his business, and a verdict resulted in favor of plaintiff. On appeal it is urged that the court erred to the prejudice of appellant in refusing to add after the word "diabetes" the words "independently of all other causes." Held—That the omission of said words was not prejudicial.

Moody & Bourne for appellant.

Lindsay & Botts for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Hobson.

Appellant issued to appellee, a deputy sheriff of Owen county, a policy of insurance by which it agreed to indemnify him in the sum of \$10 a week for a period of not more than twenty-six weeks, during which he should "independently of all other causes be continuously and wholly disabled and prevented by * * * diabetes * * * from transacting any and every kind of business pertaining to his occupation." He filed this suit to recover on the policy, alleging disability for twenty-six weeks by reason of diabetes. It is unnecessary to determine now whether the petition was sufficient, as the defect, if any, was cured by the answer, which set out the terms of the policy, and pleaded that his disability, if it existed, was not caused by diabetes independently of all other causes. The proof was very conflicting. At the first trial the jury disagreed, but at the second trial they found a verdict for the plaintiff. The evidence was sufficient to warrant the submission of the case to the jury, and their verdict is not so against the evidence as to justify us in disturbing it on that ground. The main ground relied on for reversal is the action of the court in giving and refusing instructions. The instruction given by the court is as follows: "The court instructs the jury that if they shall believe from all the evidence in this case that the plaintiff, Alford Cobb Duvall, was at any time from the 1st day of May, 1901, to the 31st day of October, 1901, continuously and wholly disabled and prevented by diabetes from transacting the business pertaining to his usual occupation, you will find for the plaintiff at the rate of \$10 per week for such time as you shall, from the evidence, believe he was continuously and wholly disabled and prevented by diabetes from transacting the business pertaining to his occupation, not exceeding in all twenty-six weeks in time and \$260 in amount."

The defendant asked this instruction, which was refused: "Although the jury may believe from the evidence that the plaintiff was sick and wholly prevented from transacting any and every kind of business pertaining to his occupation as deputy sheriff from May 1 to October 31, 1901, or during any part of said time, yet unless they further believe from the evidence that said disability was caused by diabetes, independent of all other causes, they should find for the defendant."

The complaint is that the instruction of the court is erroneous, in that it omitted the words "independently of all other causes" after the word "diabetes." But it will be observed that by the instruction of the court the jury were only authorized to find for the plaintiff for such time as they believed from the evidence "he was continuously and wholly disabled and prevented by diabetes from transacting the business pertaining to his occupation." Under this instruction the jury could not have found for the plaintiff for any disability not resulting from diabetes, and this seems to be the proper construction of the policy. If the plaintiff had some other malady besides diabetes, he would be entitled to recover on the policy, if the diabetes disabled him from transacting the business pertaining to his occupation, without regard to his other malady. In other words, if he had both diabetes and

prostititis, either of which was sufficient to disable him entirely from transacting his business, the fact that he had prostatitis, as well as diabetes, would not prevent his recovering upon his policy if the diabetes disabled him from following his calling. The meaning of the policy is that he can not recover unless the diabetes, by itself and without reference to the other disease, disabled him; but if he was thus disabled the fact that he labored also under some other disability would not impair his right of action. A policy of insurance is construed more strongly against the company, and under this rule the words "independently of all other causes" can not be allowed to control the other words of the clause giving a right of indemnity for disability caused by diabetes.

Judgment affirmed.

ELLIOTT, &c. v. HAUN, &c.

(Filed June 3, 1903—Not to be reported.)

Title—Statute of limitation—In this action involving a conflict of title to land between appellants and appellees, the proof showing that appellees and those under whom they claimed had been in adverse possession for more than thirty years, their title was properly adjudged the better. Besides, appellant's contention having been previously adjudged against her, she is bound thereby.

W. R. Black for appellants.

B. B. Golden for appellees.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Mary Elliott, brought this suit against the appellees in the Knox Circuit Court on the 15th day of August, 1891, claiming to be the owner and in possession of the boundary of twenty-eight and one-half acres of land lying on the waters of the Cumberland river, in Knox county, from which she alleged the defendants had cut and removed a great number of valuable chestnut trees, and laid her damages therefor at \$300. The defendant, in his answer, denied plaintiff's alleged ownership of the land from which the trees were alleged to have been cut, or that they had cut any timber from any land belonging to the plaintiff. He further alleges that he is the owner of the land in controversy and held title thereto by deed from Rich Adams, bearing date of February, 1884, and plead that he and those under whom he claims have continually occupied the land set out, claimed and described in plaintiff's petition, for more than thirty years last past, and relies upon the statute of limitation in bar of plaintiff's petition.

The pleadings were made up and a great deal of proof taken, and the case finally submitted for judgment at the January term, 1902, of the Knox Circuit Court, when it was adjudged that plaintiff's petition should be dismissed, and she has appealed. It appears from the record that Acel Elliott, the father of the appellant, Henry Elliott, prior to his death in 1850, was the owner and in possession of a tract of 455 acres of land on the Cumberland river, in Knox county, Kentucky, which embraced the twenty-eight and one-half acres from which it is alleged the trees sued for in this action

were cut; and that soon after his death this tract of land was sold to satisfy a judgment recovered against his executors by G. M. and Rich Adams. At this sale the appellant, Henry Elliott, and his brother-in-law, Fisher, became the purchasers, and divided the land between them. In the division there was allotted to Fisher 240 acres of land, and to Henry Elliott 215. The 215 acres allotted to Henry embraced the twenty-eight and one-half acres claimed by Mary Elliott, and is identical with the boundary now claimed by the appellee, Haun.

At the August term, 1874, of the Knox Circuit Court a judgment was entered in the case of Richard Adams against Henry Elliott, and Henry Elliott and wife against Richard Adams, decreeing a sale of this same tract of 215 acres of land, which had been allotted to Henry Elliott in the division made with Edward Fisher to satisfy a judgment in favor of Adams against Henry Elliott. During this suit the appellant, Mary Elliott, filed her petition to be made a party, in which she set out the proceedings in the case of G. M. and R. Adams v. Acel Elliott's Adm'r, the sale of the 415 acres of land to satisfy the judgment rendered in that action in favor of the Adams; its purchase by her husband and his brother-in-law, and alleged that her father, James Fernillion, had furnished the money to pay for the land allotted to Henry Elliott under an agreement that the title therefor was to be made to her and her children, and denied the right of Adams to subject this land to the payment of Henry Elliott's debt. Her claim seems to have been thoroughly litigated in that proceeding, and the decision was adverse to her contention.

Adams bought the 215 acres of land at the sale rendered pursuant to the judgment in that proceeding, and the possession was voluntarily surrendered to him on the 28th of March, 1877, by the plaintiffs, as appears from their written agreement, attested by John Lay, filed in this proceeding. The Elliotts subsequently occupied the premises for several years as Adams' tenant. Adams subsequently sold the property to the appellee, Haun, and he has continued to live upon it until this suit was instituted. The evidence establishes an adverse holding of this land by the appellee and those under whom he claimed for more than thirty years. In 1874 Mary Elliott acquired title to the adjacent tract from one Taulbee, the calls of which seem to conflict with the boundary of 215 acres, and this interference is made the basis of appellant's contention that she owns the twenty-eight and one-half acres in controversy. It is clear from the evidence that plaintiffs, Mary and Henry Elliott, when they were in possession of the 215 acre tract, claimed to the same lines and corners as now claimed by the defendant, Haun, and appellant's claim to this property having been once litigated and determined against her contention, her claim that the boundaries are not located where she claimed them to have been in the former suit can not prevail. In our opinion the trial court properly adjudged in favor of defendant's title, both on the merits of the case and under the plea of limitation.

Judgment affirmed.

LOGSDON v. WESTERN BRICK CO.

(Filed June 3, 1903—Not to be reported.)

Negligence—Instructions—Pleadings—In this action to recover damages of appellant for personal injuries caused by a bank falling on him while employed by appellee in shoveling sand, appellant alleged that the injury resulted from the acts of appellee's servants in picking and digging into the bank, and the court properly instructed the jury on this issue, which decided in favor of appellee. On appeal appellant complains that the court improperly refused to instruct the jury that it was the duty of appellee to furnish its servant a reasonably safe place to work, and if the place was dangerous, and it was known to the master, or ought to have been known by him and was unknown to the servant, the master was liable. Held—That said instruction was properly refused as issue was not made on such point by the pleadings.

J. D. Reed and W. W. Thum for appellant.

O'Neal & O'Neal and Forcht & Field for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 2.

Opinion of the court by Judge Hobson.

Appellant sued appellee to recover for personal injuries received in its service. The testimony tended to show that he was employed in appellee's brickyard, and was directed by the foreman to go to another part of the yard than that in which he was at work and assist in shoveling some dirt in cars. While he was thus engaged near a high bank it caved in on him, inflicting serious injuries. The proof was conflicting as to the cause of the caving in of the bank. The jury found for the defendant. The chief complaint on the appeal relates to the instructions given by the court, which, so far as material, were as follows: "The court instructs the jury that if they shall believe from the evidence that while the plaintiff was at work in the pit in the evidence mentioned, the defendant's agents or servants superior to the plaintiff in its service, by or through their gross negligence, caused a portion of the clay bank in the evidence referred to to fall upon him, and that the plaintiff thereby sustained the injuries by him alleged, then the law is for the plaintiff, and the jury should so find, unless the jury shall believe from the evidence that the plaintiff, by negligence on his part, so far contributed to his injury that but for such negligence he would not have been injured, in which latter event the law is for the defendant, and the jury should so find."

It is complained that the instruction should have been that it was the duty of the master to furnish a safe place for the servant to work, and if the place was dangerous, and this was known to the master, or ought to have been known to it, and was unknown to the servant, and by reason of this he was hurt, he could recover. (*Ashland Coal and Iron Co. v. Wallace*, 20 Ky. Law Rep., 853; *Van Dyke v. Memphis, &c., Co.*, 24 Ky. Law Rep., 1283.) There was evidence that the bank was in a dangerous condition from the fact that it had been dug under and wooden gluts had been driven in above to separate this part of the clay from that back of it. It was also in evidence that just before the fall of the clay a servant of the defendant was prying at it with a crowbar, and it might be inferred from the proof that this caused it to fall.

The issue submitted to the jury by the instructions must be made in the pleadings. The instruction given by the court followed the plaintiff's petition, which, omitting formal parts, was as follows: "Plaintiff says that on the — day of April, 1901, he was hired by the defendant, and entered into its employ, and was employed by it and put by said defendant to work shoveling and throwing out dirt or clay from its pit or clay bank on its premises at or near Thirty-first and Alford streets in the city of Louisville, Ky.; that while he was so at work for the defendant, on the 8th day of April of said year, and under its directions and orders, working in said pit or clay bank, that the wall or side of said pit or clay bank caved in and overwhelmed, covered and buried this plaintiff, through and by reason of the gross negligence and carelessness of the defendant, and without any fault on plaintiff's part, and caused him great injuries and suffering, by severely wrenching and spraining his right hip and back and otherwise injuring him internally. Plaintiff says that the caving in of said wall or side of said pit or clay bank at said time, by which he was so injured and damaged, was due to no fault or negligence on his part, but was wholly caused by and due to the gross negligence, carelessness and recklessness of defendant; that while he was below in the said pit, working as directed by the defendant, shoveling and throwing out said clay or dirt, without any warning to this plaintiff, who had had very little experience in such employment, the defendant had the ground above him picked and dug into and loosened without notifying the plaintiff of his danger, or that there was any danger while so working in the said pit below, and the said picking, digging, loosening and jarring by defendant of said ground above where plaintiff was working caused it to cave in and overwhelm and bury and injure plaintiff, as hereinbefore stated, causing him great anguish of mind and injuries and suffering of body."

It will be observed that the charge in the petition was that while the plaintiff was below working in the pit the defendant had the ground above him picked into without notifying him of the danger, and this picking and jarring of the ground by the defendant caused it to cave in and fall upon the plaintiff. It was not charged that the defendant placed him in a dangerous place to work, knowing the danger or having reason to know it, but that the defendant, while he was at work, picked into the ground above him, without warning to him, and caused it to fall on him. The instruction of the court aptly submitted this issue to the jury. If the ground was picked into and thus caused to fall while plaintiff was at work beneath, the defendant would not be responsible unless this was done by some person who, as between it and the plaintiff, represented it. The rule is well settled that where death does not ensue there can be no recovery by an injured servant for the negligence of a superior servant engaged with him in the work, unless the negligence is gross. The instructions of the court conform to this rule, and the only issue made by the pleadings being aptly submitted to the jury by the instruction; we are unable to see that appellant has any substantial ground of complaint. Besides, we do not think the use of the word gross in defining negligence in the instruction could have been prejudicial under the facts of this case, for the reason that it would have been the grossest negligence to put a man to work under a high bank and then pry it off on him. The verdict of the jury for the defendant must, therefore, have been a finding against the plaintiff on his version of the transaction.

Judgment affirmed.

MAXWELL'S TRUSTEE v. ENGLAND.

(Filed June 8, 1908.)

Commissioners—Final orders—This was a motion against appellee as commissioner, requiring him to pay over to appellant a fund in obedience to a judgment of the court. In his response he alleged that it was his duty to hold the fund and pay to appellant the interest semiannually. A demurrer to this response was sustained. On appeal it is insisted that the order sustaining the demurrer to the response was not a final order. Held—That overruling said demurrer was in effect a final order, and this court has jurisdiction to determine the question on its merits. The entry of the order directing the payment of the money to appellant, as trustee, was binding on appellant and appellee until reversed, modified or changed.

Thompson & Spalding for appellant.

E. L. England for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Burnani.

At the January term, 1900, of the Marion Circuit Court, a judgment was entered in the equity suit of Cora Maxwell v. Mrs. J. Ann Hood, &c., appointing the appellant, J. M. Knott, trustee of a fund of \$1,000, devised by Elizabeth Chandler to Cora Maxwell, for and during her natural life, and at her death to Mrs. Hood and Joseph E. Shelby equally, which was at that time in the hands of the appellee, E. L. England, as master commissioner of the court, the fund having arisen from the sale of real property belonging to the estate of Elizabeth Chandler, sold under judgment of the court in the settlement of her estate, and the appellee was directed by the judgment to pay the \$1,000 to appellant after his qualification as trustee. The appellant, Knott, accepted the appointment, executed the bond in conformity with the judgment and duly qualified as trustee, and thereafter demanded of the appellee, England, that he should pay over to him, as trustee for Cora Maxwell, the \$1,000, as directed by the judgment. This appellee refused to do, and subsequently appellant moved the court to grant a rule against appellee to show cause why he should not be compelled to comply with the judgment and pay over the money.

Cora Maxwell, by attorney, objected to the rule, and appellee, E. L. England filed the following response to the motion for a rule: He says that "at the January term, 1900, of this court a judgment was entered in favor of plaintiff for \$1,000 to be held in trust; that thereafter a supersedeas bond was executed superseding all of said judgment except the \$1,000, and that said judgment directed the said sum to be paid to the trustee, and immediately this respondent made arrangement to pay said sum to said Knott, when the attorney for the plaintiff in whose favor the judgment was rendered, and by whom it was controlled, ordered and directed this respondent, in most emphatic terms, not to pay over the said sum to said Knott, but to hold same and pay the interest to the plaintiff semi-annually. The respondent says that Cora Maxwell is over fourteen years old and is married. This respondent has at various times loaned out to good and solvent parties various portions of said sum, and it is now bearing interest. Wherefore, said

respondent asked for the advice and direction of the court, and that the rule be discharged."

The appellant, Knott, filed a general demurrer to the response of appellee on the ground that it did not state facts to support a defense to the rule. Upon the trial of this motion the court held the response of the appellee sufficient, and refused to require him to pay over the money to appellant in conformity with the judgment, and Knott has appealed and discharged the rule. The first point relied on by appellee is that the judgment of the trial court upon the demurrer is not a final order. In the Ency. of Pleading and Practice, volume 2, page 72, a final order is defined as an "adjudication made upon a motion or other application, completely disposing of the subject-matter and the rights of the parties."

In *Nelson v. Brown*, 59 Vermont, 60L, it was said: "A final order is one that disposes of the merits of the cause; that settles the rights of the parties under the issues made by the pleadings."

In *Hovey v. Crane*, 10 Pick., 440, it was held that: "Any order or proceeding which disposes of the cause and places the parties out of the court is final."

The distinction between final and interlocutory orders and judgment is often difficult to determine, but tested by the rules laid down *supra*, we are of the opinion that the judgment of the trial court overruling the demurrer to appellee's response was a final order, as it in effect adjudged that appellant was not entitled to the possession of the trust fund under the judgment, and put him out of court. We, therefore, conclude that this court has jurisdiction to determine the question upon its merits. After the entry of the judgment appointing appellant Knott trustee, to hold the fund of \$1,000 in accordance with the terms and conditions of the bequest in the will of Elizabeth Chandler, and directing appellee to pay it over to him upon demand, neither Cora Maxwell nor her attorney had any legal right to forbid appellee from complying with that judgment. It was binding upon both appellant and appellee until reversed, modified or changed by some subsequent judgment properly rendered. It follows, therefore, that the trial court erred in not sustaining the demurrer filed by appellant to appellee's response and in failing to make the rule for the payment of the money in accordance with the judgment absolute.

For the reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

MILLIGAN, &c. v. MASDEN.

(Filed June 4, 1903—Not to be reported.)

Life tenants—Joint tenants—Partition—Where two joint tenants for life made a partition between them of said lands, in which A. received sixteen acres, with improvements thereon, and B. the remaining twenty acres, and a division fence was built between them and B. erected valuable improvements on the land allotted to him, said allotment is not binding on the remainderman in the land owned by A. for life, as they should have proceeded as provided by statute to obtain a partition; but the commissioners should be instructed to set apart to B. the portion on which he had erected his im-

provements, regardless of their value, if same could be done without injury to the rights of parties as they existed at the date of partition made by the life tenants.

C. F. Atkinson for appellants.

Morgan Yewell and Nat W. Halstead for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 23d day of April, 1902, the appellee, William Masden, brought this suit in the Nelson Circuit Court against the appellants. He alleged, in substance, that on the 14th day of February, 1880, his grandmother, Melvina Milligan, in consideration of \$1, conveyed to his mother, Elizabeth Coats, a life estate in an undivided one-half interest in a tract of thirty-six acres of land, lying in Nelson county, with remainder in fee to him; and that on the 24th day of February, 1880, Melvina Milligan, in consideration of \$1, conveyed the remaining one-half undivided interest in the same tract to the defendant, Jonathan Milligan, her son, for life, and at his death to his children; that his mother, Elizabeth Coats, died on the — day of February, 1902, and that he, as remainderman in the deed from his grandmother, was the owner in fee of the undivided interest conveyed to his mother, and asked that the land be divided, and one-half thereof, according to quantity and quality, be allotted to him. The defendants, in the third paragraph of their answer filed to the petition of plaintiff, allege that, on the 15th of March, 1881, Elizabeth Coats, the mother of plaintiff, and her brother, the defendant, Jonathan Milligan, mutually agreed that John Johnson and Irvine Miller should divide the thirty-six acres between them, and that they allotted by a survey to Mrs Coats sixteen acres of the thirty-six, on which was located the building, orchard, etc., and to Jonathan Milligan the remaining twenty acres; and that immediately after the division the parties put a division fence on the line between them, and that from the 15th day of March, 1881, until her death, on the 6th of February, 1902, Mrs. Coats and the plaintiff had used, occupied and claimed the sixteen acres of land so allotted; and that the defendant had taken possession of the remaining twenty acres allotted to him and had erected thereon a dwelling house and other improvements at a cost of \$400; that Mrs. Coats had permitted her sixteen acres of land to waste, and that it had greatly depreciated in value; whilst the defendants, in addition to the improvements spoken of above, had, by good husbandry, greatly appreciated the value of the twenty acres allotted to them, and asked that the division agreed to by the parties in 1881 be approved and confirmed; but if same should be disturbed, and any part of the twenty acres allotted to the defendants be taken, that they be adjudged the value of the improvements placed thereon, and that their share be allotted in such manner as to include his improvements. The plaintiff filed a general demurrer to the third paragraph of the defendant's answer, which was sustained, and a judgment entered appointing commissioners, who were directed to divide the thirty-six acres of land equally between the plaintiff and defendants, without regard to the previous division made by the life tenants, and the defendants have appealed.

The question for decision upon the appeal is, conceding the division of the

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thirty-six acres made by the appellants' life tenants in 1881 to have been fair and equal at the time of the division, is it binding upon appellee? In the American and English Ency. of Law, 2d edition, volume 21, page 1183, the general rule as to voluntary partitions of real estate is stated in these words: "Speaking generally, parties, their privies, in representation or estate, and persons not interested in the property, are bound by a voluntary partition executed by cotenants."

Judge Story, in his work on Equity Jurisprudence, says: "Doubts were formerly entertained whether in a suit in equity brought by or against a tenant for life of an estate, where the remainder is in a person not in esse, a decree could be made, which would be binding on the persons in remainder. That doubt is now removed, and the decree is held binding upon them upon the ground of a virtual representation of them by the tenant for life in such cases."

In volume 17 of the A. & E. Ency. of Law, 1st edition, page 662, that author says: "A valid and binding agreement for partition can of course be made by cotenants, all of whom are competent to contract. So infants, married women, and other persons under disability, may usually make a partition, and it will be upheld for the reason that they are compelled by law to make the partition, and for the same reason, where the partition is actually carried into effect formal, defects in the execution of the partition agreement will not affect its validity. Where any unfairness was exercised those not sui juris can not be held, even though they may have performed acts of ownership after the removal of their disability."

Our attention has also been called to a manuscript opinion delivered by this court, in the case of Ford v. Trisler, on the 19th of September, 1874, which substantially holds this doctrine. In that case John Farmer devised 500 acres of land to his four children for life, with remainder to their children. His son, J. C. Farmer, and his sister sold their portion to James Carter. Mrs. Ford, another sister, sold her fourth to their brother, Leonard Farmer, the other life tenant. Carter and Leonard Farmer then agreed on a division, Carter getting 300 acres, and Leonard Farmer 200 acres. On the death of J. C. Farmer his children recovered from Carter one half of his 300 acres. Leonard Farmer died, leaving an infant child, John, and a widow, who married Trisler. On the death of Mrs. Ford her children recovered of Leonard Farmer's widow and child their mother's one-fourth interest, together with their proper share of the rent of the entire 500 acres from the date of their mother's death. In that case the court said: "The division made by the life tenants of the land was binding upon the parties to this litigation, and the interest sought to be subjected could have been recovered only out of the moiety of the land held by Leonard Farmer. The judgment for rent should have been determined by the rental value of the moiety of the land in the possession of Leonard Farmer."

It is evident from the authorities quoted supra that the courts have been strongly disposed to hold partitions of real estate made by the life tenants, if fair and equal in every respect, as binding upon the remaindermen. The interest of Mrs. Coats and Jonathan Milligan in this tract of land under the deeds was distinct and fixed, which they had the right to have determined and ascertained, and either could have applied to a court of equity for this

purpose, and it is hard to understand why they might not voluntarily have done for themselves what the courts would have done for them. In recognition of this well-recognized principle of equity section 490a of the Civil Code was enacted in 1886. But as the statute affords a complete remedy to life tenants desiring a partition of real estate, we have reached the conclusion that since its enactment its provisions must be followed in cases of this character; and that plaintiff was not bound by the voluntary division of the thirty six acres entered into by his mother in 1881. But it is proper for us to say that in making a new partition of the land the commissioners should have been instructed to allot to appellants that part of the land on which they had erected buildings and made improvements, without taking into consideration the value of such improvements, in so far as this can be done consistently with an equitable partition of the land as it existed in 1881.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

FORSYTHE v. HUEY.

(Filed June 4, 1903—Not to be reported.)

1. **Forcible detainer**—Bill of exceptions—On this appeal from a judgment on a traverse in a forcible detainer case, which resulted in favor of the plaintiff in the warrant, the appellant, who was defendant, prosecutes this appeal. The motion is made to strike the bill of exceptions from the record because same was not tendered and filed in time. The motion for a new trial was made and overruled on the last day of the term, which was the day the trial was had. Afterwards, in vacation, and within sixty days after the trial, appellant filed the bill of exceptions in the clerk's office, and afterwards, at the succeeding term of the court, the same was tendered to the judge in open court, who refused to sign same on the ground that it was not tendered to him in time. Held—That the bill of exceptions should be stricken from the record as filing the same in the clerk's office is not equivalent to tendering it to the judge, and no order was entered extending the time.

2. **Service of warrant**—The objection that the copy of the warrant served on the appellant was not signed by the magistrate can not be raised on appeal as it was waived on the trial by answering without objection.

3. **Amendment to warrant**—An amendment to the warrant in the circuit court, by making the description of the land more definite, was properly allowed under section 184, Civil Code of Practice, as it did not change the issue tried before the magistrate.

4. **Amendment to verdict**—An amendment to the verdict, making it conform to the Code, was properly allowed.

H. Clay White and O. M. Rogers for appellant.

S. W. Adams for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Settle.

This proceeding of forcible detainer was instituted by the appellee against the appellant before a justice of the peace of Kenton county, in whose court a trial was had, which resulted in favor of appellant. Appellee, by traverse, then carried the case to the circuit court; the trial in that court resulted in

his favor, and the appellant now asks of this court a reversal of that judgment.

The first question presented for our consideration is the motion of appellee to strike from the record the bill of exceptions. It appears from the record that the judgment was entered on the 8th day of July, 1902, the Kenton Circuit Court then being in session at Independence, and that the motion for a new trial was overruled on that day. The order refusing the new trial recites the exceptions taken thereto by the appellant, and the granting of the appeal, but did not fix or extend the time for filing the bill of exceptions. On the 27th day of August, 1902, appellant filed in the clerk's office of the Kenton Circuit Court, at Independence, a bill of exceptions which was tendered to the judge of the Kenton Circuit Court in open court for his signature and approval on October 22, 1902, and he then refused to either sign or approve the same because not tendered within sixty days from the entering of the judgment as required by the continuous session practice act applicable to the circuit court of Kenton county.

Section 1016 of the statute supra is as follows: "Bills of exceptions must be prepared and presented to the judge within sixty days after the making of the order excepted to, but exceptions taken during the trial need not be of record, nor reduced to writing unless by order of court, until after the trial; within sixty days after the judgment becomes final the party excepting shall, unless further time be given him, prepare his bill of exceptions; but further time may be given to prepare a bill, but not beyond one hundred and twenty days after the judgment becomes final."

We are of opinion that the mere filing of the bill of exceptions in the clerk's office was not a tender of the same. Something more than that step was necessary. The language of the section supra is that "bills of exception must be prepared and presented to the judge within sixty days." It is essential, therefore, that they be presented to the judge for his approval and signature. The filing of the bill should follow its approval by the judge that it may become a part of the record. It may be tendered, that is, presented, to the judge in open court at any time within the sixty days, in which event, if he, or opposing counsel, wish to examine it, the proper practice is to allow time for such examination; but if so, an order should be entered showing such tender, and the purpose of the judge in delaying the signing of it.

In *Tower's Adm'r v. The South Covington and Cincinnati Street Ry. Co.*, 29 Ky. Law Rep., 564, it was held by this court that "the plaintiff having tendered his bill of exceptions in time, should not be affected by the delay of the court in signing it, nor by the fact, if true, that corrections were made in the bill as offered before it was signed."

In *Beattyville & Cumberland Gap R. R. Co. v. Plummer*, 21 Ky. Law Rep., 385, we find that the lower court allowed the appellant sixty days for the filing of its bill of exceptions. The bill was filed in the clerk's office within the sixty days, and also approved by the judge in vacation within that time. At the succeeding term of the court this order was entered: "The bill of exceptions filed in the clerk's office of this court, and approved in vacation, is now noted of record."

This court in passing on the motion to strike the bill of exceptions men-

tioned from the record, said: "It seems to be a well-settled rule that the judge has no right to receive and approve a bill of exceptions in vacation. Time might have been extended to a day of the succeeding term of court to file a bill."

Three terms of the Kenton Circuit Court are required by section 980, Kentucky Statutes, to be held each year in Independence, the county seat of Kenton county, namely, in February, June and October. At other times, when in session, the court is held in the city of Covington, which is also situated in Kenton county. The June term, 1902, of the court held at Independence ended July 8, the day on which appellant's motion for a new trial was overruled, and as his bill of exceptions was not presented to the judge of the Kenton Circuit Court, in open court, for his approval and signature until October 22, 1902, more than sixty days after the entering of the judgment and the overruling of the motion for a new trial, it follows that no error was committed by the lower court in refusing to approve and sign the same, and the motion to strike the bill of exceptions from the record must be sustained. The apparent hardship resulting to the appellant from striking from the record the bill of exceptions might have been avoided by an order entered when his motion for a new trial was overruled, extending the time for preparing and filing the same not later than one hundred and twenty days from the date of the judgment. But no effort appears to have been made by him to obtain such extension.

The elimination of the bill of exceptions from the record brings us to the consideration of the form and sufficiency of the warrant, and other questions growing out of the proceedings herein, not required to be presented by a bill of exceptions, but necessary to be inquired into, in order that it may be determined by this court whether the verdict of the jury and the judgment of the lower court shall be permitted to stand. It is contended for appellant that the service of the warrant upon him for the inquisition in the magistrate's court was illegal, in that the copy thereof delivered him by the constable had not been signed by the magistrate. We deem it unnecessary to discuss this proposition, as appellant, by entering his appearance, and making defense on the merits of the case in the court of the justice, without objecting to the sufficiency of the service of the warrant, submitted himself to the jurisdiction of that court, and waived all right to deny its jurisdiction or that of the circuit court at any subsequent stage of the proceedings. (*Phillips v. Harmon*, 1 Dana, 468.)

Counsel for appellant also contends that the traverse was not filed in the justice's court within the time required by law. This contention can not be sustained, as the record shows that the trial in the justice's court occurred April 5, 1902, and that the traverse was filed and bond executed in that court on April 7, 1902. Both of these necessary steps were, therefore, taken within the three days required by section 463 of the Civil Code.

It is further contended by counsel for appellant that the circuit court erred in permitting an amendment to the warrant in that court. In *Trent v. Collins*, 18 Ky. Law Rep., 173, this court held that it was sufficient to give in the warrant a general description of the land in controversy. In this case the land was described in the warrant as one house and eighty-two acres of land in Kenton county. By permission of the circuit court the

warrant was amended by inserting after the words "acres of land" the following: "Situated on Bristow turnpike road and near the waters of Bank Lick creek." The amendment was clearly permissible under section 134, Civil Code. It presented no new cause of action, nor did it change the issue tried in the inquisition before the magistrate. (Bailey v. Kelly, 18 Ky. Law Rep., 718; Parker v. Ozment, 8 Ky. Law Rep., 525.)

Complaint is likewise made by appellant that the circuit court erred in allowing the jury to amend their verdict. The verdict as first returned by the jury was: "We, the jury, find for the plaintiff." As amended by them, in accordance with the direction of the court, the verdict reads: "We, the jury, find for the plaintiff, and that the requisition found in the lower court is not true." The amendment was eminently proper, as it made the verdict take the precise form prescribed by the Code.

We do not feel called upon to discuss or pass upon the question made by appellant's counsel as to the alleged error committed by the clerk of the Kenton Circuit Court in issuing in appellee's behalf a writ of possession for the land in controversy. As it was not done by an order, judgment or ruling of the circuit court, but was the ministerial act of the clerk, over which, upon the record here presented, this court has no revisory power.

For the reasons given herein the judgment of the lower court is affirmed.

WOOD v. NEWELL, JUDGE, &c.

(Filed June 4, 1903—Not to be reported.)

W. G. Dearing for appellant.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Burnam.

The facts out of which this case grew are fully recited in the opinion rendered in Wood v. Carr, &c., 24 Ky. Law Rep., 2144, decided on the 15th of April, 1903, and the same questions of law are involved. For reasons indicated in that opinion, the trial court erred in sustaining the demurrer filed by the defendant to plaintiff's petition, and in dismissing it.

Judgment reversed and cause remanded for proceedings indicated in Wood v. Carr, &c.

CHESAPEAKE & OHIO RY. CO. v. CLARK'S ADM'X.

(Filed June 4, 1903—Not to be reported.)

Railroads—Negligence—In this action appellee recovered a judgment for \$2,000 damages for the death of her intestate, resulting from the gross negligence of the employes in charge of appellant's passenger train in running over the deceased while he was attempting to cross a double track in Ashland. On appeal, Held—That the verdict is not contrary to the evidence, and was rendered under proper instructions.

W. H. Wadsworth and E. L. Worthington for appellant.

Jas. Andrew Scott, W. C. Marshall and R. S. Dinkle for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Nunn.

From this record it appears that on the morning of December 21, 1899, appellee's intestate, John Clark, while on the way from his home to his work, and while attempting to cross the double track of appellant where they cross a public street at Ashland, was struck and instantly killed by one of the passenger trains of appellant.

His administratrix brought suit against appellant, and charged that her intestate's death was caused solely by the gross negligence of the appellant, its agents and servants, then and there in charge of the train, and by the negligent manner of the management and operation thereof. The appellant traversed these allegations and pleaded contributory negligence on the part of the deceased, which was denied by appellee. The evidence was heard, and the jury returned a verdict for the amount sued for, to wit, \$2,000. The court overruled appellant's motion for a new trial, and the case is here on appeal.

According to appellee's evidence the deceased had reason to believe that the passenger train had passed that point some twenty or thirty minutes prior to his death. It is shown, without contradiction, that appellant has two tracks, parallel with each other, and the trains going west going on one track, and the trains going east on the other; that 19th street is one of the principal streets of Ashland, a city of some 7,000 or 8,000 inhabitants; that this street is much used by the traveling public. One of appellee's witnesses stated that she was standing in the corner of her lot, near the point where the tracks of appellant cross the street and saw the deceased walk from his house towards the railroad, and a freight train of thirty-five or forty cars was crossing the street, traveling east on the track nearest to him; that he stopped and stood there until the freight train had passed, and he immediately started across the track in the direction of his work, and he was instantly killed by the passenger train. She stated that the passenger train was obscured from the deceased by the passing freight; that the passenger train did not blow its whistle or ring its bell, and was traveling at the rate of about forty miles an hour. Only one other witness saw the killing, and that was the fireman on the passenger train. He stated that the deceased ran across the track in front of the freight engine and ran against the driver of the passenger engine and was killed; that the passenger train was running at the rate of about twenty miles an hour, and that it was ringing the bell, but was not blowing the whistle, and that there was nothing to prevent the deceased from seeing the approaching passenger train when he attempted to cross the track.

According to appellee's evidence the deceased came to his death by reason of the gross negligence of the appellant's agents and servants in charge of the train. According to appellant's evidence, the deceased came to his death by his own negligence, or at least he so far contributed to the negligence of appellant that but for his own negligence he would not have been killed. These issues were, by proper instructions, submitted to the jury. The criticism by appellant of one of the court's instructions is not well founded. The case of *Kentucky Central Ry. Co. v. Smith*, 93 Ky., 449, sustains the court's instructions. The instructions, as a whole, were not prejudicial to appellant.

Wherefore, the judgment of the lower court is affirmed.

LOUISVILLE RY. CO. V. HARTLEGE.

(Filed June 4, 1908—Not to be reported.)

1. Street railways—Negligence—Instructions—In this action for damages to appellee, alleged to have been caused by a car becoming derailed, causing bruises and other painful injuries, a trial resulted in a verdict of \$500 in favor of appellee. On appeal it is insisted that the court erred to the prejudice of appellant in refusing an instruction offered. Held—That the court did not err in refusing said instruction as it was contrary to the law, which requires the carriers of passengers by rail to know or exercise the highest degree of care consistent with the proper and prudent conduct of their business; to ascertain and remove causes which might derail their cars and injure their passengers.

2. Evidence—Physical examination—It is insisted that the refusal of the court to require appellee to submit to a physical examination by surgeons of appellant was prejudicial error. Held—That the weight of authorities favors the right of defendant to demand a physical examination of plaintiff. The decisions, however, recognize that the defendant has no absolute right to have an order made to that end, but that a motion therefor is directed to the sound discretion of the court, and that this exercise will be reviewed on appeal and corrected in case of abuse; that such examination may be ordered when the facts can only be brought to light or fully elucidated in that way, when it can be made without danger to plaintiff's life or health, or without the infliction of severe pain, or offend decency. The lower court did not abuse its discretion in refusing to require a physical examination of appellee.

Fairleigh, Straus & Fairleigh for appellant.

W. O. Bradley for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Nunn.

The appellee claimed that she was a passenger on one of appellant's cars, a trailer car, and that while going over the intersection of the streets at a curve the car jumped the track and ran some distance off the track, throwing her against a seat and on the floor of the car, thereby injuring her hip and side.

The appellant denied all negligence, and in effect pleaded that it was an unavoidable accident that caused the derailment of the car, and that the injuries the appellee sustained, if any, were unavoidable. The evidence was heard, the court gave to the jury instructions in apt language and altogether unobjectionable, and the jury returned a verdict in favor of appellee for \$500. The appellant complains of the action of the court in failing to give two instructions which it offered. One of the instructions was embodied in the instructions given by the court; the other one did not contain the law of the case, and the court properly refused to give it. If the court had given it the jury would have been told that if the injury and derailment of the car was by reason of some unknown cause, etc., then they should find for appellant. Appellant's counsel appear to overlook the fact that the law requires of the carriers of passengers by rail to know or exercise the highest degree of care consistent with the proper and prudent conduct of their business; to ascertain and remove causes which might derail their cars and in-

jure their passengers, and this instruction would have been misleading to the jury in this respect.

The only other alleged error complained of by appellant is that the lower court refused to compel appellee to submit to a physical examination by a competent surgeon or surgeons to ascertain the extent of alleged internal injuries. The appellant made a motion in the lower court to this effect, and in support thereof filed an affidavit of its superintendent, in which he stated that it was important to the ends of justice that the plaintiff submit to a personal and physical examination by competent surgeons. He stated that the plaintiff was claiming serious internal injuries which could not be determined except by a physical examination. He stated that the examination could be had without any injury to the plaintiff, or causing her any pain, and that his company would pay the expenses therefor.

In opposition appellee filed the following affidavit: "Affiants, George C. Leachman and Jos. E. Bland, say that they are physicians and surgeons; that the injury to the plaintiff can not be objectively determined by an examination of her person except by exploring the vagina and breaking the hymen, which is now intact. Her injuries are to be determined by her clinical history and symptoms alone."

And the same physicians made another affidavit, in which they stated that a physical examination could not be made of the appellee without injury to her, and would cause her pain, and could not be made without the exposure of her person. The substance of the evidence with regard to the injuries of appellee is as follows: That she suffered pains in her side and hip from the time of the injury until the trial; that about a week after the injury she was compelled to go to bed on account of same, and there remained for two weeks or more under the treatment of a physician, and his charge was \$80; her medical bill was \$10; that she was employed at \$4 per week as saleslady in a store, and lost \$8 on that account; that previous to her injury she had been in perfect health; that from and after the time she received her injuries to the time of the trial her menstruation periods had been prolonged from two to four or five days, which detained her from her work; that the flow was much greater and painful, and that she had not been troubled with it prior to the injury. Other lady witnesses corroborated her in these statements.

The two physicians referred to, as well as two surgeons representing the appellant, were present and heard all the testimony with reference to appellee's injuries, and the probable effects resulting therefrom. They testified the two for appellee from their examination and from the clinical history of the case as detailed by the witnesses, that this trouble with her menstruation was probably caused by the injuries received by her. The other two said that it could not have been so caused or produced. This question has been before this court within the last few years in the cases of *Belt Electric Line Co. v. Allen*, 102 Ky., 551; *Bell of Nelson v. Riggs*, 104 Ky., 1; *Ill. Cent. R. R. Co. v. Clark*, 21 Ky. Law Rep., 1549; *L. & N. R. R. Co. v. Simpson*, 23 Ky. Law Rep., 1044, and *L. & N. R. R. Co. v. McLain*, *ib.*, 1878. From a review of all these cases the weight of authority favors the right of defendant to demand a physical examination of plaintiff. The decisions, however, recognize that the defendant has no absolute right to have an order

made to that end, but that a motion therefor is directed to the sound discretion of the court, and that this exercise will be reviewed on appeal, and corrected in case of abuse; that such an examination may be ordered when the facts can only be brought to light or fully elucidated in that way; when it can be made without danger to the plaintiff's life or health, or without the infliction of severe pain, or offend decency.

The record discloses the fact that the extent of appellee's injuries were substantially disclosed by the means used, and that the drastic measures demanded by appellant were unnecessary to that end. The small verdict in this case is one evidence of that fact. This court does not feel authorized, nor does it deem it proper, to reverse this case and order another trial, and have appellee's person exposed, suffer the humiliation and the loss of the evidence of her virginity, to relieve the appellant of so small a verdict obtained under the circumstances shown in this record.

Wherefore, the judgment of the lower court is affirmed.

MOSER v. SOUTH COVINGTON & CINCINNATI STREET RY. CO.

(Filed June 4, 1903—Not to be reported.)

1. Street railways—Negligence—Pleading—Evidence—In this action appellant sought to recover of appellee damages received by him while riding on the front of one of its trolley cars, and when the car was going around a sharp curve in the track appellant was thrown across a gate and struck by an iron trolley pole. On the trial the court gave a peremptory instruction for defendant, from which this appeal is prosecuted, and it is urged that appellant was entitled to recover on the ground that the iron trolley pole was placed too near the track. Held—That appellant was not entitled to recover on that ground, as no allegation was made in the petition that the trolley pole was placed too near the track, and the peremptory instruction was properly given.

2. Evidence—This court will not review the action of the lower court in refusing to admit evidence where no avowals are made as to the statements that the witness would make.

Phil. J. Ryan and Thos. L. Michel for appellant.

Ernst, Cassett & McDougall for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was a passenger on one of appellee's electric cars running from Fountain Square in Cincinnati to Fort Thomas in this State. Owing to the crowded condition of the car he was invited to, and did, take position on the front platform, standing beside the gate. As the car was going around a sharp curve in the track appellant lost or was thrown from his balance, and partially fell across the gate toward the side of the track, when his head was struck by an iron trolley pole, there erected by the company for supporting its feed wires. The evidence failed to show that the car was operated negligently in any sense, or that it was run at an unusual or negligently high rate of speed at the time of the accident. So far as the evidence shows, the natural or inevitable lurch or swing of the car, as it re-

sponded to the curve in the track, caused the lurch that unbalanced appellant. These acts do not constitute culpable negligence. (*Ayres v. Rochester Ry. Co.*, 156 N. Y., 106; *Hayes v. Street Ry. Co.*, 97 N. Y., 259; *Stewart v. Ry. Co.*, 146 Mass., 605; *Jonas v. Long Island Ry. Co.*, 47 N. Y. Sup., 149.)

Appellant attempted to show a cause of action by evidence to the effect that the iron pole by which he was struck was situated so near the track as to be dangerous to those using the cars as passengers, and, therefore, that its maintenance at that point was negligence. The allegation of the petition upon this matter is as follows: "Defendant had, previous to the said 18th day of August, 1901, wrongfully and negligently caused to be constructed and maintained a large iron pole south of the said Bonnie Leslie, in close proximity to its street railway tracks, upon which its said car upon which plaintiff was a passenger was running south as aforesaid. * * * While the plaintiff was standing upon the front of its said car the said car gave a sudden lurch and swing, and with great force and violence threw plaintiff towards and against the said iron pole," etc.

It will be observed that the petition fails to aver that the pole was dangerously near to the track, or that its proximity was too close to the track for the safety of the passengers upon the car. It may be doubted whether evidence should have been admitted under this allegation tending to show that the pole was too close to the track. The proof offered upon this point was that of Mr. Ryan, who testified that on the Monday previous to the trial, which occurred on the 12th of March, 1902, the accident having occurred on the 18th of August, 1901, he measured the distance between the tracks at the point in question. When asked to give the result of his measurement, the court sustained an objection upon the ground that it was not shown that the pole was in the same position that it was at the time the accident occurred. Appellant did not offer to show that it was in the same position, nor did he make avowal as to what would have been the witness' answer to the question propounded. We are unable, therefore, to say that the action of the court was in any view of the case prejudicial, for we can not assume, in the absence of such avowal, that the testimony of the witness would have shown a state of case favorable to appellant.

No other evidence having been offered the court properly instructed the jury peremptorily to find for the defendant, and the judgment must be affirmed.

PEPPER v. PEPPER & CO.

(Filed June 4, 1903—Not to be reported.)

Contracts—Evidence—This action was brought at common law by appellant, who alleged that he was entitled to recover salary, expenses and commissions as traveling salesman for appellees, in selling whisky in a designated territory, under a contract allowing him a stipulated salary and expenses and commissions on all whisky which might be sold in said territory either by him or his employers. The evidence showed a complication of accounts and a verdict for \$1 resulted in favor of appellant, from which this appeal is prosecuted. Held—That there was no error in the instructions given and the verdict is not flagrantly against the evidence and will not,

therefore, be disturbed. It was not error to refuse to allow appellant to prove that warehouse receipts of appellees were seen in his territory as this was not sufficient evidence to show there had been an actual sale of whisky in his territory. Evidence as to the reasons for employing appellant was incompetent.

Geo. S. Shanklin for appellant.

C. J. Bronston for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Nunn.

The record in this case is voluminous, and was made on a common law issue to determine the matters of account growing out of a contract for services between appellant and appellees. The trial in the lower court resulted in a verdict in favor of appellant for \$1 only, and he has appealed to the court.

He alleged in his petition, in substance, that he was employed by appellee to travel and make sales of appellee's liquor, appellee being a distiller; that he was assigned the territory of the New England States, the State of New York, outside of Brooklyn and New York City, and the northern part of the State of Ohio in which to travel and make the sales; that it was agreed that he was to receive as compensation \$125 per month and 50 cents for each case of whisky and each barrel sold in his territory, whether sold by himself or others, and he was also to be allowed all expenses incurred by him; that this contract was made and entered into about the 1st of May, 1899, and continued under these terms until the first of the year 1900, when he says their contract was modified in this, that his expenses were to be limited from that time to not exceeding \$50 per week while he was in the city of Boston and not upon the road, and the contract continued as thus modified until about the 1st of May, 1901, when the contract was again changed. He was then to be allowed \$75 per week in lieu of traveling expenses and of salary and commissions, fixed by the contract in its original form, and he was to be allowed from that date \$2.50 per barrel on all whisky sold in the above territory, whether by the appellant or otherwise; and alleged that under this last contract that appellee was indebted to him in the sum of about \$125, and under the previous contracts in a balance of about \$5,000.

Appellee agreed to the original contract, as stated, except it denied that his expense account was to be unlimited, and alleged that it was not to exceed \$30 per week, and denied that he was given the State of New York and the northern part of the State of Ohio as part of his territory in which to travel, and denied that the contract was modified in any respect, and that this contract continued until about the 1st of May, 1901; and denied any modification of this contract, except it stated that about the first of the year 1900 that it agreed that the expense account should be increased to not exceeding \$50 per week. It also alleged that during the existence of this contract appellant drew many drafts upon appellee for salary, expense account and commissions on sales, which, together with what they paid him in checks, amounted to \$3,750.63, which overpaid appellant about \$2,300; it denied that it employed appellant, or that he labored for it after about the 1st of May, 1901, but it alleged that it had sold the whisky output from

its distillery for a number of years, beginning the 1st of May, 1901, to the J. E. Pepper Distributing Co., one Wolf being the president thereof, and that Wolf employed appellant to labor for it from that date, but that it paid to appellant for the distributing company the sum of \$625, and charged the same to the distributing company, which was paid to appellee by it.

Appellant was the only witness who testified in his behalf. He proved his contract as alleged by him. Appellee introduced its president, its vice-president and its secretary, and proved the contract as alleged by it. A great amount of correspondence between the parties was introduced as evidence, which threw but little light upon the questions at issue, but is evidence of great extravagance upon the part of appellant and by appellee for suffering it. The appellant contends that the court erred to his prejudice by refusing to give instruction "A" offered by him. The appellant is mistaken in this. The court's instruction, No. 5, was, in substance, the same as offered, except that the court did not authorize the jury to allow the appellant anything as commissions on sales after the 1st of May, 1901. The court was right in this, for there was not any proof that any whisky of appellee was sold in the territory named after the 1st of May, 1901. We understand that appellant's counsel concedes, or in effect concedes, this in his brief, but complains that the court erred to his prejudice in refusing to allow appellant to testify that while traveling in that territory after the 1st of May, 1901, he saw in the possession of two or three parties warehouse receipts for Pepper whisky which were issued by James E. Pepper & Co., which he claimed was evidence of sales of whisky of appellee in his territory on which he was entitled to commission.

If these receipts, in the possession of others, were evidence of sales made within that territory, then the receipts themselves were the best evidence, and the appellant should have produced those receipts, or have taken the depositions of those who held them. Even if it had been competent for appellant to prove that he saw some of these warehouse receipts in his territory, it was not sufficient evidence to show there had been an actual sale and delivery of liquor therein.

The president of the appellees, James E. Pepper, in giving his evidence, stated that he was induced to make the contract with his brother, the appellant, by the importunities of their sisters; in effect, that he gave the appellant the contract as a matter of charity. Appellant offered one of his sisters as a witness to prove that this was not correct. The court refused to allow her to testify on this point. Of this the appellant complains.

There was other evidence offered by both parties as to the inducement for the making of the contract, and of the reasons why the contract was made and entered into, and in this way each was endeavoring to discredit the other before the jury. This was improper, and the court should have prevented it. The parties agree that the contract was made, and the only question to be tried was the nature and extent of it, and what had been paid the appellant thereunder. Such testimony would not have elucidated the questions at issue, nor enabled the jury to arrive at a proper verdict.

Perceiving no error prejudicial to the appellant the judgment of the lower court is, therefore, affirmed.

SOUTH COVINGTON AND CINCINNATI STREET RY. CO. v. CONSTANS.

(Filed June 4, 1903—Not to be reported.)

1. Street railways—Negligence—Instructions—Appellee recovered a verdict against appellant for \$6,000 as damages for severe and permanent injuries received by her as the result of a derailment of one of appellant's electric cars upon which she was a passenger. Appellant relies on an error in an instruction given as grounds for reversal. Held—That said instruction was not erroneous in which the court told the jury that appellant's duty was to prevent the car from running at a rate of speed which was dangerous, and that the failure to exercise such care was negligence.

2. Evidence—The fact that a witness for plaintiff had a suit pending against appellant was relevant, but the amount that he claimed or the amount that may have been awarded him by the jury was not relevant.

Ernst, Cassett & McDougall and L. J. Crawford for appellant.

James C. Wright for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee recovered a verdict against appellant for \$6,000 as damages for severe and permanent injuries received by her as the result of a derailment of one of appellant's electric cars upon which she was a passenger.

Three grounds of reversal are presented. The first is: It is claimed appellant was not negligent in the operation of the car. For some distance before the point was reached where the accident occurred there was a grade down which the car was running. A number of witnesses testified that the car was run on this occasion at an unusually high rate of speed, so much so, in fact, that some of the witnesses instinctively felt, as they said, that some accident was liable to happen, and braced themselves for the shock. At the point in the grade where the accident occurred was a curve. Near this was a ravine. The car left the track at this curve and plunged down the ravine. The evidence on behalf of appellee was abundant to sustain the finding of the jury that the manner in which the car was run at the time and place the accident occurred was negligent. The amount of the verdict is not complained of. The second ground of reversal is because of the second instruction given to the jury. The first instruction told the jury that if they believed from the evidence that the car was negligently run at a rate of speed that was dangerous, and that by reason of said speed the car left the track, precipitating it into Taylor's creek, whereby plaintiff was injured, they should find for her compensatory damages for such pain and suffering, and for such destruction or diminution of her power to earn money, either or both, as resulted from the injury. The second instruction was: "The court instructs the jury that the defendant owed the plaintiff the duty to exercise the utmost care and skill which prudent persons exercise under similar circumstances, to prevent said car from running at a rate of speed which was dangerous, and that their failure to exercise such care is in law negligence."

The criticism of the instruction is that it is said to assume that the rate of speed with which the car was run was dangerous. We do not so understand

the instruction. The court was telling the jury by this instruction what was the duty of appellant in regard to the rate of speed at which it should have run its car, and the court told them that appellant's duty was to prevent the car from running at a rate of speed which was dangerous, and that the failure to exercise such care was negligence. We think this instruction correctly stated the law, although it may have been couched in language less subject to criticism.

The third ground relied upon is that the court erred in refusing the further cross-examination of witness Smyrl. This witness was a passenger upon the car at the time of the accident. It seems that he was also injured, and had brought a suit to recover damages for it. Appellant sought to show by the witness the amount of damages he had claimed in his action, as well as to show the result of the suit. It was said the purpose of this interrogation was to expose the bias of the witness. The court refused to permit it, and we think properly so. The fact that the witness had pending a suit against appellant for his injuries he claimed to have sustained in the same accident was relevant, but the amount that he had claimed, or the amount that may have been awarded him by the jury, could not be relevant upon any issue in this case.

The judgment is affirmed, with damages.

DANIEL v. BULLITT COUNTY.

(Filed June 4, 1903.)

1. Office and officer—Salaries—Evidence—Appellant was county judge of Bullitt county and after his induction into office the fiscal court of the county fixed his salary at \$300 per annum which he refused to accept and prosecuted an appeal to the circuit court, where the court, on a verdict of a jury, fixed his salary at \$300. On appeal appellant urges the error of the court in admitting and rejecting evidence. Held—That the court erred in confining the testimony of appellant's witnesses to reading sections of the statute prescribing the duties of a county judge, and in refusing to permit his witnesses who were familiar with the duties and responsibilities of a county judge, to testify as to same. Only such witnesses as show themselves sufficiently acquainted with the duties of the county judge to testify understandingly thereto should be permitted to testify as to the value of his services.

2. Jurisdiction—The legislature has wisely vested in the fiscal court of each county the authority to fix and allow the salary of its county judge, but the authority thus conferred is not absolute; for its abuse there is a remedy, the right of appeal to the circuit court.

Chapeze & Halstead for appellant.

J. F. Combs for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Settle.

Appellant was re-elected judge of the Bullitt County Court in November, 1901. His term of office, under and by virtue of his election, began the first Monday in January, 1902, and will end four years from that date.

At the March term, 1902, of the fiscal court of Bullitt county, held for the purpose of fixing salaries and attending to other business then before it, an order was entered by a majority vote of the members present fixing appellant's salary as county judge for the year 1902 at \$300, payable quarterly, which sum, as shown by the order mentioned, he refused to accept. An appeal from the order and allowance of the fiscal court was thereupon taken by him to the circuit court of the county, and upon trial had in that court his salary for the year indicated was fixed by the verdict of the jury and judgment of the court at \$300. A new trial was refused him by the circuit court, and the case has been brought to this court by appeal. Numerous errors are assigned for reversal, but only such of them will be considered as are deemed material. The office of county judge is one of great importance. For the performance of some of the duties required of him he is compensated by fees fixed by statute, but these are duties mainly clerical in their nature. For others of a weightier character, the value of which can not be estimated under the fee system, the law provides that he shall be paid a salary, to be fixed each year of his term of office by the fiscal court of the county. The duties and responsibilities of the office are more onerous in some counties than others, for which reason the legislature has wisely vested in the fiscal court of each county the authority to fix and allow the salary of its county judge, but the authority thus conferred is not absolute; for its abuse there is a remedy, the right of appeal to the circuit court.

It appears from the record that the appellant and his witnesses were refused permission by the lower court to enter upon a full explanation, in testifying before the jury, of the duties and responsibilities of his office as county judge, but were confined in the main to the introduction and reading of the several sections of the Kentucky Statutes relating to county judges and their duties. Indeed it appears that as many as sixty-eight sections of the statutes were thus required to be read by appellant while upon the witness stand.

This requirement of the court made the jury the judges of the law. It is not to be expected that the average jury would be sufficiently learned in the law to interpret statutes, or to distinguish between such duties of the county judge as are judicial and such as are ministerial, or to be able, unaided, to understand what services of that officer are remunerated by specified statutory compensation, or what compensation he is entitled to receive by way of salary. We think the jury were probably more confused than enlightened by the reading to them of the statute. Upon the other hand, a full explanation to the jury from the appellant and his witnesses, who were informed on the subject, in regard to the nature of such of his duties and the labor necessary to their proper performance, as are to be compensated by the salary allowed him, would have been sufficient to enable them to understand what was required of them, and it would of course have been the duty of the court to restrict the testimony of the witnesses to such statements as would have been competent under the rules of evidence.

We are of opinion that the lower court did not err in admitting testimony as to appellant's being interested as a partner in an agricultural implement store in Shepherdsville, and as to the time and attention which he gave to that business. We think the evidence competent not for the purpose of

proving neglect of his official duties, but as tending to show that the duties of his office were not so exacting as to take all of his time or attention. It is contended for appellant that the court erred in allowing to go to the jury the evidence of divers witnesses who are unfamiliar with the duties of appellant as county judge, yet were permitted to testify in regard to the character and value of his services. While some of the witnesses introduced by appellee manifested little knowledge of the duties of the appellant's office or of the value of his services, we are not prepared to say that their testimony was prejudicial to him; but as the case must again be tried, we would advise that only such witnesses as show themselves sufficiently acquainted with the duties of the county judge to testify understandingly in regard thereto should be permitted to testify as to the value of his services.

We find no error in the instructions given by the lower court. But on account of the error committed by that court in permitting the reading of the statutes to the jury, and in rejecting the testimony of appellant and his witnesses, as herein indicated, the judgment is reversed and cause remanded, with directions to the lower court to grant appellant a new trial and for further proceedings not inconsistent with this opinion.

CITY OF CATLETTSBURG, &c. v. SELF, &c.

(Filed May 27, 1908.)

Municipal government—Street improvements—Constitutional law—Thirty or more years ago certain streets of appellant, a city of the fourth class, had been macadamized. At whose cost is not shown. The city council, under authority of section 8572, Kentucky Statutes, had same improved by building them of fire clay brick at the cost of lot owners, and in pursuance of section 3574, Kentucky Statutes, bonds of the city were issued, payable in different amounts, within ten years, out of a street improvement fund to be raised by an assessment on the abutting property. This action was instituted by the property owners to enjoin the collection of said assessment. It is insisted that said bonds are invalid because said improvement is not original construction of the streets, but a reconstruction for which the city alone is liable. Held—That said improvement is original construction, and properly chargeable to the lot owners. It is also insisted that said bonds are invalid as issued in violation of section 157 of the Constitution, which prohibits the city from incurring an indebtedness in excess of the revenues and income of the city for the year, because it was not authorized by two-thirds of the voters of the city voting on that subject at an election held for that purpose. Held—That said bonds are not in violation of said section of the Constitution, as the indebtedness is not a debt of the city, but an indebtedness against the property alone.

Thos. R. Brown for appellants.

P. K. Malin and W. H. Wadsworth for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant city belongs to the fourth class. Thirty years or more ago certain of its streets had been graded and macadamized. At whose cost is not

shown. The improvement was quite deficient. The city council in 1900 determined to improve these ways by building them of fire-clay street paving brick, and to make the cost of the construction a charge against the abutting property. The proceedings were taken under section 3572, Kentucky Statutes, which allows: "The original construction of any street, road, alley, market space, lane, public square or grounds, wharves, levees, or avenue, may also be made at the exclusive cost of the owners of the lots and parts of lots or land fronting or abutting or bordering upon the grounds so improved, to be equally apportioned by the board of council according to the number of front feet owned by them respectively."

The ordinance requiring the improvement to be made under the section quoted was regularly adopted. The contract was let to the lowest bidder, and as required by statute. The contract price of the whole work undertaken was about \$25,000. The work has been completed as required by the specifications of the contract, and has been accepted by the city authorities.

Under section 3574, Kentucky Statutes, the city issued bonds for the payment of the work. That section required the mayor of the city, when the work was undertaken under section 3572, to, within thirty days after the signing of the contract, issue the bonds of the city in such amount as the council might order, not exceeding the contract price of the work, and the expenses of issuing the bonds, which bonds were made redeemable at any time within ten years. Section 3575, Kentucky Statutes, provides an elaborate plan for the payment of the bonds and interest, the substance of which is: The funds arising from a sale of the bonds shall be kept separately and exclusively, and be known as the "street improvement fund," and be applied only to the purpose for which the bonds were by ordinance directed to be issued; as soon as the improvement should be completed, it should, with its accruing interest, be prorated against the abutting property, by the front foot. The apportionment so made thereby became an assessment upon the abutting properties, collectible therefrom as other taxes, and secured by a lien on the property. It was collectible in annual installments, so that when collected it would liquidate the bonds.

The bonds, as provided for in the section last referred to, were issued to the amount of \$25,000, "payable semi-annually from date of same, and payable and redeemable not on the faith and credit of said city, but out of and secured by a lien on the assessments to be made and equally apportioned against said lots and parts of lots of lands," etc.

Thereafter the city undertook to refund those bonds by substituting its unconditional obligation to pay the holders that much money in any event, pledging all the revenues and property of the city therefor. This suit was brought by appellees, on their own behalves, as well as on behalf of all others similarly situated, who it was alleged were too numerous to be joined, but whose interest was one in common with appellees, obtaining an injunction against the collection of the assessments made by the city against the abutting property to pay the bonds in question. Appellees are owners of some of the property affected by the assessment.

Two grounds were relied on to defeat the city's right to require appellees' property, by any sort of tax, to pay for this improvement: First, it is claimed that the work was not original construction, but was reconstruc-

tion, which is, by statute (section 3565), to be borne by the city, and not by the abutting property; and, second, that, viewing it as a debt of the city, it was in excess of the income and revenues provided for that year, and not having been authorized by a two-thirds vote of the taxpayers at an election held for that purpose, was, therefore, contracted in violation of sections 157-158 of the Constitution, and was by the terms of that instrument forever void. The learned circuit court sustained appellees' attack upon the assessment, but upon which of the two grounds asserted we are not advised.

Paving the streets with fire-clay paving brick was a radical improvement. For aught the record shows the old macadamized roadway was an incomplete and insufficient provision for accommodating the public travel. It was probably more in the nature of a temporary makeshift till such time as the growth, affairs and importance of the municipality would justify its making a more permanent and expensive roadway.

In *McHenry v. Selvage*, 99 Ky., 232 (18 Ky. Law Rep., 473), a macadamized road had been taken into the city by an extension of its boundary. Upon the city's directing it to be paved in accordance with a general plan of street improvements, it was held that this was original and not reconstruction, within the meaning of the statutes. This was followed in *Mackin v. Wilson*, 20 Ky. Law Rep., 218.

This view of the law seems to have been founded upon the idea that as the abutting property is most benefited by a radical and permanent improvement, it should bear the cost of it; but where it has once done that, reconstructions, in their nature resembling repairs, should be borne by the entire municipality. Until the abutting property has once been compelled to bear this burden it has not constructed originally the street, which, in justice to all other property within the city, and upon an equal basis under the statute, it should do. We are of opinion that the improvement in this case comes within the term original construction, as used in the statute. We have not overlooked *City of Louisville v. Tyler*, 23 Ky. Law Rep., 827. Even if the principle of that case is not opposed to *McHenry v. Selvage* the facts are variant enough to distinguish it from this case. If these bonds, or the cost of this improvement, be deemed a debt or liability of the city, it is admittedly in excess of the revenues and income of the city for the year 1900 (when incurred), and would be void, because, not having been authorized by two-thirds of the voters of the city voting on that subject at an election held for that purpose, it would be in violation of section 157 of the Constitution.

It is argued for appellees that the fact that the city has assumed by its bonds to pay for this work makes the liability that of the municipality; that it is not material as affecting the nature of the liability whence the city derives its means of discharging it.

The construction and maintenance of proper roadways within its jurisdiction is one of the first duties of a municipality. In the matter of selecting the time and manner of making such improvements, the town acts legislatively. So it does, too, in providing the manner of the payment for the improvement. It derives this legislative authority, including the power of taxation to that end, by its delegation from the State legislature, in which is vested all the power of taxation in the State; that such improvements

may be made, if deemed advisable by the proper legislative body, at the exclusive cost of the property primarily and directly benefited thereby, within the limits of such benefit, is a doctrine too long and too often applied in this State, and generally everywhere, to now admit of question, or need citation of authorities. When the city directs, as it may, that such improvement be made at the exclusive cost of the abutting property, and the statute requires it to be borne, in such event, exclusively by the abutting property, the liability for the cost of the improvement is in no sense a personal one upon the city. The contractor must look alone to the property designated by the ordinance directing the improvement for pay for his work and materials. (*Gosnell v. City of Louisville*, 104 Ky., 201, 20 Ky. Law Rep., 519; *Becker v. City of Henderson*, 100 Ky., 450.) The city in this matter acts for the State in exercising the legislative discretion as to when, where and how such roadway improvements shall be made. The imposition of the cost, in the nature of a tax, is generally involuntary, so far as the person to bear it is concerned. The city council must, and does, act for him in making the contract with the contractor, as to terms, price, etc. The statute has undertaken to break the payments of such improvements into installments, of such duration and amounts as will likely bear least oppressively upon the taxpayer. The council, by virtue of its statutory authority to contract for the taxpaying lot owner, executes the city's bonds for the contract price. These bonds, by the terms of the ordinance under which they are issued, and of the statute upon which their validity is dependent, are payable only out of the "street improvement fund," which is to be collected from the property benefited by the improvement and charged with it.

A statute very similar to the one here involved, and under a like constitutional provision, was before the Indiana Supreme Court, in *Quill v. City of Indianapolis*, 7 L. R. A., 681. The conclusions of that court appear to us to fairly state the nature and effect of the obligations. It said: "It is enough to say the remedy of the holders of the bonds or certificates is confined exclusively to the special fund provided for, and to the collection of assessments by enforcing the lien upon the lots or parcels of ground assessed with the cost of the improvement. The city is in no way liable for the payment of the bonds except out of the special fund to be accumulated from assessments made against the property benefited. According to the scheme promulgated in the statute, in case the assessments are paid without delinquency, it is impossible for a single bond or certificate to mature in advance of the accumulation of a special fund devoted exclusively to its payment. If the assessments become delinquent, the remedy of the holders of the bonds or certificates is confined to the property. There is no liability against the city. The special fund provided for and the property are the sources from which the holders of the bonds and certificates must receive their pay, the city authorities acting merely as an agency for making and collecting the assessments, and as the custodian of the fund when the assessments are collected. In this they do not act as the agents of the city, but as special agents to accomplish a public end."

We are of opinion that the bonds first issued in settlement of this work were valid, and not in conflict with section 157 of the Constitution. Whether the second issue of bonds, the refunding bonds referred to, wherein the credit

and property of the city are pledged to the payment of the cost of the improvement, is a valid one, may be doubted. (*City of Covington v. Nadaud*, 103 Ky., 455, 20 Ky. Law Rep., 151.) But we are unable to see wherein appellees are prejudiced by that fact, for if these are not valid, then they owe the others which were exchanged for them. There does not appear to be any question between the city and the holders of the bonds as to their validity; and if appellees and others liable therefor pay to the city the money owing for the improvement as required by the ordinance and the statute, and the money is applied to discharging the liens upon their property, it does not appear to us that the matter of the form of the indebtedness, as executed by the city, is of vital materiality to appellees. It is admitted that the benefits were more than double the cost of the improvement, and that the work has been done in every respect according to the contract.

The judgment of the circuit court is reversed and cause remanded, with directions to dismiss appellees' petition and to discharge the injunction.

CENTRAL COAL AND IRON CO. v. GRIDER'S ADM'R.

(Filed June 3, 1903.)

Master and servant—Independent contractor—Negligence—Appellant made a contract with F. to sink a shaft for it, and agreed to furnish him a whim or hoist for the purpose of enabling him to perform his work. As a part of the hoist a rope was necessary to be used for the purpose of suspending a tub in the removal of the material from the shaft, and for the use of the workmen going to and from their work in it. For this purpose appellant furnished a wire rope which was used for about six months, when one of F.'s workmen was descending in the tub the rope broke precipitating him to the bottom, where the tub fell on appellee's intestate, crushing and killing him. In this action, brought to recover damages, appellant insists that it is not liable for said injury, as the relation of master and servant did not exist between it and the intestate, for F. was an independent contractor and the intestate was his employee, and that the injury resulted from the neglect of the independent contractor to ascertain and maintain the wire rope in a safe condition, and that same became rusted by coming in contact with copperas water. Held—That the relation of master and servant did not exist between appellant and the intestate, and that it was not under a duty to look after the rope and keep it in a reasonably safe condition. If any one was guilty of actionable negligence F. was in using the rope after it got in an unsafe condition. The negligent act did not consist in furnishing an insufficient or defective rope, but in allowing it to become so by those to whom it was furnished, the intestate's employers, between whom the relation of master and servant existed.

R. Y. Thomas and H. P. Taylor for appellant.

W. L. Reeves, W. J. Ross and Q. B. Coleman for appellee.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, a corporation, is a coal operator. It desiring to have sunk on its property a circular shaft eight feet in diameter, entered into a contract with Foley & Nunan, evidenced by a writing, by which they, at a stip-

ulated price per foot, agreed to sink it. There are provisions of the contract which read as follows: "The party of the second part agrees to sink a shaft at a point designated by the party of the first part, the said shaft to be eight feet in diameter and circular, for the sum of \$7.87½ per foot in depth, reckoned from a point on a level with the bottom of the retaining wall, which will be built by a separate contract. It is further agreed that the party of the first part shall furnish the necessary tools, with electric blast battery, for doing this work, and also a whim or hoist to be worked by horse power; also two horses for said whim. All labor and ammunition necessary for the completion of the work to be furnished by the parties of the second part." * * *

Pursuant to the contract the appellant furnished a "whim or hoist," and as a part of it a rope was necessary to be used for the purpose of suspending a tub used in the removal of the material from the shaft, and for the use of the workmen going to and from their work in it. First a grass rope was used, but it was believed to be unsafe, when the appellant, at the request of Foley & Nunan, furnished them a new wire rope, one that had never been used before. It was delivered to them on the — day of November, 1901, and they continued to use it from that date until the 23d day of May, 1902, when Allen Bailey, one of Foley & Nunan's employes got into the tub for the purpose of going to the bottom of the shaft in the prosecution of his labors, and as the tub swung clear, the rope broke about six feet above the ball of the tub; it fell with Bailey in it to the bottom of the shaft, which was about 170 feet deep, striking the intestate, Daniel Grider, who was working at the bottom of the shaft, killing him probably instantly, as he was dead when rescued from the shaft a few minutes later. The accident occurred while Foley & Nunan were sinking the shaft under their contract with the appellant. The personal representative of the intestate, Daniel Grider, brought this action to recover damages for the alleged negligence of the appellant in furnishing an insufficient, dangerous and defective rope to be used for the purpose hereinbefore stated.

The appellee claims that as it was the duty of appellant to furnish a rope to be used for the purpose and in the manner in which the one in question was being used when the accident occurred, the law imposed the duty of furnishing one in a reasonably safe condition, and to so keep it during the progress of the work. For the appellant it is contended that Foley & Nunan were independent contractors; that in addition to paying them a stipulated price per foot for the work, it agreed to furnish tools, whim, etc., which it did to their satisfaction; that the intestate was there, not its employe, and that the relation of master and servant did not exist between it and the intestate.

The evidence, without contradiction, establishes the facts to be as follows: That the wire rope was new when furnished the contractors; that the estimated weight it would carry was many times greater than it was sustaining when the accident happened; that when the rope was furnished there were no apparent defects in it; that the contractors employed and paid their laborers; that their laborers were not on the pay roll of the appellant; that it did not direct or control them in the performance of their duties; that a party representing the appellant occasionally visited the shaft to note the

progress of the work and make estimates, as required by the contract, to enable it to make payments to the contractors on the work. The rope could not have been defective when delivered to the contractors, or it would not have stood the use for six months before it broke. Copperas water, in contact with which it constantly came, caused it to rust and become defective. No jury composed of reasonable men, could from the evidence, or by reasonable inference drawn therefrom, have reached conclusions other than the one last above stated.

Counsel invites the attention of the court to a great variety of cases, which he contends support the right of the appellee to recover in this case, claiming that some place the right upon one ground and some upon others.

Attention has been called to the case of Bright's Adm'r v. Barnett & Record Co., 26 L. R. A., 524. In that case it appeared that the defendant was engaged in building an elevator for grain, and contracted with a fire extinguishing company to construct a fire extinguishing apparatus and appliances; the defendant was to furnish the staging that the men employed by the fire extinguishing company would need in performing the work. A staging plank or a plank walk of a single plank was needed to be thrown across the bins about seventy feet from the bottom, or above the floor, on which the employees stood or walked while prosecuting the work. The defendant undertook to, and did, furnish the walk across one of the bins for the use of the employees. The plank used had a large knot extending nearly across it, about five feet from one end. The deceased was an employe of the fire extinguishing company, and it was necessary for him to walk across the plank, and while doing so, it broke at the place where the knot was, precipitating him to the floor, killing him instantly. The deceased did not know of the defect in the plank, and owing to darkness could not see it. The defendant undertook to furnish the material and build the walk in a safe and suitable manner for the use of the deceased and other employes of the fire extinguishing company. A recovery was sustained against the defendant on two grounds: First, the defendant in furnishing the staging for the use of the employes of the fire extinguishing company had impliedly invited the deceased to walk on it while doing his work, and was liable to him if he suffered injury from its defective condition caused by negligence in its construction; second, such liability might rest upon the duty which the law imposes on every one to avoid acts immediately dangerous to the lives of others.

In *Mulchey v. Methodist Religious Society, &c.*, 125 Mass., 487, on an analogous state of facts the court held the Methodist Religious Society liable upon the theory that it had in effect invited and induced the injured party, an employe of one who had contracted to do certain painting on its church, to go upon dangerous and defective staging which it had procured to be erected for use of the contractor and his employes in performing the work under the contract. If the dangerous and defective condition of the staging from which the injuries resulted as appeared in *Bright, Adm'r v. Barnett & Record Co.*, and *Mulchey v. Methodist Religious Society*, had not existed by reason of the defective construction of the staging, it is evident, from the statements and reasoning of the court, no recovery would have been allowed.

In the last-named case the court said: "In the present case the society,

through its authorized agents, had accepted and used the staging, and had in effect invited and induced Needham and his workmen to come upon it to paint the church, and was liable to any of them who suffered injury from the dangerous condition of the staging which was not apparent to them, and which was caused by negligence in its construction."

A fair inference to be drawn from the cases to which we have alluded is that if the staging had become defective by being used after it had been constructed and accepted by the contractors, the injured employes could not have maintained the action against Barnett & Record Co., or the Methodist Religious Society. Many cases enunciating the same doctrine exist, but it would be unprofitable to cite and review them. Cases are cited to show (yet there are cases holding a contrary view) that premises upon which an independent contractor is required to labor for the benefit of the owner must be safe for the purpose. Other cases are cited to show the circumstances under which owners of land were held responsible for injuries suffered by persons going upon it at the owner's invitation, etc. The injury did not result from the defective condition of appellant's premises, therefore, no such question is here for consideration.

The chief contention of counsel for appellee is that the relation of master and servant existed between the appellant and the intestate, and that the appellee is entitled to recover upon that theory. In this view the court below concurred, and instructed the jury in accordance therewith. Among other instructions the court told the jury that it was the duty of the appellant to use ordinary care to keep the rope which it furnished Foley & Nunan in a sufficiently strong and safe condition for the purpose for which it was being used. As the uncontradicted testimony shows the rope at the time it was delivered to Foley & Nunan was new, and reasonably safe for the purpose for which it was to be used. The real question is: Did the law impose upon appellant the duty to keep it in that condition during the prosecution of the work under the contract? This duty was not imposed on appellant by the terms of the contract, nor was it by law, unless the relation of master and servant existed between appellant and the intestate. If the relation of master and servant existed, then the duty was imposed to furnish a rope in a reasonably safe condition for the purpose intended, and so maintain it. The intestate was neither employed, controlled nor paid by the appellant. It had neither the authority to employ him to work in the shaft, direct him while there, nor to discharge him. If he had been the servant of the appellant he would have been entirely under its control and direction.

In Cooley on Torts, pages 531-533, it is said: "A preliminary remark is essential regarding the employment in the law of the words master and servant. The common understanding of the words and the legal understanding is not the same; the latter is broader, and comprehends some cases in which the parties are master and servant only in a peculiar sense, and for certain purposes; perhaps only for a single purpose. In strictness, a servant is one who, for a valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful business. * * * It could not at all depend on whether the master was to pay anything, nor whether the service was permanent or temporary. His control of the action of the other is the important circumstances, and the particulars of his arrangement are immaterial."

The court in *Mulchey v. Methodist Religious Society*, cited by counsel for appellee, said: "The plaintiff, not being employed, controlled or paid by the defendant, would seem not to be their servant so that they would be liable for his acts, or their liability to him be governed by the rules applicable as between master and servant." (*Johnson v. Boston*, 118 Mass., 114.)

In *Robinson, &c. v. Webb*, 11 Bush, 465, the court quotes, with approval, a definition of master, as follows: "He is to be deemed the master who has the superior choice, control and direction of the servant, and whose will the servant represents, not merely in the ultimate result of the work, but in details."

It appeared in that case that the owner of a lot of ground contracted with a builder that the latter furnish all the materials and labor; and should erect thereon a building for a fixed price, to be done under the supervision of an architect. The court held that it was an independent employment, in which the relation of master and servant did not exist. The court concludes that the relation of master and servant did not exist between appellant and Foley & Nunan, or between it and the intestate; and that it was not under a duty to look after the rope and keep it in a reasonably safe condition. If any one was guilty of actionable negligence, Foley & Nunan were in using the rope after it got in an unsafe condition. Suppose a pick and shovel which appellant had furnished them had become unsafe for use after they had commenced using it, and in consequence thereof one of their employes had been injured, would the appellant have been responsible therefor? We think not. Neither is it any more responsible in the case at bar than it would have been in the supposed case. The undisputed facts show that negligent act (if such there was) did not consist in furnishing an insufficient or defective rope, but in allowing it to become so by those to whom it was furnished, the intestate's employers, between whom the relation of master and servant existed. Without passing upon the question (it not being before us) as to whether or not the appellant would have been responsible had it furnished a defective rope and the intestate had been killed in consequence thereof, it is sufficient to say that, as there was no evidence to show that it was defective when it was delivered to Foley & Nunan; and further, as the relation of master and servant did not exist between appellant and intestate, no duty rested on it to see that the rope continued safe for use in the shaft, the court should have given the jury peremptory instructions to find for the appellant.

The judgment is reversed for proceedings consistent with this opinion.

THOMAS, &c. v. CONRAD.

(Filed June 3, 1903—Not to be reported.)

Landlord and tenant—In an action by a landlord against an assignee of his tenant, the assignee may make any defenses that were available to the tenant.

Humphrey, Burnett & Humphrey for appellants.

Wm. Krieger and Harris & Marshall for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Judge Paynter delivered the following response to petition for rehearing:

The assignees of the lessees acquired all rights in the contract of lease which they had, one of which is to have it enforced according to the terms in the same manner as the lessees could have done. The landlord is asserting a claim under the lease against the assignees of the lessees. Certainly any claim which would have been available as a defense by the lessees is likewise available as a defense by their assignees. The same proceeding in the case that would have been necessary to have enabled the lessees to establish their defense is open to their assignees.

The petition for a rehearing was considered by a judge other than the one who delivered the opinion.

GRUBBS v. PENCE.

(Filed June 3, 1903—Not to be reported.)

C. C. Bagby, R. V. Hume and R. G. McKee for appellant.

E. V. Puryear, John C. Voris and W. R. Embry for appellee.

Appeal from Boyle Circuit Court.

Judge Paynter delivered the following response to petition for rehearing:

The court has been unable to discover any error in the opinion delivered in this case. In support of the petition for rehearing the appellee files her affidavit in which she makes statements, if true, she should not have recovered the judgment from which the appeal is prosecuted. This court can not consider on an appeal facts which would properly come before the lower court in an action for a new trial, therefore, they could not justify this court in reversing the case. The court has neither the disposition nor right to deprive the attorneys who have prosecuted the case of their fees without hearing, which it would practically do if it reversed the case on the affidavit of the appellee.

The petition for rehearing was considered by a judge other than the one who delivered the opinion.

FURGUSON, &c. v. HACKETT, &c.

(Filed June 3, 1903—Not to be reported.)

Elections—Constitutional law—The incumbents of the offices of police judge and marshal of Lookport, a city of the sixth class, who had been elected at the November election, 1901, resigned, and in March, 1902, the town council appointed appellant S. police judge and appellant F. marshal to fill the vacancies. At the ensuing November election, at which only a congressman was to be elected, appellees were respectively elected police judge and marshal. In this action, contesting the election, the question involved is whether or not said election is prohibited by section 152 of the Constitution. Held—That said election was invalid, as it was not held at an election "at which there are city, town, county, district or State officers to be elected," as provided by section 152 of the Constitution.

J. R. Fears and John D. Carroll for appellants.

W. O. Jackson for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Paynter.

At the November election, 1901, H. C. L. Montgomery was elected police judge of the town of Lockport for the ensuing term of four years, and at the same election James Newton was elected marshal of that town for the same term. On the first Monday in January, 1902, each was inducted into the office which he was elected to fill. Both having resigned, the board of trustees, in March, 1902, appointed the appellant, Steiger, judge of the police court and the appellant, Furguson, as marshal to fill the vacancies occasioned by the resignation of Montgomery and Newton. Although the board of trustees of the town were not requested to and did not order an election to fill the vacancies, an election was held on the day of the regular November election, 1902, at which the appellee, John Hackett, received a majority of all the votes cast for the office of police judge and Elijah Shaw received a majority of all the votes cast for the office of marshal. Lockport is situated in Henry county. At the regular November election of 1902 there were no city officers elected in Lockport, nor county officers in Henry county, or any part thereof, or in any district of which it is a part, or for the State at large. The only office to be filled at the November election in the district of which Henry county forms a part, was a representative in congress. For this reason the appellants who held the offices under appointment of the board of trustees claim that by virtue thereof they are entitled to hold them until their successors are elected at the regular November election in 1903, and are qualified. On the other hand, the appellee, contend that the vacancies should have been filled at the regular November election of 1902; and that as they received a majority of the votes cast at that election they are entitled to hold the respective offices of police judge and marshal.

Lockport is a city of the sixth class. By section 3699 of the Kentucky Statutes it is made a duty of the board of trustees to fill vacancies by appointment for the time fixed in the Constitution. The question is, should an election have been held in November, 1902, to fill the vacancies for the balance of the terms for which Montgomery and Newton were elected?

Section 152 of the Constitution reads as follows: "If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, and if three months intervene before said succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment until said election, and then said vacancies shall be filled by an election for the remainder of the term. If three months do not intervene between the happening of said vacancy and the next succeeding election at which city, town, county, district or State officers are to be elected, the office shall be filled by appointment until the second succeeding annual election at which city, town, county, district or State officers are to be elected; and then, if any part of the term remains unexpired, the office shall be filled by election until the regular time for the election of officers to fill said offices. Vacancies in all offices for the State at large, or districts larger than a county, shall be filled by appointment of the governor; all other ap-

pointments shall be made as prescribed by law. No person shall ever be appointed a member of the general assembly, but vacancies therein may be filled at a special election, in such manner as may be provided by law."

More than three months had elapsed from the time the appellants were appointed until the November election of 1902; that election was not an annual election to which section 152 of the Constitution related. The election referred to in that section is one "at which there are city, town, county, district or State officers to be elected." If section 152 had provided that vacancies should be filled at the next annual election, and not have limited the right to do so to an annual election at which either city, town, county, district or State officers were to be elected, then it would be clear that the election to fill the vacancy would have taken place at the regular annual November election in 1902. This conclusion is supported by *Shelly v. McCullough*, 97 Ky., 164; *Neely v. McCollum, &c.*, 107 Ky., 143; *Eversole v. Brown*, 21 Ky. Law Rep., 925; *Todd v. Johnson, &c.*, 99 Ky., 548. In the case of *Todd v. Johnson, &c.*, it is decided that the time at which an election is to be held by the people to fill vacancies for the unexpired term of an elective office is controlled by the provisions of section 152 of the Constitution, and that presidential electors are State officers in the meaning of that section. In *Eversole v. Brown* it appeared that in April, 1898, Clark, who had been elected circuit judge at the regular election of 1897, died and the governor appointed Brown to fill the vacancy. At the regular election in 1898, Eversole was elected to fill the unexpired term. This court held that under section 152 of the Constitution such an election could not be legally held at that time. In *Neely v. McCollum* it is held that vacancies in the office of sheriff can not be filled at an election when the only officer to be voted for in the county is a member of congress. This court in that case construed section 152 of the Constitution as it did in *Eversole v. Brown*. It follows that vacancies in the offices of police judge and marshal could not be filled by the people at the regular annual election in November, 1902.

The judgment is reversed for proceedings consistent with this opinion.

MUTUAL BENEFIT LIFE INSURANCE CO. OF NEWARK, NEW JERSEY v. FIRST NATIONAL BANK OF LOUISVILLE.

(Filed June 3, 1903.)

1. Insurance—Cessation of policy—Appellant issued a policy for \$5,000 on the life of S., on which he paid the premium for twelve years, and at the end of that time S. obtained a loan for \$599.32 from the company, and executed his note therefor, which was due July 30, 1899. Before the maturity of said note S. assigned said policy to appellee. S. failed to pay said note at maturity, or the premium then due, and died in November, the same year. An action having been instituted on said policy, appellant claimed that the policy ceased on July 1, 1899, when S. failed to pay the premium when due. Previous to the loan S. had made a change in the nonforfeiture clause by which the company agreed to pay as a cash surrender value its entire net reserve, less a surrender charge equal to 1 per cent. of the sum insured by the policy. If there be any loan upon the policy it shall be paid out of the cash surrender value and remainder paid in cash by the company, but the policy should cease upon the failure to pay any premium that might

be due. On July 30, 1899, there was a loan upon the policy then amounting to \$617.30, and which matured on that day, it also being the day upon which the semiannual premium was due, which he failed to pay. The amount of the cash surrender value of the policy on that day was the amount of the loan. There was, therefore, on July 30, after the payment of the note, nothing left of the cash surrender value to be applied to extended insurance, and the premium which was then due not being paid, by the terms of the contract the policy ceased. The policy did not cease on account of failure to pay the loan, but on account of the failure to pay the premium.

2. Estoppel—The insurance company by assenting to the assignment of the policy is not estopped from setting up the defense of the termination of the policy as the assignee received it with notice of the loan as the amount thereof was endorsed on the policy.

Dodd & Dodd and Harris & Marshall for appellant.

Mat O'Doherty for appellee, First National Bank.

Leopold & Pennebaker for Sudduth's Executor.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Paynter.

On July 30, 1897, the appellant issued to Watson A. Sudduth a policy insuring his life in the sum of \$5,000 for the benefit of his executors or assigns, in consideration of the payment of a semi-annual premium of \$63.50. He paid the premiums for twelve years. On July 14, 1898, he borrowed of the company on the policy \$549.60, executing a note due in six months. At maturity, an additional loan being made, the note was renewed for \$599.32, payable July 30, 1899. On May 6, 1899, Sudduth, for value, assigned the policy to the appellee, the First National Bank of Louisville. The assignment was assented to by the company in writing, but it was stipulated therein that the assignee agreed that any indebtedness to the company on the policy should be a valid and prior lien thereon. The semiannual premium falling due on July 30, 1899, was not paid, nor was the note due by Sudduth to the company; and he died the following November. This action was brought to recover on the policy.

Among other provisions the policy contained the following: "Provided, That in case the said premium shall not be paid on or before the several days hereinbefore mentioned for the payment thereof at the office of the company in the city of Newark, or to agent when they produce receipts, signed by the president or treasurer, then in every such case this policy shall cease and determine, subject to the provisions of the company's nonforfeiture system, as endorsed hereon with accompanying table."

Sudduth failing to pay the semi-annual premium falling due on July 30, 1899, the policy by its terms ceased, unless it was saved by the nonforfeiture provisions thereon endorsed. The nonforfeiture clause as originally endorsed on the policy was on March 24, 1896, changed by the consent of parties and another substituted for it. The rights of the parties must be determined by the substituted agreement, which is in these words: "In consideration of the release (copy of which is endorsed hereon) of the nonforfeiture provisions hereto, applicable to policy No. 187,661, on the life of Watson A. Sudduth, the Mutual Benefit Life Insurance Co. hereby agrees that the fol-

lowing nonforfeiture provisions shall apply thereto as if originally incorporated in and endorsed upon said policy:

"NONFORFEITURE PROVISIONS.

"When after two full annual premiums shall have been paid on this policy it shall cease or become void solely by the nonpayment of any premium when due, its entire net reserve by the American Experience Mortality and interest at 4 per cent. yearly (provided there be no loan on the policy) shall be applied by the company as a single premium at the company's rates published and in force at this date, either, first, to the purchase of nonparticipating term insurance for the full amount insured by this policy; or, second, upon the written application by the owner of this policy and the surrender thereof to the company at Newark within three months from such nonpayment of premium, to the purchase of a nonparticipating paid-up policy, payable at the time this policy would be payable if continued in force. Both kinds of insurance aforesaid will be subject to the same conditions, except as to payment of premiums, as those of this policy; third, if preferred the company will, on surrender of the policy fully receipted within the said three months, pay as a cash surrender value its entire net reserve by the American Experience Mortality and interest at $4\frac{1}{4}$ per cent. yearly, less a surrender charge equal to 1 per cent. of the sum insured by the policy.

"If there be any loan on the policy such indebtedness shall be paid off out of the cash surrender value and the remainder paid in cash by the company; or a value will be allowed by the company in the form of extended or paid-up insurance, as above provided, the amount to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash surrender value.

"If death shall occur within one year after the nonpayment of premium and during the term of extended insurance, there shall be deducted from the amount payable any premium that would have become due on this policy if it had continued in full force; also the amount of any indebtedness on this policy at time of such nonpayment of premium.

"The company will, at any time the policy is in full force, loan up to the limit secured by its cash surrender value upon a satisfactory assignment of the policy to the company as collateral security.

"The figures given in the following table are based upon the assumption that all premiums (less current dividends) have been fully paid in cash. The indebtedness, if any, may be paid off in cash, in which case the figures in the table will apply:

AT END OF YEAR.	CASH SURRENDER VALUE. LOAN VALUE.	IN CASE OF LAPSE OF POLICY.		
		EXTENDED INSURANCE.		PAID-UP POLICY.
		YEARS	DAYS.	
9th	\$421.15	9	92	\$1,140
10th	484.20	10	36	1,266
11th	549.00	10	812	1,390
12th	617.90	11	184	1,510
* * * *	* * * * *	* * *	* * *	* * * *

The question involved here is one of contract. The language which evidences the contract is plain and unambiguous. This being true, the court should have but little difficulty in determining the rights of the parties to it. By the terms of the policy, where is a loan upon it, after two full premiums are paid, it shall cease and become void solely by nonpayment of any premium when due; and its entire net reserve by the American Experience Mortality and interest at 4 per cent. yearly shall be applied by the company as a single premium at the company's rate published and in force at that date, to the purchase of nonparticipating term insurance for the full amount insured by the policy. By the second nonforfeiture provision the owner of the policy had the option to apply to the company and surrender the policy to it within three months from such nonpayment of premiums and have the net reserve and interest at 4 per cent. yearly applied to the purchase of a nonparticipating paid-up policy, payable at the time the policy would be payable, if continuing in force. The insured had paid the premiums for twelve years, and if he had not secured a loan upon the policy the net reserve so calculated would have carried the policy for something more than eleven years. On July 30, 1899, there was a loan upon the policy then amounting to \$617.30, and which matured on that day, it also being the day upon which the semiannual premium was due, which he failed to pay. The first and second nonforfeiture provisions were not available because of the loan. The third nonforfeiture provision reads as follows: "If preferred the company will, on surrender of the policy fully receipted within the said three months, pay as a cash surrender value its entire net reserve by the American Experience Mortality and interest at $4\frac{1}{2}$ per cent. yearly, less a surrender charge equal to 1 per cent. of the sum insured by the policy. If there be any loan upon the policy such indebtedness shall be paid off out of the cash surrender value, and the remainder paid in cash by the company; or a value will be allowed by the company in the form of extended or paid-up insurance as above provided, the amount to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash surrender value."

This is the provision of the policy which must control in determining the rights of the parties. It will be observed by the nonforfeiture provisions that where there is no loan upon the policy, the net reserve and interest at 4 per cent. purchases the extended insurance. Where there is a loan upon the policy it is not the net reserve and interest which forms the basis for extended insurance, but the cash surrender value of the policy. The cash surrender value is defined by the policy to be "its entire net reserve by the American Experience Mortality and interest at $4\frac{1}{2}$ per cent., less a surrender charge equal to 1 per cent. of the sum insured by the policy." The table on the policy shows this to be \$617.30, besides the evidence likewise establishes that to be the correct amount. On July 30, 1899, the day Sudduth failed to pay the semiannual premium on the policy, he owed exactly the amount of the cash surrender value of his policy. The net reserve under the first clause is computed on the basis of interest at 4 per cent., but under the third clause, to get the cash surrender value, on the basis of interest at the rate of $4\frac{1}{2}$ per cent. From a casual examination it might seem that the greater the rate of interest, the greater the amount would be, but it is just

the contrary, as the purpose is to find the present value of the policy, which has not matured and the present value of a sum due in the future is smaller at $4\frac{1}{2}$ per cent. than at 4 per cent. The net reserve of the policy by the American Experience Mortality and interest at $4\frac{1}{2}$ per cent. is \$668.30. The amount of the policy being \$5,000, if there be deducted 1 per cent. of the sum insured, \$50, from the net reserve at $4\frac{1}{2}$ per cent., there is left \$617.30, the amount stated in the table. There was, therefore, on July 30, after the payment of the note, nothing left of the cash surrender value to be applied to extended insurance, and the premium which was then due, not being paid by the terms of the contract, the policy ceased. It was understood by Sudduth and the company when the loan was made that the cash surrender value of the policy on July 30, 1899, would be \$617.30, therefore, the company loaned him that amount as it agreed to do under the nonforfeiture provisions of the policy; for it is there provided that it will "at any time while the policy is in full force loan up to the limit secured by its cash surrender value, upon a satisfactory assignment of the policy to the company as collateral security." Sudduth anticipated the cash surrender value of the policy, and drew it in advance. The basis for settlement, after the nonpayment of the premiums, when a loan has been made to the insured by the company is, as plainly stated in the nonforfeiture provisions, and it is when no loan has been made and the insured requests that he be given "a nonparticipating paid-up policy." He had the right to elect which nonforfeiture right he would accept. When he concluded to borrow from the company an amount, the exact equivalent of the cash surrender value of the policy, he could not fail to pay it and the premium, and then claim the right to extended or paid-up insurance. By borrowing the money under the terms of the policy he had exhausted the entire amount of the cash surrender value of it; and in failing to pay it and the premium he elected to settle on the basis of the cash surrender value of the policy. This is necessarily so, because he had nothing due him to purchase extended or paid-up insurance. Suppose Sudduth, on July 30, 1899, had elected to take under second option for settlement a paid-up policy payable at his death; he certainly could not afterwards have had the right to exercise the first option and get "nonparticipating term insurance for the full amount insured by the policy."

If he could not do this, it is manifest he could not take the cash surrender value of the policy and then claim insurance under either of the other plans. The election to exercise one of the options for settlement excludes the right to a settlement under either of the others provided in the policy. Sudduth did not demand a settlement under either the first or second nonforfeiture clause. Suppose he had done so; presumably the parties would have read from the nonforfeiture provisions the clause as follows: "If there be any loan on the policy such indebtedness shall be paid off out of the cash surrender value, and the remainder paid in cash by the company; or a value will be allowed by the company in the form of extended or paid-up insurance as above provided, the amount to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash surrender value."

Then they would have ascertained the insured's indebtedness to the company to be \$617.30, after deducting the surrender charge equal to 1 per cent.

of the sum insured by the policy, the cash surrender value would have been found to be exactly \$617.80. It would have demonstrated that he did not have one cent coming to him with which to pay for extended insurance or a paid-up policy. Of course the company would have refused to have given him extended insurance or a paid-up policy, because there was nothing due the insured to purchase the same. After making the deduction there was no cash due the insured, so there was no value for the company to allow in the form of extended or paid-up insurance, hence the policy was not in force when he died. To so hold does not work a forfeiture of any of the insured's rights, but gives him all the rights which the company contracted to give him, and such as he agreed to accept. There is no element of forfeiture in the case. The three options given by the nonforfeiture provisions presumably were of equal monetary value. As to whether the insured would take one or the other depended entirely upon himself. If he did that which by the express terms of his contract showed he elected to take one instead of another, it can not be said he forfeited any right, but rather that he made a choice of rights or privileges thereunder. Sudduth simply withdrew from the company and used money which he might have left with it as a protection for the future in case he failed to pay a premium. It does not claim a forfeiture of the policy for the failure to pay the note, but that the policy ceased to bind it upon the nonpayment of the premium. When this took place, then the nonforfeiture provisions became operative, and the rights of the parties should be determined thereby. That he might exercise the right as fully as he did he procured the company to substitute the present nonforfeiture provisions for those which the policy originally contained. Appellant seeks the enforcement of the terms of the contract, which are not doubtful or uncertain in meaning. Peckham, J., delivered the opinion of the court in *Holly v. Metropolitan Life Insurance Co.*, 105 N. Y., 442, in which it is said: "If language as plain and unambiguous as this is not only to be twisted out of its natural meaning, but is to be wholly ignored by the courts of justice, it will be useless in the future for companies to make any effort to bind policyholders to perform their contracts. The use of language is to express ideas, and writing is resorted to in order to furnish conclusive proof of what language was used. Being certain of the language used, and the case being free from fraud or mistake, if such language is plain and susceptible of but one meaning, that meaning, even in cases of contracts regarding life insurance, must control."

There was nothing unjust in the fact that the policy allowed 4 per cent. reserve, or \$718.30, if that sum be used for extended or paid-up insurance; whilst it fixed a value of \$617.80 to be paid to the policy holder in case of lapse. The company doubtless regarded the benefit which it hoped to derive by the policy holder taking extended or paid-up insurance instead of cash as being a good business reason for allowing \$718.30 in the purchase of such insurance.

The cash surrender value of the policy was not diminished because of the loan which the company made to Sudduth. If it was not, then the transaction was not usurious. If no loan had been made the cash surrender value of the policy, on July 30th, 1899, by its terms was \$617.80, and Sudduth could

only have withdrawn that amount. It is also urged that the insurance company having assented to the assignment to the appellee, is estopped to make the defense now relied on. Appellee had no notice there was a loan on the policy, and was informed by Sudduth when he assigned the policy to it that the policy was good for something over eleven years, if he paid nothing more on the premiums, but there were then the following endorsements on the policy:

"July 14, 1898, the existing indebtedness to the company on this policy is \$549.60 (interest at 6 per cent. from July 30, 1898), as evidenced by the certificate of loan in the company's possession.

"Paid off January 30, 1899, out of new loan.

"M. B. L. I. CO.,

"Per G. H. C.

"January 30, 1899, the existing indebtedness to the company on this policy is \$599.33 (with interest at 6 per cent. from January 30, 1899), as evidenced by the certificate of loan in the company's possession."

Appellee's agents failed to observe these endorsements, but being on the policy at the time of the assignment, appellee took subject to them. While the contract above quoted stipulated that the company would loan on a proper assignment of the policy, it was not required to take an assignment. The policy was the obligation of the company to the assured. It was, therefore, properly held by him, and the endorsements on it were notice to all persons dealing with it that a loan had been made on it. No notice was given to the bank as to the maturity of the premium; it was given to Sudduth, which was sufficient, if a notice was necessary at all. Counsel relies upon section 653, Kentucky Statutes, as prescribing how policies shall be valued, but this is only for the guidance of the insurance commissioner in determining the solvency of the company, and has no application to a contract like the one under consideration. The cases of *St. Louis Mutual Life Insurance Co. v. Grigsby*, 73 Ky., 310; *Northwestern Mutual Life Insurance Co. v. Fort's Adm'r*, 82 Ky., 269; *New York Life Insurance Co. v. Curry*, 24 Ky. Law Rep., 1930, and other cases resting upon the same principle, are not in conflict with the conclusions in the case at bar. In those cases the default was in the payment of a note or interest, not in the nonpayment of the premium. In this case the insured received the full amount he was entitled to under the plan of settlement which he elected to adopt, which does not appear to have been done in those cases. In this case the settlement is made in conformity to the contract of insurance.

The judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

Judges Hobson, O'Rear and Nunn dissent.

Judge Hobson delivered the following dissenting opinion:

It is conceded that by the terms of the contract the policy ceased when Sudduth failed to pay the note or the premium due on July 30, 1899. But back of this is the question whether the contract to this effect is such as the courts of this State will enforce. A distinction must be made between the rights of appellant as insurer and its rights as money lender. If there had been no loan on the policy it would have continued in force, notwith-

standing the nonpayment of the premium, something over eleven years. It has been held in a number of cases that the court will not enforce a penalty for the nonpayment of a debt and thus bring about a forfeiture of the policy.

In *St. Louis Mutual Life Ins. Co. v. Grigsby*, 78 Ky., 310, Grigsby's life was insured in the sum of \$10,000 by a policy issued August 16, 1867, in consideration of the payment annually for ten years of a premium of \$690.60.

It was stipulated that if default was made in the payment of any premium, such default should not work a forfeiture of the policy, but it should be reduced to such proportionate part of the sum insured as the sum of the annual payments made bore to the sum of the ten annual payments stipulated for. It was also provided that if Grigsby failed to pay annually in advance the interest on any unpaid note or loan on account of any of the annual premiums, the policy should cease and determine. Grigsby paid the initial premium of \$690.60 in 1867. He also paid one-half the premium for 1868 and 1869, and executed his notes for the other half. He failed to pay the premium for the year 1870 or the interest on his notes. In November, 1870, by a written contract, the policy was renewed and continued in force for the commuted amount of \$3,000 until August, 1871; Grigsby then paid the amount required of him by the company, and executed notes for the remainder, but he failed to pay the interest due on his notes on August 16, 1871, and after this died on January 2, 1872. The court enforced the policy. It said: "We are satisfied from the nature of the contract that the forfeiture was intended as a penalty to secure not the ultimate, but the prompt, payment of the interest to become due, and as the default is only in time and the company can be given all that it stipulated to receive, a case is presented in which relief can and ought to be afforded."

In *Northwestern Mutual Life Ins. Co. v. Fort's Adm'r*, 82 Ky., 289, where the failure to pay the interest on a premium note was likewise relied on to defeat a recovery on the policy, the court, referring to the case above cited, said: "Here the default, if any has occurred, is not of the substance of the contract, but in time of the payment of interest, and the company can be given all that it stipulated to receive. On the other hand, to forfeit the whole policy on account of default in time of payment of the interest, which formed but a small part of the consideration, and which the company is fully secured in the ultimate payment of, if not already paid, would impose upon the insured the entire loss of the premiums actually paid. A forfeiture under such circumstances would be extremely oppressive, and if provided for in a contract between individuals concerning any ordinary business transaction, be held as in the nature of a penalty. And as we are unable to perceive any reason for changing or relaxing the rule in respect to contracts about the business of life insurance, the forfeiture provided for in this case must be likewise so held."

In *New York Life Ins. Co. v. Curry, &c.*, 24 Ky. Law Rep., 1930, the assured held a paid-up policy for \$680. He borrowed \$180, pledging the policy to secure the loan, and signed a writing to the effect that if he failed to pay the interest on the loan the policy should be surrendered to the company at its customary cash surrender value, and in that case it should be liable to him for the balance only of the cash surrender value after deducting the loan and interest and any expenses incurred. The interest was not paid,

The company claimed that the policy was terminated, and after eight months refused to reinstate the policy upon the payment of the debt. The court said: "By the terms of this writing, if the loan or its interest was not repaid when due under the loan agreement, the policy was to be surrendered to the insurer 'at the customary cash surrender value then allowed by said party for the surrender of policies of this class.' This is, pure and simple, a provision for the forfeiture of the policy upon such terms as the payee of the note may require and at its option. The difference between this and ordinary unqualified forfeiture lies alone in the extent of the forfeiture. It operates as an enforced conversion without further notice to or consent of the borrower of his collateral if he fails to meet promptly the payment of interest upon his debt. * * * Appellant, as a money lender, stands under the law precisely as any other lender of money. Its charters and privileges as a life insurance company can not affect its other quality as a money lender. If it loans money on its policies held by its policy holders its rights as lender are exactly what they would be if instead of the policy the borrower pledged stocks, bonds or policies in other companies, or gave a chattel or real estate mortgage to secure the loan."

Along the same line and resting upon the same principle are *Montgomery v. Phoenix Mutual Life Ins. Co.*, 77 Ky., 51; *Mutual Life Ins. Co. v. Jarboe*, 102, Ky., 80; *Manhattan Life Ins. Co. v. Patterson*, 23 Ky. Law Rep., 1283; *Washington Life Ins. Co. v. Miles*, 23 Ky. Law Rep., 1705.

The case before us differs from those cited in the following particulars:

1st. Here there was a default in the payment of a premium as well as of the note. There the default was only in the payment of a note.

2d. Here the amount of the note was equal to the cash surrender value of the policy as fixed by the company. This does not appear in any of the cases cited.

3d. Here the agreement as to the termination of the policy is contained in the same contract that provides for the extended insurance, and not in a supplementary contract.

4th. In those cases the assured held or was entitled to a paid-up policy.

1st. While there was a default, both in the payment of a premium and of the note, if the note had been paid the default in the premium would not have affected the policy, for if there had been no loan the policy would have been extended for something over eleven years. It was not, therefore, the failure to pay the premium that terminated the policy, for this would not have mattered but for the nonpayment of the note.

2d. In some of the cases nothing is said about the cash surrender value or its amount. But aside from this, the cash surrender value is fixed by the company as the amount at which it will take the policy under any circumstances on the application of the insured. The policy may be of much greater value, for the cash surrender value does not purport to be the real value of the policy. By statute in this State policies are valued under the American Experience Mortality, with interest at 4 per cent. (Kentucky Statutes, section 653.) It must be presumed that policies are ordinarily worth this. On this basis the policy in contest was of cash value \$718.80. Under special circumstances they are often worth practically their face value, as where the health of the insured has failed. If Sudduth had paid his note of

\$617.30 on July 30, 1899, his policy would have been extended over eleven years. The failure to pay the note, if it gave the company an absolute right to terminate the policy by applying its cash surrender value to the payment of the note, can not be distinguished from a like contract as to any other collateral pledged to secure a debt, with a provision in the contract that if the debt is not paid the collateral shall vest in the creditor at a price fixed by the contract in advance.

3d. It is settled by the cases above cited that where the right to continue insurance has been acquired, a contract for the termination of the policy on the nonpayment of a debt will not be enforced. The reason for the rule is that the law will not suffer the lender to impose on the borrower. The form of the transaction is immaterial. The court will not allow any disguise or mere form to defeat the rule. Here Sudduth has acquired a right to continued insurance on March 24, 1896, when the substituted contract was made; and by the terms of that contract when he had paid in July, 1897, the full annual premium for ten years, as there was then no loan on the policy, he had the right to extended insurance without paying anything more for ten years and thirty-eight days. In July, 1898, when he originally negotiated the loan, he had the right to continued insurance by the terms of the contract for ten years and three hundred and twelve days, as there was until then no loan on the policy. This right to continued insurance for over ten years, which he had acquired before the loan was made, he continued to have until his death, unless he lost it by the bare fact that he afterwards secured a loan on the policy. When the loan matured he did not elect to take up his note and surrender the policy to the company. The following correspondence took place between them looking to Sudduth's paying part of the premium and giving a new note:

"July 30, 1899.

"The undersigned, the party assured under policy No. 137,661 in the Mutual Benefit Life Insurance Co., hereby requests that the cash due July 30, 1899, be settled by premium loan.

"WATSON A. SUDDUTH."

"Louisville, Ky., August 23, 1899.

"Mr. W. A. Sudduth, Fifth and Court Place, City:

"Dear Sir—Upon return of policy No. 137,661 the inclosed certificate of loan, signed by yourself and the outstanding assignment to the First National Bank of Louisville cancelled by the bank, the company will now increase the policy loan from \$599.33 to \$638.30, applying the increase in part payment of the premium due the 30th ult., provided the remainder of the premium, \$31.85, be paid in cash. The seal of the bank should be attached to the cancellation of its assignment.

Yours truly,

"K. W. SMITH & CO."

The letter of Smith & Co. was written in accordance with instructions from the home office, to which, in the meantime, the application of Sudduth had been sent. Sudduth did not comply with this proposition, and, though there were some other propositions made subsequently, they were not accepted by him, and matters stood as they were until he was taken sick in November following, when the bank offered to pay both the premium and the note, but the company refused to accept the money.

If a bank had made a contract with Sudduth to lend him \$617.30, and had provided in it that if the note was not paid it should have the policy absolutely or the entire benefit of it, there would be no doubt that the contract would not be enforced. The fact that the insurance company made the loan to one who held a policy in the company on his own life can not put it in a better position than if the policy had been in another company and had been hypothecated for the loan. The substance of the transaction is that the insurance company lent its policy holder \$617.30 on his policy. When the note matured and was not paid the relation of debtor and creditor existed between them on the note, and the policy was the collateral securing the obligation. A stipulation in a contract that in this event the insurance company should have the right to cancel the policy if the note was not paid, could not be enforced. But that is, in substance, the case we have, for if the amount of the note is subtracted from the cash surrender value, nothing is left, and if the cash surrender value is paid by the company in the cancellation of the note, the policy is at an end.

4th. In the cases cited the assured had paid for insurance during his life. Here the assured, when the loan was obtained, had paid for insurance for a term of years. No sound distinction can be made between this case and those, because the insurance there had been paid for during the life of the assured, and here for a term of years, which might exceed the limit of his life; for in either case the assured had a definite right to insurance, a vested right, which continued far beyond Sudduth's death, unless it was divested in his lifetime. It was suggested on the argument that he consumed the fund which he had thus provided for extended insurance, and in illustration it was said that one can not keep his cake and eat it too. But the difficulty is that Sudduth ate no cake. He only got a loan. If the company had paid him a sum of money absolutely in distinguishment of his right to continued insurance, the argument for appellant would apply. But this it did not do; it only lent him the money, and he was under obligation to pay the money back, with interest at 6 per cent. The interest on the money is the only consideration which our statute allows to be paid for its use. All contracts for a greater consideration for the use of money, direct or indirect, are declared void. (Kentucky Statutes, section 2219.) The purpose of the statute is to prevent lenders from making hard contracts with borrowers, and the agreement by Sudduth to forego his right to extended insurance, which he had then absolutely for a term of years, extending beyond the time of his death, in consideration of the loan, besides the lawful interest on the money, was both within the letter and meaning of the statute. When the note matured the company had a legal demand against Sudduth for the amount of the note, and this it could enforce. He could at his election cancel his policy at its surrender value and apply the proceeds to the payment of his note. But this he did not do. The company continued to hold the note until his death, and, therefore, continued to hold the demand against him for the money. His assignee, the First National Bank, held the policy. Sudduth had a right to pay his note and save his policy, for the election was in him to cancel at the surrender value or not. The company did not tender the note or demand the policy. It, therefore, stood simply as a lien creditor, and it could not on the nonpayment of the note appropriate the debtor's

property at a price fixed by it in advance; for it can not be permitted to impose more onerous conditions upon its policy holders, who borrow from it and fail to pay, than other lenders of money may impose upon their debtors.

It is, however, provided in the contract that if the death of the assured occurred within one year after the nonpayment of a premium, and during the term of extended insurance, there should be deducted from the amount payable such premium as well as the amount of any indebtedness of the assured to the company on the policy. This was a reasonable provision, for otherwise, one who was in bad health might risk his not surviving the year, and thus profit by his own violation of the contract. The amount of the premium due July 30 was not subtracted in the judgment. This was error. The credit should have been given as well for the premium and interest from the time it was due as for the note. With this modification, the judgment complained of seems to me correct.

I. therefore, dissent from the opinion of the court.

Judges O'Rear and Nunn concur in this dissent.

NEAL, &c. v. YOUNG, &c.

(Filed June 20, 1903—Not to be reported.)

1. Injunction—Primary elections—Authority of State Democratic Central Committee to prevent the holding of a local primary election—Vested rights of candidates—After the regularly constituted Democratic Committee of Jefferson county had ordered the holding of a primary election in said county and the city of Louisville for the nomination of circuit judges, circuit clerks and other officers, the State Central Committee, within three days before the day fixed for holding said primary election and without any notice, ordered that said primary election be not held, and by resolution authorized the chairman to take such steps as were necessary to carry out said order and approving in advance his acts done in pursuance thereof. The local committee refused to obey the order of the State Central Committee, and announced its intention to hold said primary election. Whereupon the chairman of the State Central Committee made an order removing the principal part of the local committee. The local committee obtained this injunction restraining the chairman from interfering with the holding of said primary election; also from removing said committee, and the validity of said injunction is involved on this motion to dissolve same. Held—That as the local committee had decided that a primary election should be held for the nomination of Democratic candidates for office, the law regulating primary elections applied to it, and under it the candidates, having complied with its provisions by paying the necessary assessments and having their names printed on the ballots, had acquired a vested right which were beyond the power of party authority to destroy by calling off the primary election. The local committee, whose duty it was to call and conduct a primary election, could not call off said election, and certainly the State Central Committee, with certain supervisory powers over the local committee, can not destroy the rights acquired by candidates in the primary.

2. Removal of committee—The State Central Committee, even if it possessed authority to remove a local committee, had no power by resolution to delegate such authority to its chairman.

Appeal from Jefferson Circuit Court.

Judge Paynter delivered the following opinion upon a motion to dissolve the injunction:

All the defendants pursuant to notices appeared before me as one of the judges of the Court of Appeals, and moved to dissolve the injunction granted by Judge Caruth. A primary election had been called for May 26, 1903, by the regularly constituted Democratic Committee of Jefferson county and of the city of Louisville and the Thirtieth Judicial District to nominate circuit judges, circuit clerk and other officers. The committee had made all the necessary arrangements for holding the primary election. The candidates had been assessed amounts aggregating over \$4,000 to pay the expenses of the primary; the ballots had been printed, and the election officers appointed and sworn. The Democratic State Central Committee, without giving notice of a purpose to do so, on the 23d day of May passed a resolution declaring the primary thus called should not be held on the date named; and in addition to that declaration the resolution concluded in the following language, namely: "The chairman of this committee is directed to take all steps to see that this order is fully carried out, and if the committee which now exists in the said city of Louisville should fail or refuse on or before next Tuesday to comply with this order, then said chairman is empowered to take such steps as are necessary to see that this order is carried out, and his acts are hereby approved, and he will report at the next meeting of this committee his acts in the premises."

The local committee charged with the responsibility of conducting the primary election refused to obey the order of the State Central Committee, and announced its purpose to proceed with the primary election. The defendant, Allie W. Young, being chairman of the committee, proceeded to make an order removing the principal part of the old committee, and appointed others in their places as members of the committee. The local committee denied the right of the State Central Committee to prevent the holding of the primary, and the right of Young to remove members of the local committee, and appoint others in their stead. This action was instituted by the members of the local committee and certain of the candidates who had complied with the rules for the conduct of the primary, and had their names printed upon the ballots as candidates for certain offices; and an order of injunction was obtained restraining Young, his associates and appointees from interfering with the holding of the primary election, and the removal of the committee.

The following questions are to be determined: First, did the State Central Committee have the authority to prevent the holding of the primary election? second, did Young, by virtue of the resolution, have the right to remove members of the local committee? third, did the court have the jurisdiction to restrain Young and his associates from interfering with the local committee in the conduct of the primary election?

The committee named was the governing authority of the Democratic party in Jefferson county, and as such was authorized to call and conduct a primary election for nominating candidates for judges of the circuit courts of the Thirtieth Judicial District and candidates for other offices. The committee was not required to call a primary election, but when it did so it subjected itself to the operation of the primary election law. The general

assembly thought it wise to require all primary elections to be held under the law, and for the violation of its provisions prescribed penalties of the same character as are inflicted upon wrongdoers for the violation of the general election law. The primary election law is a statute law the same as is the law for the regulation of general elections, the difference in purpose being that the former is to regulate the nomination of candidates for offices, the latter to regulate the election at which they are chosen by the electors to fill the offices. In *Egan v. Cerwe*, 23 Ky. Law Rep., 1496, this court said: "It seems reasonably clear from these provisions that the legislative intent was to place primary elections on the same plane as the regular elections." When a primary election has been called in the manner prescribed by the statutes the members of the committee who called and are required by the law to conduct it became officers of the law, and are required to respect and enforce the statutes enacted for the regulation of primary elections. If they refuse to perform a duty imposed by law, for instance, refuse to place the name of a candidate on the ballot, a mandamus will lie to compel them to do so. (*Young v. Beckham*, 24 Ky. Law Rep., 2135.) In *Egan v. Cerwe* the court held that any candidate had the right to have his name placed upon the ballot not later than fifteen days next preceding the holding of the primary election by complying with its rules; and that the committee did not have the right to fix as a limit a day more than fifteen days before the primary election when entries of names shall close. In that case the court held that a mandatory injunction would lie to enforce the rights of the party who desired to be a candidate. The relief sought in *Brown v. Republican County Committee*, 23 Ky. Law Rep., 2422, was more comprehensive than that adjudged in *Egan v. Cerwe* and *Young v. Beckham*, and the court decided that the action could be maintained. The whole court considered the *Brown* case and the *Young v. Beckham* case, and the opinions were unanimous. The Court of Appeals has not only stated that a primary election is placed upon the plane of a general election, but that individual rights may be acquired which will be enforced by the extraordinary remedies of mandamus and injunction. If courts should compel the committee having charge of a primary to place the names of candidates on the ballots, it necessarily follows they should compel the committee to have the ballots printed, hence have them distributed for use. Suppose a case where the court has been compelled to take the steps mentioned above successively, should the committee be allowed by calling off the primary election to defeat the enforcement of the mandates of the court and destroy legal rights adjudged? We think not. If the local committee whose duty it is to call and conduct a primary can not do so, certainly the State Central Committee, with certain supervisory authority over the local committee, can not destroy the rights acquired by candidates in the primary. The preservation of the individual and legal rights does not depend upon the fact whether they are attacked by persons exercising inferior or superior authority; they exist independent of and are beyond the reach of arbitrary power. The candidates had incurred a large expense connected with the holding of the primary election; twelve days had elapsed after the close of entries of candidates; no candidates except those who had complied with the regulations of the committee fifteen days before the primary were entitled to

have their names printed on the ballots as candidates; thus under the statute the number of their competitors (where opposition existed) for the nominations were limited. In addition to this the ballots were printed, the officers of election were appointed, and almost everything had been done except the casting of the ballots. If it could be called off under the circumstances, it could likewise be done after the ballots had been cast, but before the result was certified. I am of the opinion that the candidates had acquired rights which were beyond the power of party authority to destroy "by calling off the primary election."

The State Central Committee by its resolution did not nor did it attempt to remove the committee in Jefferson county and the city of Louisville. If it had the authority to do so (which I do not decide) it did not exercise it. If it had such authority, it was delegated to it by the Democratic State Convention; that authority could not be delegated to any one, be he the chairman or member of the committee. To remove a committee, if the authority existed, necessitated the exercise of judgment and discretion of the committee, not of some one else. If the State Central Committee had intended that such judgment or discretion and authority should be exercised by the chairman, it would have given it to him. He is not even given a vote at a committee meeting except in case of a tie. It, therefore, follows that the action of the chairman of the State Central Committee in his attempted removal of the old and the appointment of a new committee was without authority, and his action was void. It is proper to express this view, because the committee conducting the primary became officers under the primary election law, and are entitled to protection in discharge of their duties without interruption or hindrance by the unauthorized body which was sought to be constituted for that purpose because the committee disregarded the attempt to call off the primary.

It was urged in argument that the question here involved is purely a political one, and that the courts should not take jurisdiction of it. My answer is, that the Court of Appeals has a contrary opinion, and in *Egan v. Cerwe*; *Brown v. Republican County Committee* and *Young v. Beckham*, has held that it had jurisdiction to enforce individual and legal rights.

If it were a controversy between the old committee and the members claiming to be under the appointment of the chairman, as to which was the regular committee, and no other rights were dependent upon the controversy, then it would be a purely political question, to settle which the courts would not take jurisdiction. When elections were conducted under the *viva voce* system or by ballots furnished the electors by the candidates or their friends, no such question as is involved could arise. Since the adoption of the official ballot system by the Constitutional Convention, since the legislative branch of the State government provided for the regulation of primary elections by law, questions involving the legal rights of individuals will arise for the determination of the courts. The necessity for such adjudications has been placed upon the courts by the changes which have been made by the organic and statutory law of the State. However much the courts desired to do so, they could not avoid the responsibility of deciding such questions, even if perchance some one should fail to discriminate between political rights and those legal rights which arise under the law, and declare the court was ad-

judicating purely political questions. The Democratic Committee of Jefferson county and the city of Louisville being officers in virtue of the primary election law, were entitled to conduct the primary election and to ascertain and certify the result of it without any interference or hindrance of the defendants. To protect them in the exercise of this right injunction was the proper remedy. (*Poynts v. Shackelford*, 107 Ky., 555.)

The motion to dissolve the injunction is overruled.

I invited the whole court to sit with me on the hearing of the motion, which it did. A majority of the court concurs with me in this opinion.

POGUE, &c. v. ROSS, &c.

(Filed June 5, 1908—Not to be reported.)

Trusts—Sureties—Alteration of contract—S. borrowed \$5,000 from his sister, for which he executed an obligation to hold it in trust for the benefit of herself and children. Appellants signed same as sureties. In an action to recover the amount of said loan appellees insist that they are not bound for same as the entire amount was not loaned to S. at the time the obligation was executed, and that after they signed same the paper was altered by adding thereto, without their knowledge or consent, the provision that additional sureties would be added if desired by the beneficiary. They also insist that by the terms of the instrument the money was to be invested in stock of a distillery company for the beneficiaries, and that if there is any liability on the part of the sureties it is only for the residue over and above the value of said stock. Held—That although S. did not receive all the money at the date of the obligation he subsequently received it and the obligation speaks from that time and not from its date. The obligation was a loan of the money and not an investment in the stock for the benefit of the beneficiaries. The proof as to the alteration of the instrument being conflicting, and the laches of the sureties in pleading the alteration satisfies the court that the decision of the chancellor below in favor of the integrity of the paper should be sustained.

W. H. Mackoy and Pogue & Pogue for appellants.

C. L. Sallee and Breckinridge & Shelby for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hobson.

In the year 1894 Hamlet C. Sharp owned forty shares of stock in the H. E. Pogue Distillery Co., for which he had subscribed and agreed to pay \$4,000. John F. Pogue had advanced for him \$2,000 on the stock and he needed \$2,000 more to pay for the other twenty shares, besides some interest that was due. His sister, Lucy F. Waller, who was then about to be married to H. E. Ross, her present husband, had \$5,000 in choses in action which she desired to secure for herself and children. Hamlet C. Sharp thought the distillery stock would enhance rapidly in value and wanted to hold this for himself. She wanted her money secured, and he needed money to meet his obligations. Under these circumstances the following written agreement was entered into:

"This trust agreement, this 6th day of November, 1894, between Lucy F.

Waller and Hamlet C. Sharp, as principals, and John F. Pogue and Henry E. Pogue, as sureties, witnesseth:

"Whereas, the said Lucy F. Waller has this day paid over to the said Hamlet C. Sharp the sum of \$5,000 to hold and invest, in trust nevertheless, for the use and benefit of the parties hereinafter named; and, whereas, it is understood and agreed between the parties first named that the said Hamlet C. Sharp may borrow for his own use any part of said sum of \$5,000 during the operation of this trust, and may invest the same in the capital stock of the H. E. Pogue Distillery Co., or otherwise, for his sole and exclusive benefit, and the said Lucy F. Waller expressly consents and agrees thereto, the said Hamlet C. Sharp paying for the use of same the legal rate of interest thereon. Therefore, the said Hamlet C. Sharp, as trustee, and the said John F. Pogue and Henry E. Pogue, as sureties, hereby obligate themselves that the said Hamlet C. Sharp shall faithfully discharge his duties as such trustee, and well and truly account for the said sum of \$5,000, together with the income collected from same, in the following manner, to wit: It is agreed between the said parties respectively that the income realized and collected from the said sum of \$5,000 during the lifetime of said Lucy F. Waller, as the same is collected, and upon her death the principal sum of \$5,000 and any interest uncollected shall be paid to Elizabeth Waller and Louise Waller, children of said Lucy F. Waller, share and share alike, as their separate estate. If said Lucy F. Waller should die before both of said children shall become twenty-one years of age, then the income therefrom shall be paid to said children equally until they arrive at the age of twenty-one years, when the principal sum shall be paid to them as their separate estate. It is further agreed that in the event of the death of either Elizabeth or Louise Waller, without issue, before reaching the age of twenty-one years, the said sum of \$5,000, upon the death of said Lucy F. Waller, shall be paid over to the survivor of said two children, at her majority, for her sole and separate use and benefit. And in the event of the death of both Elizabeth and Louise Waller, without issue, before the death of the said Lucy F. Waller, the said sum of \$5,000 shall revert to their mother, the said Lucy F. Waller, or her legal representative. Should either of said children, Elizabeth or Louise Waller, die during the lifetime of said Lucy F. Waller, leaving issue of their body surviving them, said issue shall take that part of said sum of \$5,000 which would have gone to the deceased child, respectively, of said Lucy F. Waller. Additional security shall be given by said Hamlet C. Sharp if required by the said Lucy F. Waller. It is further understood and agreed that the said Hamlet C. Sharp shall notify the said Lucy F. Waller twice each year, about the 1st of January and July, or as often as requested, how said sum of \$5,000 is invested and the rate of interest it is drawing. It is also agreed by the said Hamlet C. Sharp that he is to make no charge for his services as such trustee.

"Witness our hands the day and date above named.

"LUCY F. WALLER,
"HAMLET C. SHARP,
"JOHN F. POGUE,
"HENRY E. POGUE."

Mrs. Waller did not turn over to Hamlet C. Sharp at the time she signed

the instrument \$5,000 in cash, but turned over to him certain notes and securities, out of which a few months later he collected the \$5,000. His sureties rely on this fact as a defense to the action against them. The circuit court properly held the defense unavailable, as time was not of the essence of the payment of the money and the \$5,000 was in fact received by the trustee and held by him as such. Besides, the trust agreement, although signed by the parties, was not delivered to Mrs. Waller until the trustee had in fact collected the money and had it in his hands. Until he collected the money the trustee retained possession of the instrument, and when he delivered it he in fact had the money. The instrument speaks from its delivery and not from its date.

The sureties also insist that the distillery stock belongs to the cestui que trust, and that they are only responsible for the balance of the fund over and above so much of it as was used in paying for the distillery stock. This is not the proper construction of the contract. Hamlet C. Sharp did not intend to transfer to his sister the distillery stock. He thought that would be very valuable, and wanted the profits on it for himself. So far as she was concerned it was simply a lending of money, the trustee being given the right to use the trust fund himself or to invest it for himself in the distillery stock. Mrs. Waller desired that the money should be so invested as to secure the legal rate of interest upon it for herself during life, and the principal for the benefit of her two infant daughters after her death. The trustee was only responsible to them for the legal interest on the money. If the distillery stock depreciated in value the loss was his; if it appreciated in value the profit was his in like manner. She consented that he might borrow the money and use it for his own benefit, accounting for the legal rate of interest. If he did not choose to do this, or invest it in the distillery stock on his own account, he was to use it as a trust fund, accounting to her for the profits, hence it was required that the trustee should give security, and the sureties obligated themselves that the trustee should faithfully discharge his duties and that he would well and truly account for the sum of \$5,000, with its interest.

It appears from the proof that the paper in question was outlined by Judge A. M. J. Cochran. After this some changes were made in it at the distillery by Hamlet C. Sharp and John F. Pogue, and Sharp copied it off on a typewriter, making also two carbon copies. He then mailed the original to his sister at Carlisle, Ky., and on November 7 went to Carlisle for the double purpose of getting her to close up the arrangement and to attend her wedding that evening. She signed the paper two or three hours before the wedding and at the time she signed it it was agreed between her and her brother that additional security should be given her if required, and that this stipulation should be inserted in the paper. She then delivered to him the notes and securities from which he was to collect the \$5,000, and he took the trust agreement and the notes back with him to Maysville, where he lived. After his return to Maysville he added to the trust agreement, at the foot of one of the pages where there was a blank space left, the words "additional security shall be given by said Hamlet C. Sharp if required by said Lucy F. Waller." The sureties insist that this change was made in the paper without their knowledge or consent after they had signed it, and rely

upon the alteration as releasing them from liability. They both state in their depositions that they signed the paper before it was mailed to Carlisle, and before the above addition was made to it. They also state that the change was made without their knowledge or consent. Mrs. Ross says that when the paper was presented to her it had not been signed, and being cross-examined, says as follows: "That is my memory about it. I signed that about two hours before I was married, and I don't know anything about the signature to it. * * * I can't say positively. I don't know about those signatures, but I know mine was there and I don't remember about the rest of it." The deposition of H. E. Ross, her husband, a practicing lawyer, was also taken, who says the paper was submitted to him on that day, and there were no signatures to it; but the court properly sustained an exception to this testimony, as he and his wife can not both testify in the case. Hamlet C. Sharp says that his recollection is that neither he nor the Pagues had signed the paper when Mrs. Waller signed it, and that the addition was made to it before any other signatures were placed on it; but being cross-examined he says: "I can't be positive; I don't want to make any statement that I am not positive about, but I am going to give you my best recollection in the matter." It was also shown by the proof that before Mrs. Waller signed the paper it was also submitted to her attorney, Judge Norvell, for approval, but his deposition was not taken, as he had died in the meantime. It will thus be seen that confessedly a change in the paper was made after Mrs. Waller signed it, and if the two sureties had already signed it before it was presented to her the paper was changed after they signed it and before its delivery to Mrs. Waller. It will also be seen that the two sureties testify positively that they signed the paper before it was sent to Carlisle, and that Mrs. Waller and Hamlet C. Sharp are not positive in their recollection as to whether there were any other signatures to it when she signed it. If this were all the evidence in the case the preponderance would be with the sureties on the question of alteration. But there are some other facts that must be taken into consideration. The suit was filed on January 28, 1898. The entire paper was copied into the petition and defendants filed their original answer on July 1, 1898, or little less than three years after the transaction had been closed up by the delivery of the paper to Mrs. Waller. The proof shows it was not delivered to her until July 12, 1895. In this answer no complaint is made as to any alteration of the paper. Amended answers were filed on March 10, 1899, and November 20, 1899; but nothing was said in either of these amendments as to the alteration of the instrument. On March 1, 1900, a third amended answer was filed, and in this, for the first time, the alteration of the instrument was relied on. Not only so, but in the amended answer filed on November 20, 1899, which was duly verified, the sureties made the following allegation: "The fact that said amount of \$4,162.25 was not paid by said Ross to said Sharp was concealed from these defendants by said Sharp and said Ross, who represented to these defendants, at the time of the signing and execution of said trust agreement, that said entire sum of \$5,000 had been paid by said Ross to said Sharp, and these defendants signed said trust agreement relying upon said representations so made to them and believing the same to be true."

In a previous part of this answer the defendants had denied that \$832.75

had been placed in Sharp's hands at all. Both the sureties testified that they signed the paper before it was submitted to Mrs. Waller at all. Their pleading was, however, as shown above, that they signed the paper relying upon the representation that the entire sum of \$5,000 had been paid by Mrs. Ross to Sharp, and believing this representation to be true. Their pleading, which was never withdrawn, is inconsistent with the position subsequently taken by them as to the time when they signed the paper, and their statements in the pleading would be true if they signed the paper after Mrs. Ross signed it and after she put the notes and collaterals in Sharp's hands, for there is no doubt that these were good for \$5,000. Besides this, the presumption is in favor of the integrity of the paper, and this presumption is greatly strengthened by the long delay in pleading the alteration. It is true the delay is explained in some measure by the fact that the defendants state that they had not examined the carbon copy; still we attach little weight to this carbon copy, except as showing that the words in controversy were not in the paper as originally drawn. The parties seem all to be sincere in their statements, but after the lapse of a number of years the human memory as to the date at which a paper was signed is very liable to err. There is no testimony to support the defendants' plea, except their own depositions, conflicting with their previous pleading filed in the case. And while Mrs. Waller and Sharp only state their best recollection that the paper was a blank, this statement is confirmed by the sureties' own pleading, and by the fact that the paper when at Carlisle was submitted to two lawyers before Mrs. Waller signed it, and the question of making changes in it was discussed, at least talked about by her; and if the paper had already been signed by other parties, it is unreasonable that her attention would not have been called to this when the question was suggested of other stipulations being put in the writing. It is also a circumstance of some weight that Sharp took the paper after she signed it back with him to Maysville, and did not deliver it to her. Under all the circumstances, we conclude that the presumption in favor of the paper, after the lapse of the time that had passed before the plea was filed, making the defense that it had been altered, has not been overthrown by the proof, and it is unnecessary, therefore, for us to consider whether the alteration was material or not.

It is true Mrs. Waller held a note on her brother for \$833.75, but it was secured by a policy of life insurance, which the company paid off and amounted to more than the debt. Mrs. Waller turned the check over to Sharp and he collected the money. The transaction was in legal effect the same as if she had collected the money from the insurance company in discharge of the note, and had then lent the amount to Sharp as trustee. The money was in fact placed in Sharp's hands as trustee, and it does not matter to the sureties whom Mrs. Waller got it from.

The action was not prematurely brought. The issues made and the facts shown by the record show abundantly, not only the propriety, but the necessity, of the action. On the whole case we see no error to the prejudice of appellants. On the contrary, the judgment seems to be in accord with substantial justice. Stripped of its disguise, the transaction was substantially a borrowing of money by Hamlet C. Sharp to pay a debt to the Pagues and their giving his security for the money, and thus securing the payment

of the debt, all of them acting upon the idea that the distillery would be a greater success than it seems to have proved.

Judgment affirmed.

MOONEY, &c. v. OHIO FALLS BUILDING AND LOAN ASSOCIATION'S ASS'EE.

WARDEN v. SAME.

(Filed June 5, 1903—Not to be reported.)

B. H. Young, M. W. Ripy and E. C. Waide for appellants.

Barnett & Barnett for appellee.

Appeals from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

The facts of these cases are substantially the same as the Rettner and Voght cases, this day decided, except compromises were effected between the appellants of their respective claims and the association, and their settlements or withdrawals were made on the basis thereof, which brings these cases within the rule of Cynthiana Building and Loan Association v. Florence, &c., 21 Ky. Law Rep., 1403; United States Building and Loan Association's Ass'ees, &c. v. Denney, &c., 28 Ky. Law Rep., 2109, and to apply it here prevents a recovery by the appellants or by the appellee. If the appellants are barred by the compromises and settlements, the appellee is likewise barred by them.

The judgments in favor of the appellee on its counterclaims are reversed for proceedings consistent with this opinion.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

ÆTNA LIFE INS. CO. v. COULTER, AUDITOR, &c.

CONNECTICUT MUTUAL LIFE INS. CO. v. SAME.

EQUITABLE LIFE ASSURANCE CO. v. SAME.

FIDELITY MUTUAL LIFE INS. CO. v. SAME.

HOME LIFE INS. CO. v. SAME.

MUTUAL LIFE INS. CO., OF N. Y. v. SAME.

MUTUAL BENEFIT LIFE INS. CO. v. SAME.

MASSACHUSETTS MUTUAL LIFE INS. CO. v. SAME.

METROPOLITAN LIFE INS. CO. v. SAME.

MICHIGAN MUTUAL LIFE INS. CO. v. SAME.

NATIONAL LIFE INS. CO. v. SAME.

NEW YORK LIFE INS. CO. v. SAME.

NORTHWESTERN MUTUAL LIFE INS. CO. v. SAME.

NEW ENGLAND MUTUAL LIFE INS. CO. v. SAME.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY v. SAME.

PRUDENTIAL INS. CO. v. SAME.

PHENIX MUTUAL LIFE INS. CO. v. SAME.

PACIFIC MUTUAL LIFE INS. CO. v. SAME.

STATE MUTUAL LIFE ASSURANCE CO. v. SAME.

MUTUAL LIFE TRAVELERS INS. CO. v. SAME.

UNITED STATES LIFE INS. CO. v. SAME.

WASHINGTON LIFE INS. CO. v. SAME.

(Filed June 5, 1903.)

1. Franchises—Foreign insurance companies—Taxation—Construction of statutes—Injunction—Twenty-two foreign life insurance companies have sought to enjoin the Board of Valuation and Assessment from assessing

same for franchise tax for the year 1901, or retrospectively for the previous years since November 11, 1892, under section 4077, Kentucky Statutes, on the ground that such companies are not included in the statute, which names twenty classes of corporations, and then adds "and every other like company, corporation or association." Held—That said section was not intended to embrace all corporations, but only the twenty classes named, and every other like corporation and every other corporation having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service. In construing a statute the purpose is to effectuate the intention of the legislature, and to do this, where the words of the statute are not clear, the court may look to the course of legislation and the object aimed at. The omission to name insurance companies in section 4077 was not accidental. This conclusion is fortified by the fact that in sections 4227 and 4281 a tax on the receipts of these companies is provided for in the same act of which section 4077, Kentucky Statutes, is a part. There was no tax on foreign insurance companies previous to the act of March 11, 1848. By that act agents representing foreign insurance companies were required to furnish to the auditor a correct list of premiums, verified by oath, and pay the sum of \$2.50 on every \$100 of premium received. This statute remained, with slight modification, until the enactment of the act embracing section 4077. For something like a half century the State had observed a uniform course in the taxation of foreign life insurance companies, and this policy is continued in section 4227, Kentucky Statutes. While the State may impose a tax on premiums, and also a franchise tax, double taxation is not to be inferred from doubtful words, and when the legislative policy of the State had so long been followed, it is evident that if a change had been intended it would have been clearly signified. This construction of the statute has been adopted by the executive officers of the State since the passage of the act in contest until the year 1901, and some force must be given to this contemporaneous construction. An insurance company is not a guarantee or security company. It is not like a guarantee or security company. It exercises no special or exclusive privilege not allowed by law to natural persons. At common law private persons can make contracts of insurance, and this common law right is recognized by statute. In the interpretation of all statutes a cardinal rule is that their provisions are never extended by implication beyond the fair meaning of the terms used, and in every case of doubt they are construed more strongly against the government and in favor of the taxpayer because burdens are not to be imposed unless the intention of the legislature to impose them is distinctly shown. Under this rule, in the absence of any general words in the statute covering such corporations as insurance companies, the conclusion is that they were not embraced by it, and that the practical construction of the statute at the hands of the executive and legislative departments of the government should not now be departed from.

2. Constitutional law—The exemption of foreign life insurance companies from the provision of section 4077, is not in violation of sections 172 and 174 of the Constitution, which prohibits the exemption of any property from taxation. The Board of Valuation and Assessment is the creature of the legislature, and in creating it the legislature had authority to confer upon it such power as it saw fit. Power to assess the franchises of insurance companies not having been conferred on it by the legislature, the board is without jurisdiction to act in the premises, and the question of the power of some other authority to act is not presented.

Grubbs & Grubbs and Hazelrigg & Chenault for Etna Life Insurance

Co., Equitable Life Assurance Society, Fidelity Mutual Life Ins. Co., Mutual Life Ins. Co., of New York, Mass. Mutual Life Ins. Co., New England Mutual Life Ins. Co., Provident Savings Life Assurance Society, Prudential Ins. Co. and State Mutual Life Assurance Co.

C. B. Alexander of counsel for Equitable Life Assurance Society.

Julien T. Daviess and Edward Lyman Short of counsel for Mutual Life Ins. Co., of New York.

Humphrey, Burnett & Humphrey for Connecticut Mutual Life Ins. Co. and New York Life Ins. Co.

John J. McHenry, Joseph T. Noe and George DuRelle for Home Life Ins. Co.

Dodd & Dodd and Hazelrigg & Chenault for Mutual Benefit Life Ins. Co.

Henry Stoddard, F. M. Sackett and Alex. G. Barret for Metropolitan Life Ins. Co.

Hazelrigg & Chenault and John W. Rodman for National Life Ins. Co. and Washington Life Ins. Co.

Bennett H. Young and Hazelrigg & Chenault for Michigan Mutual Life Ins. Co.

Barnett & Barnett, Hazelrigg & Chenault, Hardin H. Herr and Chas. K. Stuart for Northwestern Mutual Life Ins. Co.

Pirtle, Trabue & Cox and Augustus E. Willson for Phoenix Mutual Life Ins. Co. and United States Life Ins. Co.

Donald B. Toucey of counsel for U. S. Life Insurance Co.

Wm. Brosmith and Pirtle, Trabue & Cox for Travelers Insurance Co.

Gordon & Gordon for Pacific Mutual Life Ins. Co.

Sweeney, Ellis & Sweeney, J. C. Beckham & Son and W. S. Pryor for appellees.

Appeals from Franklin Circuit Court.

Opinion of the court by Judge Hobson.

Appellants are foreign life insurance companies doing business in this State. They filed these suits to restrain the Board of Valuation and Assessment from proceeding to assess them for franchise tax for the year 1901, or retrospectively for the previous years since November 11, 1892, under section 407, Kentucky Statutes, on the ground that such companies are not included in the statute. This is the only question to be determined. The circuit court dismissed their petition. The statute is in these words: "Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, also every other corporation, company or association, having or exercising any special or exclusive priv-

llege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a Board of Valuation and Assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require."

In *Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky., 185, the statute was construed, and was held not to embrace private trading corporations not having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service. To this conclusion we adhere. The statute names twenty classes of corporations and then adds, "and every other like company, corporation or association," thus showing that the legislature had in mind that other unlike companies, corporations or associations were not included; and that these words were not intended to cover all corporations is further shown by the next words of the section: "Also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons or performing any public service." These words show that other companies not having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service and not included in the preceding words of the section, were not intended to be embraced by it. It follows that the section was not intended to embrace all corporations, but only the twenty classes named, and every other like corporation and every other corporation having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service. The reasons for this conclusion are elaborated in the case referred to.

It remains to determine whether insurance companies are embraced by the words "guaranty or security company," or "every other like company," or "every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service," or by all these expressions taken together. In construing a statute the purpose is to effectuate the intention of the legislature, and to do this, where the words of the statute are not clear, the court may look to the course of legislation and the object aimed at. Section 245 of the Constitution provides that upon its promulgation the governor should appoint three persons learned in the law as commissioners to revise the statute laws of the State, so as to conform them to the Constitution and effectuate its provisions. This commission was appointed and reported to the legislature a series of acts for this purpose, among others an act regulating private corporations (chapter 32, Kentucky Statutes), and an

act in regard to revenue and taxation (chapter 106, Kentucky Statutes), of which section 4077 is a part. These acts are the work of the same legislature, enacted pursuant to the constitutional provision, and in determining the meaning of either it is proper to look to the other acts of that assembly, without regard to the date at which either act was passed, for the assembly had before it the revision of the laws of the State. In the act on corporations an insurance bureau is created, and more than an hundred sections of the act are taken up with the subject of insurance. (Kentucky Statutes, sections 617-762.) The legislature, therefore, did not overlook the subject of insurance, and when it named in section 4077 twenty classes of corporations, many of them of much less consequence or capital than insurance companies, the presumption must be that the omission to name insurance companies in section 4077 was not accidental. This conclusion is fortified by the fact that in sections 4227 and 4231 a tax on the receipts of these companies is provided for in the same act. There was no tax on foreign insurance companies in this State previous to the act of March 11, 1843. By that act all agents representing foreign insurance companies were required to furnish to the auditor a correct list of premiums, verified by oath, and pay the sum of \$2.50 on every \$100 of premiums received, and in section 7 the principals of the agents were made liable for the tax. Substantially the same provision was carried into the Revised Statutes. (2 Stanton's Revised Statutes, page 246.) The law thus remained until the year 1864, when the rate was increased to \$5. (Myers' Supplement, page 410; Phoenix Ins. Co. v. Commonwealth, 68 Ky., 80.) In 1870, when the insurance bureau was established, the rate was cut down to \$2.50, and it thus remained until the act in question was passed. Thus for something like a half century the State had observed a uniform course in the taxation of foreign life insurance companies, and this policy is continued in section 4227, Kentucky Statutes. While the State may impose a tax on premiums and also a franchise tax, double taxation is not to be inferred from doubtful words, and when the legislative policy of the State had so long been followed we are persuaded that if a change had been intended, it would have been clearly signified. This construction of the statute has been adopted by the executive officers of the State since the passage of the act in contest until the year 1901, and some force must be given to this cotemporaneous construction. The last general assembly also revised the laws regulating revenue and taxation, making no change in the statute, which had thus been construed by the officers of the State for eight years.

An insurance company is not a guarantee or security company within the ordinary meaning of that term. What the legislature meant by guarantee or security company is shown by section 723, Kentucky Statutes, and is such corporation as may become surety for another, and the reason for its inclusion in the section is that by the statute it may become sole surety in all cases where, by law, two or more sureties are required, thus having the special privilege not allowed by law to natural persons. An insurance company is not like a guarantee or security company; it exercises no special or exclusive privilege not allowed by law to natural persons. At common law private persons can make contracts of insurance (21 Am. & Eng. Ency. of Law, 2551; Kerr on Insurance, 2021; May on Insurance, section 35), and this

common law right is recognized by section 641, Kentucky Statutes. In determining the meaning of the word "like," in this section, we must follow the rule *loquitur a sociis*. All the twenty named corporations have special or exclusive privileges or franchises not allowed by law to natural persons. The word "like" must be read not only in connection with the preceding words, but with the following clause. The likeness which the legislature had in mind is in having or exercising some special or exclusive privilege or franchise not allowed by law to natural persons or performing some public service. In *Levy v. Louisville*, 97 Ky., 405, this court said the Board of Valuation was created "to value every and all corporations, associations or companies having or exercising any exclusive privilege or franchise not allowed by law to natural persons."

And in *Board of Councilmen of City of Frankfort v. Stone*, 23 Ky. Law Rep., 25, the court said: "The franchise primarily in view under section 4077 is any special or exclusive privilege not allowed by law to natural persons."

In the interpretation of all statutes levying taxes a cardinal rule is that their provisions are never extended by implication beyond the fair meaning of the terms used, and in every case of doubt they are construed more strongly against the government and in favor of the taxpayers, because burdens are not to be imposed unless the intention of the legislature to impose them is distinctly shown. (*Cooley on Taxation*, 201, 202.) Under this rule, in the absence of any general words in the statute covering such corporations as insurance companies, we conclude that they were not embraced by it, and that the practical construction of the statute, at the hands of the executive and legislative departments of the government, should not now be departed from.

But it is said that by sections 172 and 174 of the Constitution all property in the State is subject to taxation, and can not be exempted, either by omission in the act or by express legislation; for to allow the property to be exempted by the failure of the legislature to act would be to allow it to accomplish by indirection what it can not do directly. The answer to this is that the Board of Valuation and Assessment is the creature of the legislature, and in creating it the legislature had authority to confer upon it such power as it saw fit. Power to assess the franchisees of insurance companies not having been conferred on it by the legislature, the board is without jurisdiction to act in the premises, and the question of the power of some other authority to act is not here presented. The Constitution of Kentucky is not peculiar in respect to taxation. The same principle is expressly stated or necessarily implied from the provisions of the Constitutions of most of the States; but in something like forty States the same mode of taxation is followed as provided by section 4227, Kentucky Statutes, and in the remaining States there is a license tax, or a tax on policies. Section 4077 does not impose upon the corporations named in it any greater taxation than is imposed on other taxpayers. It is a part of the act providing for the payment of a uniform tax on all property directed to be assessed for taxation by the owner, person or corporation assessed. (*Kentucky Statutes*, section 4019.) Personal property of every kind is separately valued, and if there be no appropriate column in the tax book it is placed in the column headed miscellany. (Section 4050.) It is the duty of the assessor to take the

tax list of all persons, whether natural or corporate, including therein their tangible and intangible property. The purpose of section 4077 is to provide another mode for the assessment of certain intangible property of the corporations referred to in it, which could not be so intelligently assessed by the county assessor. But when the board had acted in the case of these corporations it has only completed the assessment of their property, part of their assessment being made by the county assessor and part by the board; while in the case of other taxpayers the assessor makes the entire assessment. The legislature has not seen fit to take life insurance companies out of the class whose assessment is to be made by the county assessor. How and by whom property shall be assessed for taxation is a matter to be regulated by the general assembly. It is a sovereign power to impose taxes, and to direct how they shall be laid and collected. The legislature must also determine by what rule the situs of personal property for taxation shall be governed. Thus personal property in this State, although having an actual situs in another county, can be taxed only at the residence of the owner. (*Wren v. Boske*, 24 Ky. Law Rep., 1780; *Lexington v. Fishback*, 22 Ky. Law Rep., 1322.) And in the absence of legislative authority intangible property of a nonresident of the State can not be taxed here. (*Baldwin v. Shine*, Judge, 84 Ky., 502; *City of Covington v. Wayne*, 22 Ky. Law Rep., 826.) So money lent by a nonresident and secured by mortgage on property in this State has been held not taxable in this State until the legislature shall provide for its taxation by giving it a situs. (*Board of Councilmen, City of Frankfort v. Fidelity Trust and Safety Vault Co.*, 23 Ky. Law Rep., 908.)

It is incumbent on appellants to list with the assessor all their property, real or personal, subject to taxation in the respective counties of the State. (*German National Ins. Co. v. Louisville*, 21 Ky. Law Rep., 1179.) This they allege they have done, paying the taxes thereon in addition to the \$2 on each \$100 of premiums, as provided by section 4227, Kentucky Statutes. If they own any intangible property in the State, they should justly bear its part of the public burdens, and is not reached by the assessor because having no situs in the county, the legislature must act and give it a situs and provide where and by whom it shall be assessed for taxation. Until the legislature acts and gives it a situs in the State, such intangible property of appellants would seem to stand as the intangible property of the other non-residents of the State, or money lent by them on mortgages here.

Judgments reversed and causes remanded, with directions to overrule the demurrers and for further proceedings consistent herewith.

Whole court sitting.

EARLEY v. SUTTON.

(Filed June 5, 1903—Not to be reported.)

R. S. Crawford for appellant.

C. W. Lester and S. V. D. Stout for appellee.

Appeal from Whitley Circuit Court.

Chief Justice Burnam delivered the following response to petition for rehearing:

200 FIDELITY & CASUALTY CO. V. COULTER, AUDITOR.

Since the delivery of the former opinion in this State our attention has been called to the additional record filed herein showing that time had been given to tender the bill of exceptions, but a re-examination of the record satisfies us that the verdict and judgment is not in conflict with the weight of the evidence, and that the petition should be overruled.

FIDELITY & CASUALTY CO. OF N. Y. v. COULTER, AUDITOR, &c.

EMPLOYERS LIABILITY ASSURANCE CORPORATION v. SAME.

STANDARD LIFE AND ACCIDENT INS. CO. v. SAME.

MARYLAND CASUALTY CO. v. SAME.

(Filed June 5, 1903.)

Insurance companies—Franchises—Taxation—Injunction—These suits were filed to enjoin the Board of Valuation and Assessment from proceeding to assess four corporations for a tax on their franchises, under section 4077, Kentucky Statutes. The petition alleges that plaintiffs are authorized to carry on a general insurance business other than life, fire or marine insurance; that they have conducted, and are now conducting, a general insurance business other than fire, marine and life insurance, and that they have paid a tax of \$2 upon each \$100 of their gross premiums, and the board is about to assess them for a franchise tax. Held—That from the allegations of the petitions they come within the rule laid down in the insurance cases in which it was held that insurance companies are not embraced by the provisions of section 4077, Kentucky Statutes.

Barker & Woods for Employers Liability Assurance Corporation.

Montgomery & Montgomery for U. S. Casualty Co., in behalf of appellants.

Thos. W. Bullitt and Wm. Marshall Bullitt for American Surety Co., in behalf of appellants.

Forcht & Field, O'Neal & O'Neal and Humphrey, Burnett & Humphrey for Fidelity and Casualty Co. and Standard Life and Accident Ins. Co.

Joyes & Jarvis for Maryland Casualty Co.

Kohn, Baird & Spindle and John W. Ray for appellees.

Appeals from Franklin Circuit Court.

Opinion of the court by Judge Hobson.

Appellants filed these suits to enjoin the Board of Valuation and Assessment from proceeding to assess them for a tax on their franchises under section 4077, Kentucky Statutes. The court sustained a demurrer to their petitions, and they have appealed.

The petitions are much the same. It is alleged in each that the plaintiff is a corporation authorized to carry on a general insurance business, other than life, fire or marine insurance; that it has conducted, and now conducts, a general insurance business other than fire, marine and life insurance; that it has complied with all the requirements of the statutes of the State and has paid a tax of \$2 upon each \$100 of its gross premiums; but that the board is now about to assess it for several years for a franchise tax, although it is not a guarantee or security company, performs no public service and

neither has nor exercises any special or exclusive privilege or franchise not allowed by law to natural persons; that it owns no property within the State of Kentucky, and that unless restrained the Board of Valuation and Assessment, without any reasonable foundation or authority in law, will fix a value upon its supposed franchise for the purpose of State taxation for a number of years.

The allegations of the petition bring these cases within the rule laid down in the case of *Mutual Benefit Life Ins. Co. v. Coulter, &c.*, this day decided, in which it is held that insurance companies are not embraced by the provisions of section 4077, Kentucky Statutes. It is earnestly argued in the briefs filed in this court for the appellees that these companies are guarantee or security companies, or at least like companies within the purview of this section; but there is not enough in the petition in any of these cases to raise the question, as the business the companies are doing in this State is not shown by anything in the record, except by the allegations of the petitions that they are doing an insurance business. The franchise tax for which the assessment is made under section 4077 does not depend upon the name of the company, or the name by which it may designate its business. If any of these companies are in fact doing a guarantee or security business in this State, as defined in the opinion above referred to, then they are embraced by the statute, and their franchise may be assessed under it. The company that is only doing a guarantee or security business is not an insurance company within the meaning of the statute imposing a tax of \$2 on each \$100 of gross premiums, and if such a company has paid this tax and is now assessed for a franchise tax it will be entitled to a credit on the latter tax for the amount which it has heretofore paid, in the way of the tax on gross premiums, if such is the fact. A company which is in name an insurance company, but is doing a guarantee or security business in this State, is a like corporation within the meaning of section 4077, and is, therefore, embraced by it. If any of these companies has been doing both an insurance business and also a guarantee or security business, as defined in the opinion referred to, then it is liable for the tax of \$2 on each \$100 of gross premiums received in its insurance business, and is also liable to a tax on its franchise as a guarantee or security company under section 4077.

Judgment reversed and causes remanded, with directions to overrule the demurrers to the petitions and for further proceedings consistent herewith.
Whole court sitting.

THOMAS v. COMMONWEALTH.

(Filed June 5, 1908—Not to be reported.)

Criminal law—Evidence—Instructions—Appeals—Appellant was indicted for the murder of B., who had ordered him to leave his house, and after reaching the outside of the house. A conviction and sentence for ten years' imprisonment for manslaughter resulted, from which this appeal is prosecuted. It is urged as prejudicial error that the court refused to direct the jury that they could not consider as substantive testimony evidence given by witnesses in contradiction of statements of witnesses for defense. Held—That this question can not be considered on appeal, as it was not presented to the

lower court in the motion and grounds for a new trial. It was not prejudicial error to refuse to give an instruction as to the rights of the accused to defend himself if the jury believed that deceased and another were acting in concert in inducing him to leave the house, as the evidence falls to show that the other party took any part in the difficulty. It was not error to use the word "failed" instead of "refused" in the instruction which defined the right of the deceased to use force if the accused failed to leave the house after having been invited to do so. The court properly told the jury that if the deceased used unnecessary force, endangering the life of the defendant or subjecting him to great bodily harm, the defendant would then have the right to defend himself against such unnecessary force.

Sims & Thomas and James B. Garnett for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Hobson.

Appellant shot and killed Alfred Bridges in Trigg county on March 6 1902. The grand jury returned an indictment against him for murder, but on the trial the petit jury found him guilty of voluntary manslaughter and fixed his punishment at confinement in the penitentiary for ten years. The evidence is conflicting, but the following facts seem to be fairly established by the proof: Alfred Bridges was a farmer with a number of children, some of them nearly grown. For several months the young people in the neighborhood had been meeting from house to house on Saturday night to practice hymns for the Sunday services. On the night in question they met at the house of Bridges. The defendant, Thomas, had not been singing with them, but seems to have understood that he was invited on that night. He came about 9 o'clock; was staggering drunk when he got to the house; there were some twenty-five or thirty people present. Thomas sat on the side of the bed and took off his leggings and overshoes. He then talked for a few moments to some persons near by, but soon sat down on the floor and after vomiting, fell asleep. While he was thus asleep on the floor Bridges came in from the other room and shook him rather roughly, saying to him to get up and go home. He did not leave, and Bridges took hold of a chair, when a friend of Thomas said to Bridges not to strike him; he would take him out, and put his arm around him, pulling Thomas along with him to the door, Thomas facing Bridges, who followed them to the door. When Thomas got out of the door his friend let him go, and Bridges again ordered him out. He declined to go. Bridges reached back in the room and picked up a chair, and as he went out of the door with the chair and the door swung back two pistol shots were heard, and Bridges fell dead from a wound in the chest. A witness for the defendant, who was outside of the door, testified that when Bridges came out with the chair he said to Thomas again to leave or he would burst the chair over his head, and Thomas then drew his pistol and fired on him. There is some testimony that Thomas drew his pistol in the room, and one of the girls present screamed that somebody was going to be shot, but the proof on this subject is conflicting. Harry Lancaster, a brother-in-law of Bridges, was standing with the girls singing, and as Bridges went to the door Lancaster walked rapidly to the door, too. The testimony for the defense tended to show that Lancaster had out his knife

and was near Thomas when he shot Bridges. The testimony for the Commonwealth showed that Lancaster had the hymn book in his hand. His manner showed that he was excited, but he does not appear to have said anything to Thomas, and in fact the reasonable inference, from all the proof, is that Bridges was shot about the time that Lancaster got to the hall. On these facts the court gave the usual instruction on murder and manslaughter; also the usual instruction on self-defense as to the deceased, but refused to give an instruction asked by the defendant, to the effect that if Lancaster and the deceased were acting in concert, and the defendant then and there believed in good faith and had reasonable ground to believe that his life was in danger, or that he was in danger of great bodily harm at the hands of the deceased and Harry Lancaster acting in concert, and that he had no apparently safe means of escape but to take the life of the deceased, he was exculpable on the ground of self-defense. Complaint is made of this action of the court.

The principle of law embodied in the instruction is sound, but the refusal of the court to give it could not have prejudiced the defendant. The jury by their verdict, in substance, found that the defendant had not reasonable grounds to believe that he was in danger of losing his life or suffering great bodily harm at the hands of the deceased, and that it was not necessary, or apparently necessary, for him to shoot the deceased in order to save himself from the impending danger. It is evident from the testimony, taken as a whole, that Thomas shot the deceased because he ordered him out of his house, and threatened to burst a chair over his head if he did not leave. He did not shoot in the direction of Lancaster, nor, so far as appears, was his attention directed to Lancaster. His quarrel with the deceased had begun when the deceased shook him and ordered him out of the house, and he had backed from that point with his eyes on the deceased until the shooting took place. He shot the deceased for what the deceased was doing, and the instruction which the court gave aptly submitted to the jury the real issue in the case.

An important witness for the defense was asked on cross-examination if he had not, on the day after the killing, made statements as to how it occurred conflicting with his testimony on the trial. He denied making the statements, and the Commonwealth, in rebuttal, introduced four witnesses and proved by them that he had made the statements referred to. Thereupon the defendant asked the court to charge the jury that this testimony was not to be considered as substantive evidence in the case, but should only be considered for the purpose of impeaching the witness. The court declined to do so, and complaint is also made of this. But the matter was not presented to the circuit court in the grounds for new trial, nor was any instruction in writing asked of the court on the subject. The error is not, therefore, available here.

Complaint is also made that in defining the right of Bridges to use force in ejecting Thomas from his house the court used the word "failed" instead of the word "refused," in telling the jury that if Thomas was guilty of unbecoming conduct, Bridges had the right to invite him to leave his house, and if he failed to do so, Bridges had the right to use such force as was necessary to eject him. We can not see that the use of the word "failed" under

the facts of this case could have been prejudicial to the defendant, or that the word "refused" would have helped him in any way before the jury; for he plainly refused to leave after he was told by Bridges to go, and showed this by his conduct no less than by his words. The court properly told the jury that if the deceased used unnecessary force, endangering the life of the defendant or subjecting him to great bodily harm, the defendant would then have the right to defend himself against such unnecessary force. On the whole case the defendant appears to have had a fair trial on the merits of his case, and the verdict of the jury is sustained by the evidence.

Judgment affirmed.

HENSLEY v. METCALFE COUNTY COURT.

(Filed June 5, 1903.)

County courts—Refusing license to sell liquor—Remonstrances—Appeals—Appellant applied to the county court at its August term for a license to sell spirituous, vinous and malt liquors for twelve months, and on the hearing a remonstrance was filed by the citizens of the neighborhood, and the court refused the application. Appellant renewed his application at the September term, and it was again refused. An appeal was prosecuted to the circuit court, on a bill of exceptions, and the application was again refused, from which this appeal is prosecuted. Appellant insists that the court erred in hearing the appeal on the bill of exceptions and not de novo. Held—That when an appeal is prosecuted to the circuit court from an application for license under section 3083, Kentucky Statutes, it is proper to consider it on a bill of exceptions. Appellant also complains that the county court improperly considered on the second application the remonstrance that was filed on the first application. Held—That said remonstrance was properly considered. As the application was made for license to sell liquor for twelve months the remonstrance was made against selling it for the same time, and the legislature evidently never intended that the application should be renewed within twelve months after having been refused for that time, and that the citizens should be harassed by frequent applications and compelled to get up several remonstrances within said time.

J. W. Kinnaird, J. W. Compton, M. O. Scott and J. A. Scott for appellant.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Hobson.

At the August term, 1902, of the Metcalfe County Court appellant, John W. Hensley, applied to the court for license to retail spirituous, vinous and malt liquors as a retail liquor dealer at the grocery recently occupied by J. W. Hubbard, on the Glasgow and Columbia road, near the residence of J. W. Hubbard, in Metcalfe county. On the trial of the motion a remonstrance was filed, signed by a majority of the legal voters in the neighborhood, and pursuant to section 4203, Kentucky Statutes, the application was refused. At the next term of the county court, in September following, the appellant, after giving the proper notice, entered a second application for the same license. And on the hearing of this motion the county judge, having refused to vacate the bench on an affidavit filed by him, to the effect that the county judge was hostile to him and would not grant him a fair trial, allowed the

remonstrance filed at the preceding term to be read, and refused the application. Appellant appealed to the circuit court, and that court having affirmed the judgment of the county court, he prosecutes the appeal before us.

The appeal was taken to the circuit court on a bill of exceptions, and the case was not tried de novo in the circuit court. Sections 4211 and 4212, Kentucky Statutes, read: "An appeal may be prosecuted by the county attorney or the defendant to the circuit court from any decision of the county court under this article; but the order of the county court shall not be suspended until reversed by the circuit court. Where the appeal is taken by the county attorney an appeal bond shall not be required. In such cases the court shall be the judge of the law and facts, and no jury shall be required."

In *Thompson v. Koch*, 98 Ky., 460, it was held that where an appeal is taken to the circuit court from the license board, under section 3033, the circuit court must hear the case not de novo, but on the bill of exceptions, as the board has a wide discretion, and if the case is heard de novo in the circuit court the municipality will be deprived of the judgment of the officials selected by law to pass upon such questions; as in that event a different state of facts might be shown in the circuit court from what was shown on the original hearing. The same rule must be followed in appeals under section 4211, and is indicated by the use of the word "reversed" in that section, which shows that the legislature contemplated that the circuit court should not grant or refuse the license, but simply reverse or affirm the judgment of the county court, and the circuit court could not properly pass upon the propriety of the county court judgment unless it heard the case on the same evidence.

The next question to be determined is as to the effect of the remonstrance filed at the preceding term to the granting of the license. It is insisted that the court erred in allowing this to be read. Section 4203, Kentucky Statutes, is as follows: "All licenses mentioned in this article, except licenses to sell by retail spirituous, vinous or malt liquors, shall be granted by the county clerk; and licenses to sell by retail spirituous, vinous or malt liquors shall be granted by the county court; but the county court shall not grant a license to sell spirituous, vinous or malt liquors until ten days' notice shall be given by posting a written or printed notice at the door of the courthouse, and at least four public places in the neighborhood where the liquor is to be sold; and if the majority of the legal voters in the neighborhood shall protest against the application, it shall be refused. The county court in each instance shall determine what constitutes the neighborhood. Nor shall such license be granted to any person of bad character, or who does not keep an orderly, law-abiding house."

The protest filed at the August term was a remonstrance against the application then pending, and by the terms of the statute a majority of the legal voters in the neighborhood protesting against the application, it could not be granted. The statute does not make the remonstrance filed against one application a ground for the refusal of an application subsequently made. By its terms it applies only to the application then before the court. But if the applicant may renew his application at every term of the county court and the protest filed at the preceding term may not be considered, then the purpose of the statute may be defeated and the applicant, by wear-

ing the people out, may succeed in getting his application through. The statute must receive a reasonable construction. By section 460 the provisions of this revision are to be construed liberally with a view to promote its object. The purpose of the section is to allow a majority of the legal voters in the neighborhood to control the granting of the license, and to prevent a license being granted in the neighborhood where the majority of the legal voters do not want it. The license is for twelve months. (Kentucky Statutes, 4196.) The application, therefore, at the August term was an application for license for twelve months at the place indicated. The remonstrance was against the granting of the license for this twelve months. The judgment of the court on the application and the remonstrance was an adjudication against the granting of the license for the twelve months. At the very next court appellant renewed his motion, and if the previous proceeding was not competent to be considered by the county judge, then the judgment on this proceeding would not be a bar to a like application at the next term, and so the county court would be compelled to hear these applications at every term. This is not the meaning of the statute. The legislature is a practical body. It did not intend the statute to be a vain thing. In the construction of a statute that is implied which is necessary to effectuate what is expressly enacted. The judgment of the county court in refusing the license must be given a reasonable effect, as it must be presumed the legislature contemplated that the county court should have some means of self-protection, and that it should not be required to rehear these applications at every term. The question before the county court at the August term being whether the applicant should have the license for a year, and the protest of the legal voters being a remonstrance against this, the court heard the matter, and determined that the license for the year should not be granted. The purpose of the statute being to allow the majority of the legal voters of the neighborhood to control the matter, and they having signified that they were opposed to the applicant's having the license for the year in question, the judgment of the court denying the license must be held a conclusive determination against the granting of license to the applicant for the time covered by the application. The legislative intent is not only that the majority of the legal voters of the neighborhood may control the granting of the license, but that they may control it by their protest, and when they have thus protested against the granting of license to a certain applicant for a given year, and the court has heard the matter and determined it, the applicant is concluded by this determination for the year covered by the application. The legislature intended to provide a mode of settling for the people as to the applicant the question of license or no license. If his application was granted or refused the effect was the same; the question of license to him for a year was determined. If it was granted he had the license for a year; if it was refused, it was settled that for a year he could not have license.

This conclusion makes it unnecessary for us to pass on the other questions discussed; for, under the admitted facts, as a matter of law, the application in question was properly refused, and the circuit court correctly so held, no objection being made to the circuit judge.

Judgment affirmed.

Whole court sitting.

Judges Paynter, Nunn and Barker dissenting.

MILLER v. SOUTH COVINGTON AND CINCINNATI STREET RY. CO.

(Filed June 5, 1908—Not to be reported.)

Street railways—Negligence—Jury.—This was an action for damages resulting from alleged negligence of appellee's servants in starting its trolley car before appellant, who was a passenger, had an opportunity to alight therefrom. A verdict for defendant having resulted, this appeal is prosecuted. It is urged as error that the jury was illegally selected. Held—That the jury was selected in substantial compliance with the statute. It is also urged as error that an attorney for defendant talked with a physician before the trial, who was a witness for appellant, and that the testimony given by him was not as strongly in his favor as he expected. Held—That it was not improper for said attorney to learn the extent of appellant's injuries from his physician in the proper way; also to learn the fee which had been paid him for his services. The fact that the daughter of one of the jurors married the half-nephew of the president of the company, and that he had died several years before the trial, did not disqualify the juror. The fact that another of the jurors was in the employ of the express company, and that some of the attorneys for defendant were also attorneys for the express company, would not disqualify said juror. The evidence being conflicting and rendered under proper instructions, will not be disturbed.

Phil J. Ryan and Thos. L. Michie for appellant.

Ernst, Cassett & McDougall for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Joseph Miller, brought this action against the South Covington and Cincinnati Street Railway Co. for damages for personal injuries received by him in attempting to alight from one of the defendant's trolley cars, which he alleges was due to the negligence of the defendant's servants in starting the car while he was in the act of alighting. The answer of the defendant traverses all the affirmative allegations of the petition, and pleads contributory negligence. The trial resulted in a verdict and judgment for the defendant; and plaintiff asks a new trial, first, because the method of selecting the jury did not conform to the requirements of the statute; second, because the physician who attended plaintiff did not testify as he represented to the plaintiff and his attorney before the trial, and that his testimony was not true; and that he was called out of the court room during the trial and talked to by one of the defendant's attorneys; third, that one of the jurors who tried the case was connected by marriage with the president of the defendant company, and also to one of the attorneys who represented the defendant; fourth, that the verdict was palpably against the weight of evidence. We will consider seriatim these alleged errors.

Ellis, the deputy clerk who selected the jurors who tried the case, filed his affidavit on the hearing of the motion for a new trial, in which he says: "That he wrote the names of the jurors entered of record on separate slips of paper of as near the same size and appearance as may be, and that the same were placed in the drawer and well mixed; that for the purpose of the trial of this case he drew from the drawer the names of eighteen of the jurors, as required by law; that this method was uniformly used in draw-

ing jurors in the court; that the drawer was exclusively used and suitable for this purpose.'

The affidavit of this witness shows that the jury were drawn in substantial compliance with section 2265 of the statute, and no objection was made at the time to the manner of their selection; and appellant was not prejudiced so far as the record shows in this particular.

It appears that one of the attorneys employed by the defendant in the preparation of the case asked the physician summoned as a witness by the plaintiff as to the extent of the injuries received and as to the fee which had been paid him for his services. There was no impropriety in this conversation. Defendant had the right to ascertain, in a proper way, what the doctor would say on these points, as they were material in determining the extent of the plaintiff's injuries and their character. If the doctor did not testify as strongly for plaintiff as his attorneys had been lead to believe, this was their misfortune, and affords no ground for a new trial. It appears that the daughter of one of the jurors married the half-nephew of the president of the company, but that he had died several years before the trial. And even if plaintiff's attorney had known this fact at the time of the selection of the jury, it would not have constituted a cause for challenge, or have disqualified the juror. But it appears from the counter affidavit filed on this point that this fact was fully known to plaintiff's counsel before the trial. It is also complained that another of the jurors was in the employ of the express company, and that some of the attorneys employed for the defendant were also attorneys for the express company. This charge seems not to have been well founded, but if true would not have been ground for challenge.

The testimony in the case was quite conflicting. The plaintiff said that as he was attempting to alight from the trolley car, it suddenly started forward, throwing him violently against the ground; and that in consequence thereof his wrist was sprained, his clothes muddled, and that he received other injuries. His testimony is partially corroborated by other witnesses. On the other hand, several witnesses who testified for defendant say that the conductor in charge of the car carefully assisted plaintiff to the ground, and that after he had alighted he staggered and fell into the gutter. There was also testimony conducing to show that he was a victim both of the morphine and whisky habit, and that he was under the influence of one of these stimulants at the time of the accident. It was the province of the jury to determine which theory as to how the accident occurred was true. And so far as the record discloses, we can not see but that the appellant had a fair and impartial trial. No error has been pointed out which would justify a reversal of the judgment appealed from.

Judgment affirmed.

STUM, BY, &c. v. ROLL'S ADM'R.

(Filed June 9, 1903—Not to be reported.)

Hazelrigg & Chenault, C. J. Pratt and Glenn & Ringo for appellants.

W. S. Pryor, J. E. Fogle and J. B. Wilson for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Paynter.

The history of this controversy is found in Roll, &c. v. Stum, &c., 20 Ky. Law Rep., 661, and McDaniel v. Stum's Adm'r, &c. 23 Ky. Law Rep., 1935, there having been two former appeals of the case. The appellants here were appellees on the former appeals.

The judgment of the circuit court setting aside the sale of the land, and as to other matters adjudged, and the affirmance thereof, was held by this court in McDaniel v. Stum's Adm'r, &c., to be conclusive of all matters in issue, or which might have been raised. If the opinion of the court on that appeal is not conclusive of the question raised on this appeal, the reasoning employed by the court in that opinion is conclusive.

The judgments are affirmed.

REED v. MALEY.

(Filed June 5, 1908.)

Damages—Pleading—A cause of action will not lie in favor of a woman against a man who solicits her to have sexual intercourse with him.

John S. Power and G. A. Cassidy for appellant.

W. G. Dearing and J. P. McCartney for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Paynter.

The petition makes substantially the following averments: That the plaintiff was a married woman; that on October 19, 1898, whilst sitting near the window in her house, the defendant approached near it and proposed to her to have sexual intercourse with him; that she indignantly refused the proposal; that the defendant thereby committed a trespass against her person; that she was frightened and caused great mortification and shame, and in consequence of which she was greatly excited and damaged. It was not averred that the defendant entered her house or was in reach of her, so as to put her in fear. The court sustained a demurrer to and dismissed the petition on the ground that it did not state a cause of action.

In an action for an assault the petition must allege the facts which constitute the assault; and in alleged trespass, it is essential to state the facts which constituted it. (Stivers v. Baker, 87 Ky., 508.) No facts were averred which showed that the defendant made an assault upon the plaintiff, hence did not inflict any injury upon her person.

The sole question presented for consideration is, will a cause of action lie in favor of a woman against a man who solicits her to have sexual intercourse with him? If it will, the petition states a cause of action, otherwise it does not. This is a novel case, but the novelty of the case is no reason for denying a recovery if the cause of action can be made to rest upon some sound principle of law. The fact that learned counsel have been unable to cite any case involving the question here for our determination strongly conduces to show that the legal profession for centuries has labored under

the impression that a civil action will not lie on a state of facts like those averred in the petition, for it is probable that during past generations applications have been made to them for the institution of actions like this one. If such applications have been made, it is probable that they have been made by good and virtuous women; and certainly there is no moral or social reason why the members of the legal profession should not have instituted such actions to recover damages for the wounded feelings and humiliation good women have suffered from such proposals, if such an action, in their judgment, could have been maintained.

The solicitation for such intimacy is not equivalent to charging a woman with the want of chastity, therefore, if made under circumstances that would make a charge of unchastity a slander and actionable, no action for slander could be maintained on account of such solicitation. The solicitation was not a libel, and of course not actionable upon that ground. It was not a breach of contract, as in *Chapman v. Western Union Telegraph Co.*, 90 Ky., 265, where there was a failure to deliver a telegram, which resulted in an injury to the feelings, etc. So the principle upon which actions for slander and libel and the *Chapman* case are based can not be the foundation upon which to rest a recovery in this action. Neither does the principle upon which actions for malicious prosecutions or false arrest are founded furnish a basis for recovery. As there was no assault upon or trespass against the person of the plaintiff and no physical injury produced, it seems to us that no recovery can be had. It is well settled that mental suffering may be taken into consideration in estimating damages in cases of physical injury. In such cases there may be a recovery for physical and mental suffering arising from physical injury. The objection to a recovery for injury occasioned without physical impact is the difficulty of testing the statements of the alleged sufferer; the remoteness of the damages, and the metaphysical character of the injury considered apart from physical pain. In *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn., 695, the court had under consideration the question of allowing damages for mental suffering unaccompanied by physical injury. Judge Lurton, then a member of that court, in a dissenting opinion, said: "The reason why an independent action for such damages can not and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all the objections to speculative damages which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected. * * * Mental distress is or may be in some cases as real as bodily pain, and it as certainly results from language not amounting to an imputation of crime, yet such actions have always been dismissed as not authorized by

the law as it has come down to us, and as it has been for all time administered."

The only instance in which this court seems to have refused to apply this rule is in *Chapman v. Western Union Telegraph Co.* There are a class of cases in this jurisdiction where the court has allowed the jury to award punitive damages, where the employes of a railroad have wrongfully ejected persons from a train in a rude, offensive or high-handed manner. Those cases, however, are no authority for a recovery in this case. As we have said, the defendant did not accuse the plaintiff of the want of chastity, but showed a purpose to seduce her from the path of virtue. If A. should solicit B., a reputable citizen, to join him in the commission of the crime of arson, larceny or robbery, B. would indignantly reject the solicitation, he might become excited and feel humiliated and ashamed to have been thus approached, and might have worried over it for days and nights thereafter, but could he maintain an action against A. for thus approaching him with such an infamous proposition? We think not. Suppose a bawd should solicit a man upon a public street to have sexual intimacy with her; he certainly could not maintain a civil action against her. If an action could be maintained by a woman against a man for such solicitation, the same right to maintain one would exist in his favor. Whilst he might not suffer the same anguish and humiliation on account of such solicitation as the woman, yet the right of recovery would be the same. The amount of it would only be determined by reason of the difference in effect such a solicitation would have upon one or the other. Society and the moral sentiments of the people strongly condemn conduct like that with which the appellee is charged, but there is no principle of law known to us which will enable a party to maintain a civil action upon facts like those here under consideration.

Newell v. Whitcher, 58 Vt., 589, is relied upon as an authority authorizing a recovery. It appeared that the plaintiff was a blind music teacher; that she went to the house of the defendant to give lessons to his daughters; that he assigned her to a room for the night; that during the night he stealthily entered her room, sat on her bed, leaned over her person and made repeated solicitation to her for sexual intimacy, which she repelled. The court held that her private sleeping room during the night was exclusive; that trespass *quare clausum fregit* would lie against him; that sitting on her bed and leaning over her was an assault, and that she was entitled to recover exemplary damages. The principle of that case does not apply, because the defendant was guilty of trespass *quare clausum fregit*, and an assault upon the plaintiff's person. The recovery was evidently allowed on account of these wrongs.

In *Bennett v. McIntire*, 6 L. R. A., 736, the husband sued the defendant in trespass, alleging that the latter, with force and arms, entered upon plaintiff's premises and attempted to seduce his wife by wickedly soliciting and attempting to persuade her to submit to carnal intercourse. The evidence showed that defendant entered upon plaintiff's premises with his license, and recovery was denied, the court holding that the averments as to the defendant's conduct after he entered upon the premises was laid by way of aggravation of damages, and not as a ground of the action. The denial of recovery was not placed upon the ground that a cause of action was in the

wife, not in the husband, for the wrong which she suffered. The attorney who brought the action and the court which tried it evidently labored under the impression that no cause of action existed except for the trespass on the premises; and that the defendant's other acts did not constitute a cause of action, but were only available as an aggravation of damages.

It has been urged in consultation that solicitation to commit adultery is a common law offense, and may be indicted as such, and after that conclusion is reached the argument proceeds to the effect that as Maley transgressed the common law, thereby being guilty of an indictable offense, a cause of action arose. In support of that conclusion Bishop on Noncontract Law, section 71, is cited. It reads as follows: "The doctrine in general terms is that the civil wrong and the criminal are legally distinct things, though both may proceed from one act of the offender. If the injury is of a nature falling on the entire community, an individual suffering from it only as others do can maintain no action against the wrongdoer even should it in degree casually press more heavily upon him than upon others. But he who suffers a special damage may have his suit, though by reason of the public harm the defendant is also indictable."

And also section 466, Kentucky Statutes, is cited, which reads as follows: "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed."

It is also urged that the cases of the City of Henderson v. Clayton, 22 Ky. Law Rep., 283, and Hutcheson v. Louisville & Nashville R. R. Co., 22 Ky. Law Rep., 361, support that view. The doctrine stated by Bishop does not apply to the facts of this case. If one carries away another's property with the felonious intention to convert it to his own use, or if one person commits an assault upon another, the wrongdoer may be indicted therefor, but that fact does not relieve him of liability in a civil action for damages the injured party may have suffered in his estate or person. This doctrine can not be applied in disregard of other well-known rules of law to sustain a recovery where no cause of action exists. Section 466, Kentucky Statutes, is of the same tenor as the rule announced by Bishop, except its operation is restricted to violations of statutes. As there is no statute denouncing a penalty for solicitation to commit adultery, it can not be claimed to have any application to the case under consideration. The statute was applicable to the cases of the city of Henderson v. Clayton and Hutcheson v. Louisville & Nashville R. R. Co., and those cases are of the character to which the doctrine stated by Bishop and the provisions of the statute apply. In the former the city of Henderson, in violation of the statute, maintained a pest-house by reason of which Mrs. Clayton and her family took smallpox, and suffered in person and estate. In the latter case Hutcheson was compelled by the Louisville & Nashville Railroad, in violation of the Constitution, to pay excessive freight charges, and for the damages sustained in consequence thereof he was adjudged the right to recover.

The court does not admit (the question not being here) that the appellee could have been indicted at common law for the alleged offense of solicitation to commit adultery, but assuming he could have been, it is of the opinion that that fact would not enable the appellant to maintain the action.

The judgment is affirmed.

Judge Hobson delivered the following dissenting opinion June 9, 1908:

Appellant, Maggie Reed, filed this suit against appellee, William Maley. He demurred to the petition; his demurrer was sustained, and she declining to plead further, the petition was dismissed. From this judgment she appeals. Whether the facts in the petition are sufficient to constitute a cause of action is the only question to be determined on the appeal. These facts are as follows: The plaintiff was a married woman, a resident of Fleming county. On October 19, 1898, she was at her home sitting near a window in her house. The defendant came to the house, approached very near to the window, proposed to her to have sexual intercourse with her, saying to her: "Won't you meet me out somewhere? Won't you meet me alone somewhere?" She indignantly refused the proposal. It is charged in the petition that the defendant committed a trespass thus against the person of the plaintiff, and illegally, willfully and maliciously thus made a criminal assault upon her; that thereby she was frightened, humiliated and caused great mortification and shame, and was greatly excited, unnerved and damaged. The amount of the damages was laid at \$8,000, for which judgment was prayed.

So much of the opinion of the court is concurred in as holds that the petition fails to state facts sufficient to constitute a cause of action for assault. (*Stivers v. Baker*, 87 Ky., 580; 3 Cyc., 1025; *Bennett v. McIntire*, 6 L. R. A., 786.) But on another ground it is submitted that the petition is sufficient.

In *State v. Avery*, 7 Conn., 263 (18 Amer. D., 105), the defendant was indicted for sending to a married woman a letter written by him, proposing carnal intercourse with her. It was urged that he could not be punished for criminal libel because there was no publication of the letter; but the court held that the sending of such a letter without any publication is clearly an offense of a public nature and punishable as such, as it tends to create ill blood and cause disturbance of the public peace; that adultery being an offense, an attempt to commit it, or a solicitation to another to commit it, is a misdemeanor.

In Connecticut when this case was decided adultery was a felony. By our statute it is only a misdemeanor. (Kentucky Statutes, section 1320.) In *Smith v. Commonwealth*, 54 Penn. St., 209 (98 Amer. Dec., 686), it was held that solicitation to adultery is not indictable, where adultery is by law made only a misdemeanor. But it is hard to see why the solicitation to commit a felony should be punishable and not that to commit a misdemeanor, nor does the weight of authority sustain this distinction. In 1 Bishop on Criminal Law, section 768, it is said: "Though to render a solicitation indictable, it is in general, as in other attempts, immaterial whether the thing proposed is technically a felony or a misdemeanor; yet as the soliciting is the first step only in a gradation reaching to the consummation, the thing intended must, on principles already explained, be of a graver nature than if the step lay further in advance."

In *Commonwealth v. Tibbs*, 31 Ky., 524, the defendant was indicted for challenging another to fight a duel. The proof showed that when they had been quarreling Tibbs said to him: "I am told you carry weapons for me; I will fight you a duel with a pistol or rifles from one step to a hundred yards." The court held that, considering the occasion and the accompanying circumstances, the words did not necessarily import a demand, but only

willingness to fight if the other person desired such an encounter. It then added: "Such words might amount to a misdemeanor at common law, for they may be deemed an insinuation of a desire to fight with deadly weapons, which might provoke such combat and which, therefore, is punishable as a misdemeanor."

In *United States v. Lyles*, 4 Cranch C. C., 469, it was held a misdemeanor to solicit another to commit a breach of the peace. So it has been held indictable at common law, independently of statute, to solicit a witness not to testify before the grand jury or on the trial of the case. (*State v. Keys*, 30 Amer. Dec., 450, 8 Vt., 57.) In this case the court, by Judge Redfield, said: "It is equally well settled that an endeavor to induce another to commit a felony or misdemeanor is indictable as a common law offense. * * * And we feel no hesitation in saying that the attempt to commit an offense, or the soliciting another to commit an offense, should (with few exceptions not necessary to be enumerated here, resting upon peculiar grounds) be held indictable as misdemeanors at common law."

In *Commonwealth v. Willard*, 22 Pick., 476, the court, in attempting to define those cases in which solicitations are indictable, said: "One consideration, however, is manifest in all the cases, and that is that the offense proposed to be committed by the counsel, advice or enticement of another is of a high and aggravated character, tending to breaches of the peace or other great disorder or violence, being what are usually considered mala in se, or criminal in themselves, in contradistinction to mala prohibita, or acts otherwise indifferent than as they are restrained by positive law."

In a note to *State v. Butler*, 25 L. R. A., 434, the authorities are exhaustively collected, and criticising the rule followed in some of the States, the learned editor summing up the authorities says: "But that rule does not allow for the growth of the common law, which is certainly a thing of growth. In fact, indictments for solicitation to crime are of comparatively modern origin, and in some cases have not been used until quite recently. The true rule would seem to be that suggested by Judge Lawrence in *Rex v. Higgins*, 2 East., 5, who made the question of indictability depend upon whether or not it is prejudicial to the community."

Adultery is a grave offense under the moral law. A solicitation to commit adultery, if unsuccessful, is liable to lead to violence and bloodshed at the hands of the relatives of the woman; and if successful, it defeats the end for which marriage was intended and destroys the woman. It seems anomalous to say that a solicitation to commit a breach of the peace, or to disobey a subpoena, is, at common law, indictable; but that solicitations to adultery are no offense, although necessarily attended with more serious consequences to the community. It may, therefore, be safely concluded that solicitation to adultery is a common law offense and may be indicted as such.

But aside from this, section 1271, Kentucky Statutes, makes it a misdemeanor for any one to use, in the presence of another person, "any abusive or insulting language, intending thereby to insult such other person or persons, or with the intent to provoke an assault." The proposal of the defendant to the plaintiff was equivalent to a charge of unchastity, and was grossly insulting. It was intended as a charge of unchastity, and was, therefore, intended to insult her.

If A. said to B., "you have stolen my watch," he would not be excused on the ground that he did not expect B. to take it as an insult. If the words used are insulting, and are intended as an insult, there is an intention to insult, although there is no expectation that the insult will be resented.

The defendant might, therefore, have been prosecuted under this statute.

His act being punishable criminally, can it also be made the subject of a civil action for damages? In Bishop on Noncontract Law, section 71, it is said: "The doctrine in general terms is that the civil wrong and the criminal are legally distinct things, though both may proceed from one act of the offender. If the injury is of a nature falling on the entire community, an individual suffering from it only as others do, can maintain no action against the wrongdoer, even should it in degree casually press more heavily upon him than upon others. But he who suffers a special damage may have his suit, though by reason of the public harm the defendant is also indictable."

This principle was approved by this court in *City of Henderson v. Clayton*, 22 Ky. Law Rep., 283, and *Hutchinson v. L. & N. R. R. Co.*, 22 Ky. Law Rep., 361. Section 466, Kentucky Statutes, also provides: "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed."

It is insisted for the appellee that the petition shows no special damage, and authorities are cited to the effect that mental suffering, not accompanied with any physical injury or actionable wrong, is insufficient to constitute the basis of an action.

But this rule does not apply to wrongs done maliciously or with insult where the mental suffering is the natural and proximate consequence of the wrong, and there is, aside from it, a recognized cause of action. (8 Amer. & Eng. Ency. of Law, 2d edition, 667-669; 1 Sedgewick on Damages, section 47.)

It is charged in the petition that the plaintiff was excited, unnerved and damaged by the wrongs of the defendant. If she was made sick or lost time this would be a special damage, entitling her to maintain an action under the rule, although the sickness or loss of time was the result of the mental condition produced by the defendant's wrong; for his wrong was the primary cause of the trouble, and the damage was the proximate and natural result of it. One who is unnerved is in an abnormal condition or sick, and if this condition was the proximate result of the defendant's act, the plaintiff has suffered special damages therefrom within the meaning of the rule. She may recover compensation for the injury she sustained, and in addition to this the jury may, in their discretion, award such sum by way of punitive damages as they may deem proper, for the action is in the nature of an action of trespass on the case for a malicious wrong, and punitive damages may be awarded as in actions for slander or malicious prosecution. The purity of woman and the sanctity of the marriage relation lie at the basis of our whole social fabric, and attempts to destroy them are grave offenses. The law is inadequate indeed if it leaves such offenses to be punished wholly by the relatives of the injured woman. This brings about

bloodshed and disregard of the law itself. The actual injury that may be done to a virtuous woman by a wrong of this description is incalculable. If the plaintiff had suffered a miscarriage, or sustained some direct pecuniary loss as the proximate result of the wrong, it would hardly be doubted that she might maintain an action for the damages thus sustained by her. But when she is crushed under the insult and unnerved and made sick, the damage or injury, though different in a degree, is none the less actual than in the case supposed. In 8 Amer. & Eng. Ency. of Law it is said: "There has never been doubt that a defendant whose acts amount in law to a legal wrong is responsible in damages for all the loss which is both natural and proximate consequence of his wrongful act. (Page 569.) Though an act of the plaintiff himself has intervened between the defendant's wrong and the injury suffered, the latter is not thereby excused if the intervening act was the result of, or naturally and reasonably induced by, the defendant's earlier wrong." (Page 578.)

The same rule is laid down in 1 Sedgewick on Damages, section 129: "The true test would seem to be, whether the action of the intervening agency was such as was to be expected to happen upon the defendant's act. If it were so to be expected the result is not remote. In the case of a human agency the intervention will generally be of a sort not to be expected. But where the intervention was directly and naturally induced by the defendant's act the consequence is not remote, though the intervening agency was human."

The natural effect of an indecent proposal of this character to a virtuous woman would be to upset her nerves and unfit her for discharging for the time her domestic duties. It would as truly make her sick as the administration of a nauseate drug, and such a result was reasonably to be expected. The injury in the one case is none the less actual and none the less natural than the other.

I, therefore, dissent from the opinion of the court.

**RETTNER v. OHIO FALLS BUILDING AND LOAN ASSOCIATION,
ASS'EE.**

VOGHT v. SAME.

(Filed June 5, 1903—Not to be reported.)

Building and loan associations—Usury—Res judicata—Appellants were borrowing stockholders in appellee association, who settled their loans a short time before the association become insolvent and received the proceeds of their stock at its par value. Shortly afterwards they brought their actions to recover usury paid. The suits were not prosecuted with diligence, and in the meantime the assignee of the association, for the benefit of creditors, prosecuted an action to settle the estate, in which orders were made distributing the proceeds, and appellants failed to set up their claims therein, although called upon to do so. Held—That the order of settlement in the action brought by the assignee bars appellant's claims.

B. H. Young, M. W. Ripy and E. C. Walde for appellants.

Barnett & Barnett and Shackelford Miller for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

The appellant in each case was a borrowing stockholder in the Ohio Falls Building and Loan Association. Before it assigned, but after its capital was impaired, it was unable to pay all its liabilities. Appellants withdrew from the association, paid their loans, and in doing so received the proceeds of their stock at its par value, without paying any of the losses, etc. Subsequently they brought suit to recover amounts which they claim to have paid as usury. A suit was instituted by the assignee to settle the estate. It was referred to a commissioner for that purpose and to ascertain the losses it had sustained, with a view of charging the stockholders therewith in settlement with them. The appellants allowed their cases to pend for four or five years, practically without making any effort to bring them to a trial, and never did prove or attempt to prove their claims against the assigned estate, although they were called upon by proper notice and orders to do so. The action proceeded to a settlement, and a final order of distribution was made of the assets in the hands of the trustee.

We are of the opinion that the orders made in the action to settle the estate bars appellants' right to have their claims paid out of the assets of the assigned estate. To now allow the claims would work a great hardship on the other creditors and other stockholders of the association. In addition to this, they should not be allowed to open up the settlement and recover the sums claimed by them until they account for their share of the expenses and losses of the concern. (*Olliges v. Kentucky Citizens Building and Loan Association's Ass'ee*, 23 Ky. Law Rep., 2067.) Having reached the conclusion that their claims are barred by the order in the suit to settle the estate, we are of the opinion that the appellee should not have been given judgments on its counterclaims. Besides, in any event, under the facts of the case, we should not have allowed them except as a set-off against appellants' claims.

The judgments of the appellee on its counterclaims are reversed for proceedings consistent with this opinion.

LESLIE COUNTY, &c. v. WOOTEN, &c.

(Filed June 9, 1903.)

Mandamus—Fiscal court—Repair of bridges—This action was instituted by citizens of Leslie county for a mandamus to compel the fiscal court to construct a bridge across Middle Fork, on a public road within the limits of the town of Hyden. The building of the bridge was necessary to take the place of one which had washed away, and which had been built several years before by private subscription. The question involved on this appeal is whether it is the duty of the fiscal court of the county or of the city of Hyden to construct said bridge. Held—That as the city had not accepted the road as a street, or repaired it in any way, said bridge constitutes a part of the county road, and that it is the duty of the fiscal court to rebuild it, under section 1840, Kentucky Statutes. While a mandamus will not lie to control the discretion of the fiscal court in matters within their jurisdiction, a mandamus will lie to compel said fiscal court to perform its plain duty to pro-

vide a bridge for the citizens of the county where a former bridge had been destroyed and the city is unable to build it.

John L. Dixon and H. C. Eversole for appellants.

J. M. Bicknell and Jas. H. Jeffries for appellees.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Barker.

The appellees, who are citizens and taxpayers of Leslie county, Kentucky, instituted this action in the Leslie Circuit Court, in their own behalf, and in behalf, and for the benefit, of all the other residents and citizens of the county, to obtain a judgment awarding them a writ of mandamus against the appellants, Leslie county and the members of the fiscal court thereof, to compel them to repair a bridge, constituting a part of one of the public highways of the county. The facts are these:

The city of Hyden, the county seat of Leslie county, is a city of the sixth class, and contains about 300 inhabitants. It is situated at, or near, the point where Rockhouse creek empties into Middle Fork of Kentucky river. The city lies on both sides of Middle Fork and of Rockhouse creek; it has no streets or sidewalks, but there are two county roads running through its corporate limits, intersecting each other. One of these roads, running from north to south, crossed Middle Fork within the limits of Hyden by means of a bridge. This bridge, which was built some years ago, partly by private subscription and partly by a donation from the fiscal court, was, prior to the institution of this action, swept away by high water, thus depriving the citizens of the county and the traveling public of a safe and convenient mode of crossing the river, making the highway, at this point, practically useless.

The attention of the members of the fiscal court was called to the destruction of the bridge and the necessity of its being rebuilt, but they refused to take any steps towards remedying the difficulty, and declined even to entertain a proposition so to do, assuming the position that it was the duty of the city of Hyden to rebuild the destroyed bridge; and the question whether it is the duty of the fiscal court or the authorities of the city of Hyden to rebuild the bridge is the principal issue in this case.

For the appellants it is contended, first, that the charter of cities of the sixth class puts all the highways and bridges within their corporate limits under the exclusive charge and control of the municipalities; and, second, that mandamus will not lie against the fiscal court to require them to act in a matter such as is involved in this litigation. A question precisely similar to the one here involved arose in the case of Trustees of Elizabethtown v. Hardin County Court (MS. opinion filed February 9, 1877). In that case a bridge, which was within the corporate limits of Elizabethtown, and which constituted a part of one of the county roads running into the municipality, had become out of repair, and the trustees of the city instituted an action against the county court of Hardin county to compel them to repair the structure. The lower court dismissed the bill. Upon appeal this court said: "Regarding the county court as controlling the road like any other public highway in the county, it is still certain from the admitted facts that this bridge is indispensable for public use, or at least made neces-

nary by the wants of the public. It is on the principal thoroughfare traveled by one portion of the inhabitants of the county in going to and returning from the county seat and the railroad depot. It is a bridge constructed on a highway, seventy feet long, and essentially a county bridge. The county court is required by statute to erect such structures on its public ways when required for public use. The citizens of the town are taxed to aid in building all such bridges erected in the county, and when called on by the taxgatherer, must contribute in the same proportion with the citizens living outside the town limits. The citizens of the town bear the burden in common with the citizens of the county. If this town was an independent municipality, having no burdens to bear in the way of taxation in common with the people of the county for county improvements, then it might be well argued that the town should make all the improvements within its limits. While the town must keep its streets and alleys in repair, it can not be said that such a structure as this is to be regarded as a part of the street for the purpose of compelling its population to rebuild or repair it. It is within the county as well as the town limits, and is that character of improvement required to be made by the county court when the necessities of the public demand it."

In the case at bar the evidence shows the incapacity of the city of Hyden to meet the emergency with which it is confronted; it also shows that it has never taken charge of the county road, of which the bridge in question constituted a part, or done any work thereon; on the contrary, it appears that the fiscal court has heretofore ordered all the work which has been done in keeping this road in repair, and, for this purpose, has appointed overseers year after year.

Under the authority above cited we have reached the conclusion that the bridge constitutes a part of the county road, and that it is the duty of the fiscal court to rebuild it.

We come now to a discussion of the question as to whether or not mandamus is the proper remedy for the enforcement of this duty. Section 1840 of the Kentucky Statutes is as follows: "The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair the necessary public buildings; secure sufficient jail, and a comfortable and convenient place for holding court at the county seat; to erect and keep in repair bridges and other structures, and superintend the same." * * *

Section 4345 provides: "In cases of emergency the county judge may have any bridge (kept up by the county) repaired, or a new one built; but he shall make no contract for such work, or for any work on any bridge, exceeding \$500 without first calling together the fiscal court and laying the matter before them; and it shall be their duty, in such cases, to make immediate provision for the emergency."

Assuming that the bridge in question was part of the county road, as we think the evidence establishes, it was clearly the duty of the fiscal court to provide for the emergency arising from its destruction.

The case of the Commonwealth v. Boone County Court, 83 Ky., 632, involved a question similar in principle to the one at bar. In that case a mandamus was sought to compel the levy court of Boone county to build a

new bridge. The court met pursuant to the order of the circuit court, and decided that the bridge was not necessary. Upon appeal this court held that the question of building the bridge was one reposed in the discretion of the county court, and that this discretion could not be controlled by mandamus. The difference between the case cited and the one at bar lies in the matter of discretion. As to the new bridge, the law conferred upon the county levy court a discretion, but as to the repair of an old bridge, the language of the statute is peremptory. The opinion in the case cited fully recognized the right of the circuit court to control the inferior tribunal in a matter involving, not a discretion, but a plain duty. In the opinion it is said: "If an inferior tribunal has a discretion and proceeds to exercise it, then its discretion should not be controlled by mandamus; but if the subordinate public agent, whether it is vested with both judicial and ministerial functions, or only with the former, refuses to act in any way, or entertain a question as to which it has a discretion, and which the law has enjoined upon its consideration, then obedience to the law should be enforced by mandamus, and the agent compelled to act, if there is no other legal remedy; but in such a case its discretion or judgment must be left free to act, and can not be controlled in a particular direction. The performance of a plain, positive duty may be compelled by mandamus, but where there is a discretion as to the result that may be arrived at, it can not be controlled."

In the case of *Montgomery County v. Menefee County Court*, 98 Ky., 83, it was held that a writ of mandamus would issue against the members of the county court, to compel the levying of a tax which ought to have been levied, and that the levying of the tax was a plain ministerial duty.

In the case of the *County Court of Warren v. Daniel*, 2 Bibb, 573, it is said: "It (mandamus) is a proper remedy to compel an inferior court to adjudicate upon a subject within their jurisdiction, where they neglect or refuse to do so; but where they have adjudicated, the mandamus will not lie for the purpose of revising or correcting their discretion."

In the case of *Anderson County Court v. Stone & Son*, 18 B. Mon., 848, which involved the right to require the county levy court to levy a tax, and pay for a bridge built under their order, the court said: "The first question to be considered is whether the circuit court has jurisdiction to award a mandamus in a case like the present. It is contended, on the part of appellant, that the law on this subject has been changed by the Code of Practice, and that now, under operation of section 526 of the Code, such a writ can only issue against an executive or ministerial officer, and not against an inferior judicial tribunal. It must be recollected, however, that the members of the county court, in contracting for the building of bridges, and in laying a levy to pay for the work are acting ministerially, and not in a judicial capacity, and are, therefore, expressly embraced by the provisions of the Code. Consequently the jurisdiction of the circuit court to hear the application and to award the writ, if it were authorized by the testimony, was unquestionable."

In the case of *Hammer v. City of Covington*, 3 Metcalfe, 494, an action had been instituted for a mandatory injunction against the municipality, to require it to repair the public highways alleged to have been allowed to fall into ruin and decay. The court held that it was the duty of the municipal

pality to keep the streets and highways in repair, and that the relief sought should have been granted.

Section 4945 requires, in the case of an emergency like the one involved here, that the county judge shall call together the fiscal court, and lay the matter before them, and then it shall be their duty to make immediate provision for the emergency. Here the bridge had been swept away by a flood tide, and the use of the highway rendered both unsafe and inconvenient; the matter had been properly brought to the attention of the fiscal court, and they had refused to perform their plain duty in the premises, as pointed out by the statute. The circuit judge, upon the facts shown, properly awarded a writ of mandamus.

Wherefore, the judgment is affirmed.

CLEMENTS v. REESE.

(Filed June 9, 1908—Not to be reported.)

Wills—Fee-simple title—C. by his will devised his farm to his wife for life or widowhood, for her exclusive use, and to raise his four children, naming them. In another clause he devised the remainder of said property to his four children previously named, and directed that in case of death of one or more of said children such shares should be equally divided between all of testator's living children, or their issue of both wives. He had been twice married and left children by both marriages. The question involved on this appeal is whether or not the words "in case of death of one or more of said children" refer to their dying before the mother, and before the estate comes into possession. Held—That this question is answered in the affirmative. The four children took a fee-simple title to the farm.

Chas. H. Sanford for appellant.

John D. Carroll for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Paynter.

W. R. Clements died in 1884, leaving a will, which, among others, contains the following provisions:

"1st. I hereby will and bequeath to my beloved wife, Sallie, my home farm on which I now reside, containing 220 acres, more or less, to have and to hold during her natural lifetime, or widowhood, and for her exclusive use and to raise my four children by her, to wit, Dora, Nancy, Mattie and Laura.

"2d. I also will and bequeath to her the following personal property, to wit, all my household, kitchen furniture, farming implements, poultry, one bay mare, the two old mares and the young sorrel horse, three cows and calves, the choice among my cows, all my sheep, and full provisions for her (said wife and said children) for one year.

"3d. At the death of my said wife, or end of her widowhood, the said farm, as given above, and remaining personal property, I will and bequeath equally to my four children named above, and in case of death of one or more of the said children, issue of said wife, such shares to be equally divided between all my living children or their issue of both wives."

The testator had been twice married, and left children as a result of both marriages. His second wife survived him and never married. The children by her, Dora, Nancy, Mattie and Laura, mentioned in the first clause of the will, survived their father and mother, and are plaintiffs, asking for a construction of the clauses of the will quoted.

The widow took the estate during life or widowhood. The court is asked to interpret that part of clause three which reads as follows: "In case of death of one or more of the said children, issue of said wife, such shares to be equally divided between all my living children or their issue of both wives." Does the phrase, "in case of death of one or more of said children," refer to their dying before the mother and before the estate comes into possession? The court by the authority of *Prewett v. Holland*, 92 Ky., 641; *Thackston v. Watson*, 84 Ky., 206; *Ferguson, &c. v. Thomason, &c.*, 87 Ky., 519; *Lee, &c. v. Munford, &c.*, 19 Ky. Law Rep., 1585, and *Baxter, &c. v. Isaac, &c.*, 24 Ky. Law Rep., 1618, answers the question in the affirmative. The four children took a fee-simple title to the 220 acres of land.

The judgment is affirmed.

BALDWIN & CO. v. TUCKER.

(Filed June 9, 1903—Not to be reported.)

Verdict—On the second appeal in this action a verdict was rendered in favor of defendant under proper instructions of the court, and the same is asked to be set aside on this appeal. Held—That taking all the facts shown in evidence in consideration and the inferences that may be fairly drawn from them, the court is bound to conclude that there was evidence to be submitted to the jury, and the verdict is not so flagrantly against the evidence as to warrant the court in disturbing it.

Gaither & Vanarsdall for appellants.

Ben Lee Hardin for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hobson.

On the former appeal herein the court, concluding its opinion, said: "The court erred in giving a peremptory instruction to the jury. On the facts shown in this record it should have told the jury, in the absence of any evidence to show that Sparks was authorized to sell the piano and take the note, payable to himself, for the purchase price, to find for appellant. There was nothing in this case to show that, in the business of selling pianos by agents, it was usual for them to take notes payable to themselves for the purchase money. Had such been shown, then it would appear to be an act within the scope of the agent's apparent authority." (*Baldwin & Co. v. Tucker*, 23 Ky. Law Rep., 1588.)

On the return of the case to the circuit court it was tried again, and at the conclusion of the evidence on both sides the court instructed the jury as follows:

"Gentlemen of the Jury—By virtue of the written contract between D. H. Baldwin & Co. and J. W. Sparks the latter had no authority to sell the piano in contest to defendant Tucker, and to take Tucker's note therefor,

payable to himself. For this reason you will find for the plaintiff, unless you believe from the evidence that it was usual, about the time of said sale, in this part of the country, for agents in the piano selling business to take notes payable to themselves, in which case you will find for the defendant."

The jury again found for the defendant, and the plaintiff appeals a second time to this court. It is conceded that the instruction of the court follows the opinion delivered on the former appeal, but it is insisted that there was no evidence to warrant the instruction. The rule in this State is that where there is any evidence of a fact it must be submitted to the jury. It was shown on the trial that four pianos were shipped by appellants to Sparks to sell. They were shipped to him in his own name and to be sold by him as appellants' agent. One of these pianos he sold, taking a check in his own name for the price. Another he sold, taking a check in his own name for part of the price and an organ in exchange for the remainder. These checks he cashed in his own name. Appellants made no complaint of either of these transactions and ratified them. After all this Sparks was introduced by one of these purchasers to appellee, and thus made the trade with him in contest. In the written contract between Sparks and the company it was stipulated, among other things, as follows: "When a sale is made by the said Sparks it is to be reported to D. H. Baldwin & Co. without delay, and where a sale is not satisfactory to D. H. Baldwin & Co. he shall make it so, take up the instrument or pay for it within thirty days from advice to him that the sale is not satisfactory."

It was also shown that after the transaction with appellee, Sparks went to see appellant and a negotiation was had between them as to the settlement of his accounts, and they then sent an agent to Harrodsburg to look into the state of Sparks' affairs. This agent called on Tucker and examined the contract made with him by Sparks, assuring him that Sparks was their agent and had a right to sell the piano, and that they were hunting up evidence to handle him for not returning the money. It was also shown by one piano agent that he had sold and taken notes individually, and by a purchaser that he had bought an organ from another agent who had taken a note to himself personally. The defendant offered to prove by a number of witnesses that the agents for sewing machines, reapers, mowers, and property of that sort, by custom, prevalent all over the State, took notes and checks payable to themselves as agents; but the court sustained an objection to this testimony, and refused to admit it. Whether this evidence should have been admitted is not now material, as the jury found for the defendant on the evidence before them. We do not see that there was any material error in the admission of the statement of the agent sent by appellant to Harrodsburg. His statement was made in the course of his employment in discharging the business committed to him by his master, explaining why he was there and why he wanted to see the papers which Tucker had. It tended to show that appellants at that time, which was only a few days after the sale, were looking to Sparks for redress.

Taking all the facts shown by the evidence into consideration, and the inferences that may fairly be drawn from them, we can not say there was no evidence authorizing the submission of the case to the jury, or that the verdict is so against the evidence as to warrant us in disturbing the verdict.

Judgment affirmed.

TRAPP v. CITY OF NEWPORT, &c.

(Filed June 9, 1903.)

Municipal government—Injunction—Appellee is a city of the second class, governed by its charter contained in article 8, chapter 89, Kentucky Statutes. In pursuance of an ordinance passed by its council it advertised for bids for street improvements. Bidders were invited to make proposals, both for brick pavement and bituminous macadam. Appellant bid only for making the improvement with brick, and C. bid for making the improvement with bituminous macadam. Appellant's bid was the lowest. C. reduced his bid to the same figure as the bid of appellant and it was accepted by the council. Pending the closing of the contract appellant brought this action for a mandatory injunction to compel the council to accept his bid. Afterwards the council rejected all bids and readvertised for bids. Held—That as the council had the reserved right to award the contract to the lowest and best bidder, it had the right to reject any and all bids unconditionally, and can not be compelled by mandatory injunction to award the contract to appellant.

C. L. Raison, Jr., for appellant.

C. J. & W. W. Helm and Aubrey Barbour for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellant in the Campbell Circuit Court against the city of Newport and its mayor and general council for the purpose of obtaining a mandatory injunction requiring the appellees, who constitute the city government of the municipality named, to award him the contract for making certain street improvements, to which he claimed to be entitled.

Newport is a city of the second class, and its charter, therefore, is contained in article 8, chapter 89 of the Kentucky Statutes.

In the spring of 1902 the general council, by the necessary procedure, undertook to have reconstructed Columbia street, between Third and Fourth streets, and, for that purpose, bids were solicited by proper advertisement. Bidders were invited to make proposals, both for brick pavement and bituminous macadam. At the proper time and place the bids on the proposed work were received and opened, and were found to be three in number; that of the appellant, who bid only on making the improvement with brick, and who proposed to do the work in question for the sum of \$3,927.60; also one by John Collopy, who bid on brick, and who proposed to do the same work for the sum of \$4,187.70; the appellee, the Central Bitulithic Paving Co., proposed to make the improvement of bituminous macadam for the sum of \$4,466.90. Afterwards it made a written proposal to the general council, reducing its bid for making the improvement of bituminous macadam to \$3,927.60, the precise sum for which appellant proposed to do the work with brick; whereupon the board of aldermen, to whom the question of rejecting or accepting bids by the municipal law first came, accepted the reduced proposal, and, by resolution, awarded the work to the Central Bitulithic Paving Co.

While the matter was pending before the board of councilmen, and before that body could act in the premises, this action was instituted, and a re-

straining order issued by the court, prohibiting the mayor and the two boards constituting the general council of the municipality from accepting the proposal of the Central Bitulithic Paving Co., or awarding to it the contract to do the work involved in this litigation.

After the issuance of the injunction by the court the general council, by resolution, rejected all of the bids for the work, and proceeded to make new arrangements for the improvement of the street.

In his petition, as amended, the appellant prosecutes this action, both as a bidder upon the work and also as a taxpayer of the city of Newport. He alleged, substantially, the facts herein set out, and claims to have been the lowest bidder for the work, and charges that the action of the municipal officers, refusing to award him the contract, was "without authority, illegal, arbitrary and capricious."

By their answer the appellees set up the fact that all of the bids upon the work had been rejected. To this appellant filed reply, charging that the rejection of the bids had taken place after the issuance of the restraining order, and with full knowledge of its existence, and reiterated, in a large measure, the allegations of the petition. He also filed a demurrer to the answer, and appellees filed a demurrer to his reply, and moved to dissolve the injunction upon the face of the papers; whereupon the court dissolved the injunction, sustained appellees' demurrer to the reply, and overruled appellant's demurrer to the answer.

Appellant declining to plead further, the petition was dismissed, from which judgment he has appealed.

By section 3094, Kentucky Statutes, it is provided that "the general council (of cities of the second class) shall have and exercise the exclusive control and power over streets, roadways, sidewalks, alleys, landings, walks, public grounds and highways of the city; to establish, operate, alter, widen, extend, grade, pave, repave, block, construct, reconstruct, sweep, sprinkle, or otherwise improve, clean and keep repaired, the same."

Section 3096 prescribes that "the general council may, by ordinance, provide for the construction or reconstruction of the streets, alleys and other public ways and sidewalks, or part thereof, of the city, upon a petition of the owners of a majority of the front or abutting feet of the real estate abutting on such proposed improvement, or without a petition, by a vote of two-thirds of the members elect of each board of the general council."

In pursuance of the foregoing authority the general council of Newport passed an ordinance, entitled "An ordinance prescribing the method of procedure, governing and regulating the construction and reconstruction of all public ways and sidewalks in the city of Newport, Ky.," which was approved May 7, 1894. So much of this ordinance as is pertinent to the questions to be adjudicated in this case is as follows: "In the ordinance providing for the improvement by construction or reconstruction of any public way, or sidewalk or part thereof, the city civil engineer shall be directed to advertise not less than three times in the city's official paper for proposals, to be received at his office at 12 o'clock noon of a day, not a legal holiday, to be fixed by him, not less than ten nor more than fifteen days after the date of advertisement, and he shall advertise for same within ten days after the said ordinance shall have been signed by the mayor. The proposals for

doing said work shall be immediately at noon of said day opened in the presence of the mayor and city civil engineer, superintendent of public works, chairman of the improvement committee of the board of councilmen, a majority of whom shall constitute a quorum for the transaction of said business of opening said proposals. If a majority of said persons be not present, the bids or proposals shall not be opened, but an adjournment shall be had to the following day at 12 o'clock noon, when, if a quorum of said board be present, said proposals shall be opened, otherwise an adjournment, as above, shall be had from day to day until a quorum can be secured. Upon opening said proposals said committee of persons above shall report their findings as to same to the board of the general council, which first convenes in regular session thereafter, and said board, if the lowest and best bidder for same conforming to the requirements of the plans and specifications therefor shall be within the estimate of said proposed work, shall thereupon award the contract therefor to said lowest and best bidder, and report same to the other board of general council, which shall also so award same, and the mayor shall thereupon, upon direction of the general council, enter into a contract with said bidder for the performance of said work. The general council shall have the power to, and specifications shall so state, reject any and all bids therefor, in which case the city civil engineer shall proceed to readvertise for proposals for same."

There is no claim by appellant that any of the proceedings leading up to the award of the contract to the proper bidder was irregular or illegal; on the contrary, he shows that all the steps taken in the proceeding to have the improvement made, up to the time of the awards of the bid, were in strict harmony with, and conformed to, the charter and ordinance governing the matter. The questions for adjudication in this case, therefore, are, first, was the appellant the lowest and best bidder for the work to be done? and, second, assuming him so to be, had appellees the right to reject all of the bids, including that of appellant?

Appellant assumes that because on the original proposal his was for the least sum, therefore, it was the lowest and best bid. It will be observed that the proposals were to be in the alternative, either brick or bituminous macadam. The right thus to select two materials of which a public improvement may be made, and submit them for bids in the alternative, is fully recognized in the case of *Barber Asphalt Co. v. Garr*, 24 Ky. Law Rep., 2227. It does not follow, therefore, that because a bidder's proposal is for the least sum he is the lowest bidder; the fact as to whether he is or not depends upon a proper consideration of other questions besides the price. One class of material may make a much more durable and satisfactory highway than another, and may be, therefore, really cheaper at a higher price than the inferior at a lower. These matters are peculiarly within the province of those vested by law with the power of making such improvements. The court should proceed with great caution, when asked to interfere with the discretion conferred by law upon municipal officers in regard to such matters.

By the provisions of the ordinance under which the work was to be done the contract was not to be let to the lowest, but to the lowest and best bidder, and the question, therefore, which presented itself to appellees, when

the bids were opened, inspected and compared, was whether or not it was better to adopt the bituminous macadam as the material with which to construct the highway at the greater price, or the brick pavement at the lower price. It may have been that the bituminous macadam, because of its superiority and its greater durability, the ease with which breaks can be mended, the smoothness of its surface, and the greater cheapness with which it can be kept clean, would make it, in the long run, less expensive than the brick street at a lower price; if so, then we can see no reason why the municipal officers should not have had the right to award the contract to the bidder whose proposal, upon a survey of all the questions involved, seemed to them the cheapest.

We have been cited to no authority which militates against the principle here announced, and we believe that none can be found, which, in the absence of the charge of fraud or corrupt motive, neither of which is made here, would authorize interference by the court with the exercise on the part of the municipal officers of their judgment as to which of two materials for the construction of a highway would be the cheapest and the best, although costing different sums.

In *re McCain*, 9 S. D., 57, it was said: "We believe the better doctrine is that the duties of officers entrusted with the letting of contracts to the lowest bidder are not the duties of a mere ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond the control of the courts by mandamus. It was not the duty of the board to accept the Gossage bid. Its duty consisted in carefully and honestly considering the terms of each bidder, the needs of the county, the responsibility of each bidder; and upon the facts, as the members believed them to exist, the board was bound to act. The duty of determining what bids were the lowest, all things considered, and who was or not a responsible bidder, belong to the board. It was a duty confided to its honest judgment and sound discretion. This discretion did not rest with the circuit court. It should have been slow to interfere with its exercise by the officers specially intrusted therewith."

In the case of *the People v. Kent*, 160 Ill., 665, which was a proceeding to require the officers having the matter in charge to award a contract to one who claimed to be the lowest responsible bidder, the court said: "It appears that the defendant, after investigating the records made by the relator in doing similar work before, and the other matters referred to in his answer, determined that the relator was not the lowest responsible bidder. He was vested with the exercise of official judgment and discretion with which, in the absence of fraud, the courts have no right to interfere." To the same effect is the case of *Kelley v. City of Chicago, &c.*, 62 Ill., 279.

In *Smith's Modern Law of Municipal Corporations*, section 746, this rule is announced: "Where an officer in the letting of a contract to a bidder is vested with the exercise of official judgment and discretion, as where the contract is to be let to the lowest responsible bidder, courts have no right, in the absence of fraud, to interfere with the exercise of that judgment and discretion. The officer's duty is not merely ministerial and can not be controlled by mandamus."

But even if this were not so appellant would have no just ground of com-

plaint that his bid was rejected. The ordinance under which it was made contains the following reservation on the subject of proposals: "The general council shall have the power to, and specifications shall so state, reject any and all bids therefor, in which case the city civil engineer shall proceed to readvertise for proposals for same." This reservation was placed in the ordinance for the express purpose of relieving the municipality of litigation similar to that now under consideration. Experience has taught municipal officers that much vexatious litigation arises from the claim of bidders for public work to be the lowest and best; and while it is necessary, for the benefit of the taxpayers, that all public work should be let to the lowest and best bidder, it has also been found necessary to vest somewhere the absolute power of deciding who is the lowest and the best, and also, when it is to the interest of the public, that any and all bids may be rejected without being required to give any reason therefor.

Municipal officers are often certain that the bids for public work are too high, and that a reletting would redound to the public good; sometimes they have evidence of combinations among bidders, by which competition is excluded, and but for the power of rejecting any and all bids they would be unable to protect the interest of the taxpayers against such combinations.

In the case of *Anderson v. Board of President and Directors of Public Schools*, 26 Law Reports, Ann., 707, the court, in discussing the power of rejection of bids for public work, says: "No claim is advanced in the petition looking to a recovery for fraud or deceit in making the proposals for bids. It is indeed asserted that the defendant rejected the plaintiff's bid 'without cause, arbitrarily and capriciously, through favoritism and bias.' But if the defendant had the absolute right to reject any and all bids, no cause of action would arise to plaintiffs because of the motive which led to the rejection of their bid. The right to reject the bids was unconditional. Defendant was entitled to exercise that right for any cause it might deem satisfactory, or even without any assignable cause. Whatever its rules or practice as to the acceptance of bids may have been, plaintiffs' rights can not justly be held to be greater than those conferred by the published advertisement on which their bid was made. That advertisement was not an offer of a contract, but an offer to receive proposals for a contract."

So in the case at bar, when appellant made his bid, he was confronted with the fact that the municipality reserved the right to reject it unconditionally. This reservation of power is a wise and salutary one, which experience has taught public officers to be necessary for the protection of municipalities from unnecessary litigation.

We perceive no error in the judgment dismissing the petition of appellant, wherefore, it is affirmed.

EXCHANGE BANK OF KENTUCKY v. THOMAS, &c.

(Filed June 9, 1908.)

Bills and notes—Surety—Limitation—Statute of estoppel—P. executed a note to appellant for \$1,160.80, which matured on the 14th day of January, 1898, with T. as his surety. This action was brought to recover the amount of said note, subject to a credit of \$708.90, as of May 1, 1902. T. answered,

pleading the statute of limitation of seven years as a bar to the recovery. In avoidance of the plea of the statute of limitation the bank replied that on the 15th day of January, 1894, at the instance and procurement of T., the principal, deposited to his credit with the plaintiff bank \$1,201.35 for the purpose of compelling the bank to appropriate the money to the payment of the note sued on, and that in pursuance of its duty under the law it did credit the note of P., on which T. was bound as surety, with a sufficient amount to extinguish the note, and charged the credit therefor to P.'s account with the bank; that within six months thereafter a creditor of P. brought an action for the purpose of having the transaction adjudged a fraudulent preference. The court finally adjudged that the said transaction was a preference, and ordered said sum paid to the assignee, less the amount of the pro rata to which it was entitled, and that the time which transpired pending said litigation should be deducted from the period of time since the maturity of the debt, and appellant pleaded that it was hindered by the act of T., the surety, from bringing the action within the seven years, and he is estopped from interposing the plea of the statute of limitation. A demurrer was sustained to the reply and the petition was dismissed. On appeal, Held—That the conduct of T. prevents him from relying on the statute of limitation. The bank was bound to apply the deposit of the principal to the satisfaction of the note, but after the transaction was adjudged to be a fraudulent preference the liability of the principal and surety revived, and, therefore, the court erred in sustaining a demurrer to the reply.

H. R. Prewitt for appellant.

Lewis Apperson and Carroll & Carroll for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the appellant, the Exchange Bank of Kentucky, against the appellees, C. F. Thomas, administrator of T. W. Priest, and M. S. Tyler, on the 15th day of July, 1902, to recover a judgment upon a note for \$1,160.80, executed to the bank by T. W. Priest, deceased, with appellee, M. S. Tyler, as his security, which matured on the 14th of January, 1898, subject to a credit of \$708.90, as of the 1st of May, 1902. The defendant, M. S. Tyler, for answer said that he was only the security for T. W. Priest for the note sued on; and that more than seven years had elapsed since the maturity thereof; and that he was released by the lapse of time and the statute of limitation, which he plead in bar of a recovery. In avoidance of the plea of limitation the bank replied that on the 15th day of January, 1894, at the instance and suggestion and upon the advice and procurement of the defendant, M. S. Tyler, the deceased, T. W. Priest, deposited to his credit with the plaintiff bank \$1,201.35, for the purpose of compelling the bank to appropriate the money to the payment of the note sued on, and that in pursuance of its duty under the law it did credit the Priest note, on which defendant Tyler was bound as security, with a sufficient amount of such deposit to extinguish the note; and charged the credit therefor to Priest's account with the bank; that within six months thereafter a creditor of Priest brought action for the purpose of having this transaction adjudged a fraudulent preference by Priest under the act of 1856; that both plaintiff and defendant defended this suit, but that it was finally held in the opinion in the case of the Mt. Sterling Bank v. Priest, &c., 23 Ky. Law Rep., 1315,

that the act of the bank in applying the money deposited with them by Priest to the payment of their note constituted a preference of the bank, which operated as an assignment of the debtor's property under the act of 1856; and that they were compelled to pay back the money so appropriated, with interest thereon, to the assignee of Priest, less the sum of \$708.90, the pro rata of their debt paid by the estate of Priest; and charge that the period of time which intervened between the date of their application of the deposit to their note until the final reversal of the judgment of the circuit court by this court should be deducted from the time ensuing from the date of the maturity of the note to the institution of this suit, because during this period they were obstructed and hindered from suing the defendant on their obligation, and plead that by reason of these facts the appellee is estopped from relying upon the statute of limitation. A general demurrer was sustained to this reply and carried back to the petition, and plaintiff declining to plead further, their petition was dismissed, and they have appealed to this court.

The law is well settled in this State that if at the maturity of a note payable to the bank the principal had a sufficient sum of money to his credit as a general deposit in the bank, good faith towards his sureties requires that the bank should appropriate the money so held to its payment, and its failure to do so operates as a release of the sureties. (*Faulkner v. Cumberland Banking Co.*, 14 Ky. Law Rep., 923; *Pursifull v. Pineville Banking Co.*, Ass'ee, 17 Ky. Law Rep., 178.) So if appellees' contention is a sound one, a bank holding a note on an insolvent principal, but amply secured by personal security, occupies this precarious attitude: If it fails to appropriate the money of the insolvent principal in its charge to the payment of the note, it relieves the security. If, on the other hand, it appropriates the money of its insolvent or failing principal to the payment of its debt, it runs the risk of having to surrender the money which it has been forced by law to appropriate, at the demand of some other creditor, as a payment in fraud of the bankrupt act. After the appropriation by the bank of the insolvent principal's funds to the payment of its debt it had no cause of action against either him or his security until after they had been compelled to surrender and pay back the money so appropriated. To meet this contingency section 2552 of the statute was enacted. It provides that "if such surety shall abscond, conceal himself, or by removal from the State, or otherwise, obstruct or hinder his being sued, the time of such obstruction shall not be computed as part of the time of limitation in said section allowed."

In the recent case of the Northern Bank of Kentucky v. Farmers National Bank the court had before it a case very similar to the one at bar. In that case J. I. Moore deposited with the Northern Bank of Kentucky a check for \$4,557.75. The bank held a note against him for \$4,553.78, which had been due for three months, and in a few days after the deposit charged this note on his account. Subsequently the Farmers National Bank of Cynthiana attacked this transaction as within the terms of the act of 1856. Upon the trial it developed that Moore was insolvent at the time of the deposit, and the bank had reason to suspect this fact, but that the deposit was made by him without any intention on his part to give the bank a preference over his other creditors. Nor did the Northern Bank intend to charge the note

to the account of Moore at the time the deposit was made. Yet the act was held a preferential one, upon the theory that Moore knew he was insolvent at the time he made the deposit, and that the design to prefer would be presumed unless the accompanying circumstances plainly show that there was no such intention; and the bank was compelled to account for the money. But in discussing the very question we have at bar the court in that case, after referring to a number of former adjudications of this court, says: "The statute against preference by insolvent debtors applies, however innocently the creditor may act in the transaction. Failing debtors are especially often solicitous to protect their sureties. When money is tendered to the creditor, or he has the means of retaining it in his hands, he is bound to accept it or retain it in order to hold the surety. The transaction is good if not attacked within six months, and when attacked and the payment is adjudged within the statute. As by the terms of the statute such transfers are subject to the control of equity, they must, upon equitable principles, place the parties where they were originally."

In this case the allegation of the reply is that the appellee, Tyler, procured the deposit to be made with the appellant bank by his insolvent principal for the express purpose of forcing them to appropriate the money to their debt or release him from the obligation. After the deposit by Priest the bank was forced by law to appropriate the money so held by them to the payment of their note, or lose all legal recourse against the appellee, Tyler; and the note being paid, no cause of action remained to them against him until the decision by this court that the appropriation was illegal. It seems to us that it necessarily follows that the bank was by these acts prevented from the collection of their demand from appellee.

In *Newton v. Carson*, 80 Ky., 309, Newton had filed his petition against Covington as principal, and Carson as surety on a note, but no process was issued thereon. About the time the petition was filed Carson agreed with Newton that he would, during the term of court which was then in session, confess judgment for the amount of the note. Pursuant to this agreement no process was issued on the petition. On the last day of the term Carson, when asked to comply with this agreement, refused to do so. Process was thereafter issued, seven days after the expiration of the seven years from the time the note became due. Carson relied upon the statute of limitation as a defense, and the trial court peremptorily instructed the jury to find for him. Upon appeal to this court the judgment was reversed, this court saying: "To countenance such chicanery, as the making and violating of such an agreement as this, would invite into the sacred precincts of a court of justice the arts of the deceitful, and furnish a well-appointed place and secure mode of perpetrating fraud."

The court held that this was a hindering by the security of the plaintiff, which took the case out of the statute. The decisions in *Coleman v. Walker*, &c., 60 Ky., 68, and *Kennedy v. Foster's Ex'or*, 77 Ky., 479, are not in point. They only decide that a verbal request from the security to the creditor not to institute suit upon his debt, or a promise to pay at some future time, does not either obstruct or hinder the bringing of an action. In the latter case Judge Cofer says: "The failure to sue in such a case is the voluntary act of the creditor; he is left free to do as he prefers, may sue if he likes,

and can not by any fair or reasonable interpretation be said to be either obstructed or hindered."

The facts in this case clearly distinguish it from these cases, as here the joint act of the principal and security forced the bank to appropriate the money to the payment of their debt, and effectually put it out of its power to sue until after the final decision that its appropriation of the insolvent principal's money was illegal.

For reasons indicated we are of the opinion that the trial court erred in sustaining the demurrer to plaintiff's reply, and the judgment is reversed and cause remanded, with instruction to overrule the demurrer and for proceedings not inconsistent with this opinion.

Whole court sitting, except Judge O'Rear.

Judge Paynter dissenting.

Judge Paynter delivered the following dissenting opinion:

I dissent because I am of the opinion that the bank could have brought its suit at any time after the debt matured. If it was misled by the deposit, it was again placed in a position to extricate itself from the effect of it because within six months it was advised by the suit to have it so treated; that it was a preferential act. When this was done the bank was bound to take notice of the effect of the transaction, and if it desired to keep the statute of limitation from running it should have brought its suit. After deducting the time which elapsed between the date of the deposit and the institution of the suit to have it adjudged a preferential act, more than seven years elapsed after the maturity of the note until the suit was brought on it. If the surety had pleaded that the deposit paid the note, the bank could have successfully shown it did not amount to a payment of it because of the preferential character of the act. The debt was never extinguished and was enforceable.

CRAIG V. WELCH-HACKLEY COAL AND OIL CO.

(Filed June 9, 1903—Not to be reported.)

John H. Wilson for appellant.

J. Smith Hays, Nicholas T. Bond and E. B. Slater for appellee.

Judge Hobson delivered the following response to petition for rehearing:

In the petition for rehearing our attention is called to the fact that the petition was amended three times in the circuit court, and that in the third amendment it is alleged that James Welch died intestate and was the owner of the land. Still there was nothing to show how appellants were the heirs at law of Welch. It was essential to state facts sufficient to show that appellants were the heirs at law. The statement that appellee knew before purchasing the property that appellants were his heirs at law did not make the petition good, for this was only an allegation that appellee knew a question of law, and was not equivalent to an allegation of the facts necessary to establish this question of law.

Petition overruled.

KEETON v. BANDY, &c.

(Filed June 9, 1908—Not to be reported.)

Fraudulent conveyances—Appellees as children and heirs at law of K. instituted this action to recover certain lands which they alleged that appellant was holding without right. In his answer appellant alleged that said lands were conveyed to him and E. jointly by K. In reply appellees allege that after said conveyance was made the creditors of K. instituted a proceeding, in which it was adjudged that said conveyance was fraudulent as to his creditors. In rejoinder appellant alleged that after said judgment was rendered that he and his mother, who were grantees, paid off the debts of K. On this appeal the question is involved as to whether, after the conveyance from K. to appellant had been set aside as fraudulent as to his creditors and the debts of the creditors paid off by the grantees, the title to the land reverted to the grantor or remained in the grantees. Held—That while the deed from K. to appellant was void as to his existing creditors it was valid as between the parties, and the grantees having discharged the indebtedness for which the conveyance was set aside, it follows that the title remained in them.

John W. Rodman and R. H. Cooper for appellant.

W. S. Pryor and D. D. Sublett for appellees.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Barker.

The appellees, who are the children and heirs at law of Thomas B. Keeton, instituted this action to recover of appellant certain lands described in the petition. The allegations of this pleading are that the appellees are the owners and entitled to the possession of a tract of land situated in Magoffin county, Kentucky, on the waters of Lick creek, and which is described by metes and bounds, containing one hundred acres, more or less; that the appellant holds possession of the land without right, and during the last two years has unlawfully kept appellees out of possession.

Appellant, by his answer, pleaded that on the 20th day of January, 1874, Thomas B. Keeton, who was then the owner of the land in question, by deed in writing, properly executed, acknowledged and delivered, conveyed it to Elizabeth Keeton and himself jointly.

In their reply appellees allege that after the deed from Thomas B. Keeton to Elizabeth Keeton and appellant had been executed and delivered certain creditors of Thomas B. Keeton had instituted a legal proceeding against him and the grantees in the deed for the purpose of obtaining a decree vacating it as fraudulent as to them; that pending this litigation Thomas B. Keeton died intestate, and the action was revived as against Elizabeth Keeton, who had been appointed administratrix of his estate; that thereafter, by decree, the court vacated and annulled the conveyance in question as being fraudulent as to the then creditors of Thomas B. Keeton.

To this appellant rejoined that after the judgment vacating the deed in question he and his mother, who were the grantees thereunder, had paid off and discharged all of the judgment creditors in whose interest the conveyance had been set aside. The affirmative allegations of the rejoinder were controverted of record, and the action transferred to equity, and there

heard with the case of *Farish Keeton, &c. v. R. L. Keeton*, and having been finally submitted to the court for trial, it was adjudged, among other things, that the appellees were the owners and entitled to the possession of the land claimed, and described by them in their petition, from which judgment appellant has appealed to this court. The transcript brought up under the schedule filed by appellant in the court below contains only the pleadings of the parties, the exhibits filed therewith, and the final judgment of the circuit court, and it presents but one question for adjudication, to wit, whether after the conveyance from Thomas B. Keeton to his wife and stepson, R. L. Keeton, had been set aside as fraudulent as to his creditors, and the debts of the judgment creditors had been paid off and extinguished by the grantees, did the title to the land revert to the grantor or remain in the grantees?

In the case of *Elmore v. Elmore*, 23 Ky. Law Rep., 866, this court said: "A grantor in a fraudulent deed can not plead fraud and avoid the deed so as to defeat a recovery of the land. This doctrine is settled in *Bibb v. Bibb*, 17 B. Mon., 292, and reaffirmed in *Jones' Adm'r v. Jenkins*, 88 Ky., 391. Where the fraudulent contract is executory the court will grant no relief; but where it is executed the grantor can not plead his own fraud to avoid the legal consequences of his fraudulent act."

In the case of *Anderson's Adm'r v. Meredith*, 82 Ky., 568, the general rule regulating questions similar to the one under discussion is thus stated: "The general rule is, in cases of executed contracts, where both parties are guilty of actual fraud, a court of equity will not lend its aid to either, but leave each to the consequence of his own wrongdoing. To apply this rule the parties must be in *pari delicto*, each equally guilty of fraudulent intention and fraudulent acting, with equal knowledge and equal willingness."

And in *Marksbury v. Taylor*, 10 Bush, 519, it is said: "The law, both in this country and in England, now undoubtedly is, in general, where parties are equally concerned in illegal agreements or transactions, whether such agreements or transactions be *mala prohibita* or *mala in se*, courts of equity, like courts of law, will not interpose to grant relief to either."

In the case of *Bibb v. Baker's Adm'r*, 17 B. Mon., 292, it was held that where an embarrassed debtor conveyed land and personalty to a grantee, for the purpose of defrauding his creditors, and afterwards the grantee brought suit against the grantor to recover possession of property conveyed, it was no defense to the action that the deed was made to defraud the grantor's creditors. In the opinion it is said: "We have been referred to no case which decides that a plaintiff claiming by virtue of a legal title to recover property conveyed to him by the defendant may be defeated in the recovery by the fact that the conveyance was made by the defendant in fraud of his own creditors." To the same effect is the case of *Jones' Adm'r v. Jenkins*, 88 Ky., 391, and *Brookover v. Hurst*, 1 Metcalfe, 665.

The deed from Thomas B. Keeton to his wife and appellant, while void as to his existing creditors, was valid as between the parties and the grantees having discharged the indebtedness for which the conveyance was set aside, it follows that the title remained in them. Thomas B. Keeton could not himself have maintained an action to recover the property from his grantees, nor could he have resisted their action against him. One can not protect

himself from the consequences of his acts by pleading his own fraud; his heirs occupy his shoes with reference to the transaction, and have no higher claims than those which their ancestor might have lawfully asserted.

Wherefore, the judgment is reversed, with instructions to dismiss the petition.

OLIVER v. ILLINOIS CENTRAL R. R. CO.

(Filed June 9, 1903—Not to be reported.)

Damages—Res judicata—Appellant brought this action, alleging that by reason of constructing a bridge across a stream the water was diverted from its natural course and caused the foundation of his house to be injured, thus damaging his property, for which he sought to recover damages. In its answer appellee alleged that in an action formerly instituted by appellant he recovered damages for the same injury. In reply appellant alleged that the recovery was only for damages that accrued up to the filing of said suit, and that this action was for damages that accrued since. Held—That this action belongs to that class of cases which must be recovered for in a single action. The recovery pleaded was a bar to this action.

E. T. Bullock for appellant.

Pirtle & Trabue, J. M. Dickinson and M. P. Moss for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Dan Oliver, brought this action against the appellee, the Illinois Central R. R. Co., for damages for injuries to a store building belonging to him in the city of Clinton, which he alleges was occasioned by the acts of the defendant in placing dirt and other debris in the bed of the town branch, when constructing their roadbed, so as to divert the flow of its waters from its natural channel under his house, and which resulted in washing the dirt from around the pillars of the house, thereby causing it to sag in the center, and threatening its ultimate destruction. The defendant, for answer to plaintiff's petition, denied the alleged acts of negligence on their part, and aver that in 1901 it became necessary for them to construct a new track on their right of way across the town branch in front of plaintiff's property; and that in doing so it was compelled to drive some additional piling in the bed of the branch to support the trestle upon which the new track was to be built, and to fill the trestle with dirt, thereby raising a dump near the branch, but that they did not put any dirt in the branch; and they charge that what they did was necessary in the construction of its new track; and that the work was properly, carefully and skillfully done, and was permanent in its nature. In the second paragraph of their answer they allege that after the completion of this permanent addition to their roadbed the plaintiff, on the 5th day of March, 1901, instituted a suit against them for damages resulting to his storehouse in consequence thereof; and that in that action he recovered a judgment against them for the same acts now sued for, and rely upon the judgment in that action as a bar to the prosecution of this action. The plaintiff, for reply, says that "it is true the plaintiff, on the 5th day of March, 1901, filed a suit against the defend-

ant for damages to his house and lot by reason of the putting of obstructions in the town branch, and changed the natural flow of the water in the town branch, causing the same to overflow his lot and run under and wash out dirt from around the pillars of his storehouse, etc. And in said action recovered a judgment for \$125, but he says that this recovery was for damages to said property up to the filing of that action; that the obstruction of the natural flow of the water had continued ever since and up to this time; and that the damages sued for in this action have accrued since the filing of the suit of March 5, 1901, and that additional injury to the property had accrued from this cause since the trial of the former action."

The trial court sustained a demurrer to this reply, which was carried back to the petition and dismissed, and plaintiff has appealed. Ordinarily in actions for injury to real estate the plaintiff can only recover for injury done up to the commencement of the action; but an exception to this rule obtains in that class of cases where the injuries complained of are continuing and permanent in their character, and necessarily result from the proper construction of the bed for a railway. In this class of cases the injury must be recovered in a single action against the railroad company. (*Elizabethtown, Lexington & Big Sandy R. R. Co. v. Combs*, 73 Ky., 393; *L. & N. R. R. Co. v. Orr*, 91 Ky., 109; *Stickley v. C. & O. R. R. Co.*, 93 Ky., 328; *Tolle, &c. v. Owensboro, Falls of Rough and Green River R. R. Co.*, 23 Ky. Law Rep., 864; *Bramlet v. L. & N. R. R. Co.*, 24 Ky. Law Rep., 180; *Hay v. City of Lexington*, 24 Ky. Law Rep., 1495.)

But injuries which result from mere negligence in the construction of the roadbed of a railroad, or which are temporary in their nature, or which may be remedied without interference with the prudent operation of the railroad, stand upon an entirely different footing. In this class of cases no recovery can be had for prospective injuries, but only such as have actually occurred up to the trial of the action, and suit may be maintained as often as there is a recurrence of the injury thus caused until their final removal. In the first class of cases the injury comes within the meaning of section 242 of the Constitution; but in the latter class of cases the claim is for a tort, and is in its nature like a claim for personal injuries. In the *City of Louisville v. Colburn*, 22 Ky. Law Rep., 64; *Tolle v. Owensboro and Falls of Rough and Green River R. R. Co.*, *supra*, and *Finley v. City of Williamsburg*, 24 Ky. Law Rep., 1356, the principle on which this distinction rests is fully discussed.

Defendants in their answer allege that the improvements complained of as having occasioned the injuries to plaintiff's property were a permanent part of their roadbed, and a necessary improvement in the conduct of their business, and were constructed in a careful and prudent manner. These allegations are not denied by reply, and the injury to plaintiff's property, therefore, falls among that class of cases which must be recovered for in a single action. We are, therefore, of the opinion that the lower court properly sustained a demurrer to the reply.

Judgment affirmed.

GLADSTONE BAPTIST CHURCH, &c. v. SCOTT, &c.

(Filed June 10, 1903—Not to be reported.)

Bills and notes—Evidence—This action was brought by appellee as assignee of a note of \$788.57 from her husband, which is alleged to have been executed under authority of a resolution of the church for back salary as minister. It is objected that appellee does not hold the legal title to the note, and is not, therefore, entitled to recover thereon. Held—That the assignment to her vested her with legal title to the note, as the defense interposed not only complains of fraud on the part of the minister in procuring the signatures of the trustees to the note, but also denies the adoption of the resolution by the congregation, or that the church was owing the pastor any sum as back salary or otherwise, it was competent to admit evidence tending to prove the adoption of the resolution and showing the steps taken at that meeting and those previously held by the church members in regard to the settlement of the indebtedness to the pastor. The destruction of the record could not affect the rights of the pastor to collect his note as it could be proven by parol. The instructions given being proper the finding of the jury will not be disturbed, and appellant was not entitled to a peremptory instruction as there was some evidence to uphold the contention of appellee.

W. O. Bradley for appellants.

Kohn, Baird & Spindle and S. E. Sloss for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 3.

Opinion of the court by Judge Settle.

The appellee, Parthenia Scott, claiming to be the owner by assignment from her husband, George E. Scott, of a note of \$788.57, bearing date December 1, 1897, due two years after date, and purporting to have been executed to him by the appellant, Gladstone Baptist Church, through Fred Lewis and others, its trustees, instituted suit thereon in the lower court against the makers, and upon the trial in that court recovered a verdict and judgment against them for the sum named, with 6 per cent. interest from December 1, 1899, and costs. A new trial was refused the appellants, and they, by this appeal, seek a reversal of the judgment of the lower court upon the following grounds: First, that the lower court erred in the admission of evidence; second, in giving and refusing instructions; third, that the verdict was contrary to the law and evidence; and, fourth, that the judgment is not in the name of the real party in interest.

It is averred in the petition that the note in controversy was executed to George E. Scott for services rendered by him as pastor of the appellant church; that the church "in regular meeting did authorize its said directors (trustees) to execute the note above referred to, and that pursuant to said authority said note was executed by said trustees."

The answer, as amended, after traversing the affirmative averments of the petition, alleges that the execution of the note was unauthorized by the church; that the trustees did not meet together to sign the note; and further, that its execution was procured by covin, fraud and misrepresentation, in that George Scott falsely and fraudulently represented that its execution had been authorized by the congregation, when such was not true.

The reply controverts the affirmative pleas contained in the answer as amended, and in addition sets out, in hæc verba, a resolution adopted by

the congregation, which authorized the execution of the note, the resolution begin as follows: "Moved and carried, that the church empower and advise the trustees to give Bro. Scott the church's note for his back salary."

Neither in the petition nor reply does the appellee confine the authority for the execution of the note to the resolution in question, though it is set out in full by the reply, which also avers that the back salary referred to in the resolution was evidenced by orders given Scott by the church upon its treasurer, but which he had not been able to pay, and that these orders were taken up by the church at the time of the execution of the note. The rejoinder of appellants by specific denials, put all these matters in issue, and we are of opinion, therefore, that the evidence permitted by the lower court to go the jury, tending to prove the adoption of the resolution and showing the steps taken at that meeting, and those previously held by the church members, in regard to the settlement of the church's indebtedness to George E. Scott, was competent, for the defense interposed not only complains of fraud on the part of George E. Scott in procuring the signatures of the trustees to the note, but also denies the adoption of the resolution by the congregation of the appellant church, or that the church was owing George E. Scott any sum as back salary, or otherwise.

The minute book of the church was not produced at the trial, and the resolution in question being in George E. Scott's possession, and being attacked by appellants as spurious, the only method of identifying it, and of establishing its authenticity, was by the introduction of the parol evidence, of which appellants complain.

George E. Scott and George Wilson, clerk of the church, testified that the pages containing the resolution and other proceedings looking to the adjustment of Scott's salary were by authority of the congregation, and at the close of the meeting at which the resolution was adopted, removed from the minute book and handed to him; and there was other evidence tending to support their statements. Upon the other hand, a number of witnesses introduced by appellants contradicted these statements of Scott and Wilson, and in addition testified to the loss, or theft, of the church record book, and that no such resolution as that found in Scott's possession was ever adopted by the congregation.

The instructions given by the court told the jury, in substance, that if they believed from the evidence that at a regular meeting of the Gladstone Baptist Church the trustees thereof were authorized and directed by the church to execute the note sued on, they should find for the appellee, Parthenia Scott, in the sum of \$788.57, with interest from December 1, 1899. But if they believed from the evidence that the trustees were not so authorized to execute the note by the church at a regular meeting thereof, they should find for the appellants. We think the instructions fairly and pointedly presented the law applicable to the case, and that no error was committed by the court in refusing to give other instructions. If the evidence introduced by appellees was believed by the jury, which was manifestly the case, they by their verdict found that the resolution authorizing the execution of the note by the trustees was adopted at a regular meeting of the congregation of the church called for that purpose, and that it was then and there, by order of the congregation, taken from the minute book of the church and deliv-

ered to George E. Scott. If it was necessary that the authority to the trustees to execute the note should have been in writing, or made a matter of record, which it is not necessary to decide, these requirements were literally complied with by the writing and entering of it in the minute book of the church before it was delivered to the beneficiary. The subsequent mutilation of the book, by removing therefrom the resolution, did not affect the validity of the resolution.

We do not feel authorized to disturb the verdict upon the ground that it was contrary to the evidence. Under the practice in this State, if there is any evidence that tends to support the plaintiff's cause of action, the case can not be taken from the jury. There was such evidence in this case, and while that of the appellants, if the trial had taken place before the court without the intervention of a jury, might have been given greater weight than that introduced by appellees, it was the peculiar province of the jury to pass upon the facts, and as we are unable to say that their verdict is unsupported by evidence, it must be allowed to stand. We are likewise unable to sustain appellants' contention that the judgment is not in the name of the real party in interest. The note in controversy appears to have been legally assigned to the appellee, Parthenia Scott, and under the Kentucky Statutes the assignment passed to her the title to the note. She was, therefore, the proper person to institute suit for its collection. The amended petition filed at the beginning of the trial made George E. Scott, assignor of the note, a party plaintiff, and confirmed the title of Parthenia Scott to the note. He can never be heard to set up future claim of ownership to the note. Upon the state of the pleadings, after the filing of the amended petition, the issue made by the appellants as to the ownership of the note was properly eliminated by the lower court because no longer material; nor was there any error in rendering judgment in behalf of the assignee of the note. The judgment of the lower court is, therefore, affirmed.

CHAMPION ICE MANUFACTURING AND COLD STORAGE CO. v.
AMERICAN BONDING AND TRUST CO.

(Filed June 16, 1908—Not to be reported.)

1. Surety—Instructions—Appellant had in its employ W., as its bookkeeper, and appellee executed to appellant a bond of indemnity in consideration of a premium paid. By the terms of this bond appellee agreed to indemnify appellant for one year from any "loss which it might sustain by reason of any fraudulent or dishonest act upon the part of W., amounting to larceny or embezzlement, that might occur while he continued in appellant's service as bookkeeper." W., while in appellant's service, wrongfully converted \$94.91 in small amounts from the cash drawer or collected of appellant's customers, besides raising five checks \$100 each, on which he received the money and appropriated the excess raised to his own use. In this action to recover of appellee as surety of W. on said bond the amount of said shortage the court gave the jury a peremptory instruction to find for appellee except as to the amount of \$94.91, for which its liability was admitted. On appeal, Held—That said peremptory instruction was improperly given as the covenants of the bond clearly cover such a loss as was

sustained by appellant. The bond was a printed one, prepared, doubtless, by a skilled attorney in appellee's employ. The contract expressed therein is but a form of insurance, and the law of insurance is that in the construction of policies, if there be any ambiguity in them, it must be construed most strongly against the insurance company.

2. Liability of bank for payment of raised check—Appellee urges as a defense that the bank which cashed the raised check alone is liable to appellant for its loss. While it may be true that a bank must know the signature of a depositor who draws a check upon it, and that a bank in paying a forged or altered check does so at its peril and at its own loss, but the facts of this case present an exception to this rule. In the course of their business relations with the appellant, its officers and agents, the bank officers must be presumed to have become acquainted with their handwriting and that of W., and, therefore, any change of the amount of a check from appellant in the handwriting of W. would have excited neither alarm nor suspicion in their minds as such alteration or change would have been within the apparent scope of W.'s authority, and the payment by the bank of any check altered by him under such circumstances would not impose any liability on the bank. Even though the bank were liable to appellant for the amount of any check raised, that fact would not exonerate appellee from liability. Appellee's liability is primary and direct. Having a right of action against the defaulter, W., appellant has also a right of action against the guarantor of his honesty.

3. Misrepresentations of employer to surety—Appellee also relies on the defense that it is relieved from liability on said bond by reason of certain representations made by appellant to it relative to the duties of W., and the amounts of money that would likely come into his hands, which statements it was charged amounted to a warranty, and being false the bond was void. Held—That under section 639, Kentucky Statutes, said statements were not warranties, and by the terms of the bond itself it is apparent that they were neither fraudulent nor material.

J. W. Bryan and S. D. Rouse for appellant.

Frank M. Tracey for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Champion Ice Manufacturing and Cold Storage Co., is a corporation doing business in Covington, Ky. It had in its employ a bookkeeper, Geo. H. Weitkamp by name, of whom it required a bond of indemnity, which was furnished by the appellee, American Bonding and Trust Co., for the consideration of \$12.50, paid it in cash. By the terms of this bond appellee agreed to indemnify appellant for one year from any "loss which it might sustain by reason of any fraudulent or dishonest act upon the part of Weitkamp, amounting to larceny or embezzlement," that might occur while he continued in appellant's service as bookkeeper.

It appears that Weitkamp while in appellant's service wrongfully converted \$94.91 of its money, and in addition raised five of its checks, each \$100 in amount, which he caused to be cashed at the First National Bank of Covington, and appropriated to his own use the amounts thus fraudulently realized. These frauds seem to have been committed in the following manner: The weekly pay roll of the appellant company, as prepared by one of its officers, was furnished Weitkamp as bookkeeper, with direction to make out

the checks payable to himself for the amounts indicated. Upon thus filling out the checks as directed, Weitkamp handed them to the proper officer of the company, who signed and returned them to him to take to the bank to be cashed. Weitkamp raised five of these checks \$100 in amount each, had them cashed, and retained the amounts of the excess over and above the sums for which they were originally and truly issued. The checks thus fraudulently raised are supposed to have been destroyed by Weitkamp; at any rate they have not been found or produced by appellant. The aggregate amount realized by Weitkamp from the fraudulent alteration of the checks was \$500, and the additional sum of \$94.91 he retained out of moneys collected by him as bookkeeper of appellee, or took from its money drawer.

Weitkamp, upon learning that his speculations were about to be discovered by appellee, fled to parts unknown, and has ever since remained concealed and unapprehended, and this action was instituted by appellee in the Kenton Circuit Court to recover of appellant on the bond mentioned the sum of \$594.91 fraudulently appropriated by Weitkamp in the manner stated.

The appellee filed answer to the petition, denying any liability on the bond except to the extent of \$94.91, made up of small amounts taken by Weitkamp from the cash drawer or collected of appellant's customers, which it tendered to appellant, and in addition averred, in substance, that the remainder of the sum lost to appellee is not covered by the terms of the bond, and that the First National Bank, which cashed the checks raised by Weitkamp, is the sole loser by his fraud, and must account to appellee under the laws of banking for the amount of his defalcation; and further, that appellee can not be held liable on the bond given for Weitkamp for the reason that appellant, in order to procure the bond, made various misrepresentations as to the duties and responsibilities to be imposed upon Weitkamp, because of which alleged misrepresentations appellee is estopped from recovering on the bond.

After the filing of the reply, which controverted the affirmative allegations of the answer, the case went to trial, and upon conclusion of appellant's testimony the lower court, upon appellee's motion, gave the jury a peremptory instruction to find for appellee, which they accordingly did. Judgment was thereupon entered dismissing the petition and allowing appellee its costs. Thereafter appellant entered motion and grounds for a new trial, which was refused. Of the judgment dismissing its petition and refusing the new trial appellant now complains, and asks a reversal at the hands of this court.

The appellee company is engaged in the business of furnishing bonds to secure the honesty and fidelity of fiduciaries and employees, and the one sued on in this case provides, among other things, that appellee "does hereby agree that it will, within three months after receipt of proof, satisfactory to its officers and subject to the conditions hereinafter expressed, reimburse the employer (appellant) to an amount not in excess of the penalty of this bond (\$2,500) for such pecuniary loss as the employer shall have sustained of money, securities, or other personal property belonging to the employer, or for which the employer is responsible, by any act of fraud or dishonesty, amounting to larceny or embezzlement, committed by the employee during the continuance of this bond, in the performance of the duties of said office,

or position, or such other position as he may be subsequently appointed to, or called upon to fill by the employer in said service."

The bond further provided that in case of discovery of default or loss the appellant should give immediate notice to appellee, etc. There can be no question but that the covenants of the bond cover such a loss as was sustained by the appellant. Its only purpose was to insure against loss that might result to appellant from the fraud or dishonesty of Weitkamp, amounting to larceny or embezzlement, whether the loss was that of money, securities, or other personal property belonging to appellant, or for which it might be made responsible, and the indemnity thus afforded by the bond not only applies to any act of fraud or dishonesty which Weitkamp may have committed in the performance of his duties as bookkeeper, but also to such as he may have committed in any other position in appellant's employment to which he may have been appointed, or called upon to fill. It is not material, therefore, whether the fraudulent and dishonest acts of Weitkamp, which caused loss to appellant, were committed by the making of false entries in its books, by the raising of its checks, or by abstracting money from its money drawer; nor is it material whether he was at the time acting as bookkeeper, or in some other capacity in appellant's service; in either, or in any of these events, appellee, under the terms of the bond, would be, and is, liable for the loss which he occasioned.

There can be no doubt, under the evidence in this case, but that Weitkamp was authorized by appellant, and that it was a part of his duty, to receive money due it from its customers, and to draw money from the bank in which appellant's account was kept; and it was also his duty to account to appellant for the moneys thus received. His failure to do so was dishonest and fraudulent, and in fact constituted an act of embezzlement, and for the loss resulting to his employer thereby appellee's liability is fixed by the terms of the bond.

It was not necessary, in order to fix the liability of appellee upon the bond, that appellant should produce, in support of any claim that it might have arising thereunder, such proof as would convict Weitkamp of the crime of larceny, or embezzlement, as defined by the laws of Kentucky. Such a narrow construction of the provisions of the contract is not required by the law, and was never contemplated by the parties to it. While larceny is a common-law crime, yet in this State it is to a great extent statutory. Embezzlement is purely a statutory crime, but the terms larceny and embezzlement in the bond or policy sued on are used as generic terms to indicate the dishonest and fraudulent breach of any duty, or obligation, upon the part of an employee to pay over to his employer, or account to him for any money, securities or other personal property, the title to which is in the employer, that may in any manner come into the possession of the employee.

It will be observed that the bond in this case is a printed one, prepared, doubtless, by a skilled attorney in appellee's employ. The contract expressed therein is but a form of insurance, and the law of insurance is that, in the construction of policies, if there be any ambiguity in them, it must be construed most strongly against the insurance company.

In *American Surety Co. v. Pauly*, 170 U. S., 133, Mr. Justice Harlan admirably states this rule as follows: "If looking at all its provisions, the

bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company. the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers or agents of the surety company. This is a well-established rule in the law of insurance. (*First National Bank v. Hartford Fire Insurance Co.*, 95 U. S., 673.) * * * As said by Lord St. Leonards in *Anderson v. Fitzgerald*, 4 H. L. Cas., 483, 'it (a life policy) is of course prepared by the company, and if, therefore, there should be any ambiguity in it, it must be taken, according to law, most strongly against the person who prepared it.' There is no sound reason why this rule should not be applied in this case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which, in the employer's service, he might be subsequently appointed; that object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument, executed for the protection of the bank."

In *Fidelity and Casualty Co. v. Gate City National Bank*, 38 L. R. A., 821, a bond similar to the one under consideration was executed by the Fidelity and Casualty Co. to indemnify the bank against loss by reason of the fraud or dishonesty of one Lewis Redwine, in connection with his duties as paying teller, "or the duties to which in the employer's service he may be subsequently assigned by the employer." After the execution of the bond Redwine was made assistant cashier, and as such became a defaulter, causing loss to the bank in a large amount. The Supreme Court of Georgia, in discussing the liability of the guaranty company on the bond, said: "One of the questions for decision is, whether or not the company was surety for him in the latter capacity (that of assistant cashier). In view of the comprehensiveness of the above quoted language, it would be difficult to hold it was not. He was certainly appointed subsequent to the execution of the bond to the office of assistant cashier; as such had duties to perform in his employer's service, and by a violation of those duties brought loss to the master. We think the plain language of the contract covers the precise state of facts which arose, and that the company is as much bound to answer to the bank for Redwine's dishonesty in the latter capacity as in the former."

Under the rule announced in the case *supra* it is manifest that though Weltkamp in the application made by appellant to appellee for the bond sued on was designated as a bookkeeper in its service, and is so entitled in the bond itself, the fact that he was entrusted by his employer with the duty of making out checks and drawing money from the bank thereon did not relieve appellee from liability on the bond, as at most the additional duty was only one that was assigned him by his employer subsequent to the execution of the bond, and was allowed by the terms of the bond itself.

We are not, however, prepared to concede that the appellee would not have been liable for the dishonesty of Weltkamp in causing loss to his employer, by raising the checks and appropriating the money thereby received from the bank, even in the absence of the provision of the bond mentioned, for

we incline to the opinion that the duty of making out checks and procuring money of the bank thereon was a service that might properly and naturally have been entrusted to a bookkeeper.

It is contended by council for appellee that the First National Bank of Covington is liable to appellant for the sum embezzled by Weitkamp, and that it, therefore, has no cause of action upon the bond executed by appellee. We do not so understand the law. It is true that the relation of a bank and its depositor is that of debtor and creditor, and it is likewise true that a bank must know the signature of a depositor who draws a check upon it. We may, for the purposes of this case, even admit the rule to be that a bank in paying a forged or altered check does so at its peril, and at its own loss, but we think the facts of this case present an exception to this rule.

It was known to the bank's officers that Weitkamp was the bookkeeper and trusted agent of appellant, and that he was required to fill up and cash its checks, though without authority to sign them in his own name or that of his employer. In the course of their business relations with the appellant, its officers and agents, the bank officers must be presumed to have become acquainted with their handwriting and that of Weitkamp, and, therefore, any change of the amount of a check from appellant appearing in the handwriting of Weitkamp would have excited neither alarm nor suspicion in their minds, as such alteration or change would have been within the apparent scope of Weitkamp's authority, and the payment by the bank of any check altered by him, under such circumstances, would not impose any liability on the bank to reimburse appellant for the amount thereof. It is unnecessary, therefore, to determine what the liability of the bank to appellant would have been under other circumstances. But even though the bank were liable to appellant for the amount the checks were raised, that fact would not, in our opinion, exonerate appellee from liability. The purpose of the bond was to furnish indemnity to appellant from loss resulting from the fraud or dishonesty of Weitkamp; the position of appellee was not only that of an insurer, but in some sort that of a surety as well, and in both these capacities its liability is primary and direct. It would be restricting the law of both insurance and suretyship to an absurd degree to say that appellee can not be held liable, until after appellant having exhausted every other remedy, or prosecuted to insolvency any others who might be liable, is still not reimbursed. In other words, appellee's liability does not depend upon whether appellant might collect the stolen \$500 from some one else. Having a right of action against the defaulter, Weitkamp, appellant has also a right of action against the guarantor of his honesty.

It is also contended for appellee that as appellant in answer to certain written questions propounded to it by appellee before the execution of the bond in substance represented that Weitkamp's position in its service would only be that of a bookkeeper, and that the largest amount of cash likely to be in the custody of Weitkamp as its bookkeeper would be only a few dollars in the cash drawer, or for daily deposit, that this representation amounts to a warranty, and, being false, had the effect to relieve appellee from liability on the bond. The cause of action declared on is not, in our opinion, affected by the representation in question; it was not a warranty, or so intended.

Section 639, Kentucky Statutes, provides that "all statements or descrip-

tions in an application for a policy of insurance shall be deemed representations and not warranties; nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the policy."

Viewed in the light of this statute, and of the well-known rule of elementary law, that contracts of insurance are to be construed more favorably to the insured than the insurer, the answers contained in the application were not warranties, and by the terms of the bond itself it is apparent that they were neither fraudulent nor material. There is no averment in the answer that the bond of indemnity would not have been executed if the answers contained in the application had shown that Weitkamp would have been permitted to draw money from the banks on checks for the weekly pay roll, nor does the answer allege that appellee was in any way misled or deceived by appellant's answers to its written questions. They were, indeed, mere promissory representations which in the language of Mr. Joyce on Insurance (paragraph 190), are to be treated as "mere declarations of an unexecuted intention, and a failure to comply with such declarations is not fatal to a recovery upon a contract not induced by it."

Being of the opinion that the lower court erred in giving the peremptory instruction, as well as in the matter of refusing appellee a new trial, the judgment is reversed and cause remanded, with directions to the lower court to set aside the verdict and judgment and grant appellant a new trial not inconsistent with the opinion herein.

LOGSDON v. HANEY, &c.

(Filed June 10, 1903—Not to be reported.)

Wills—Renunciation by widow—Homestead—S., by his will, devised to his widow during her widowhood 100 acres of his farm of about 160 acres. The whole farm was not worth more than \$1,000, and was occupied by the testator, his wife and three infant children. The widow did not attempt to renounce the provisions of the will until after six months after testator's death and the probate of the will. She brought this action to have the entire farm set apart to her as a homestead. Held—That she is precluded from claiming homestead by her failure to renounce the provisions of the will. The rights of the infant children to claim homestead in the entire tract is not decided.

S. M. Payton for appellant.

L. A. Faurest and J. D. Irwin for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was the widow of John Slinker. He, by his will, devised to her an estate during her widowhood in 100 acres of his farm of about 160 acres, and bequeathed her some few articles of personalty besides. The whole farm of 160 acres was not worth exceeding \$1,000, and was occupied by testator and his family, including appellant and their three infant children, as a homestead at the time of the testator's death, and has been so occupied by the widow and infant children since. The widow did not attempt to renounce the provisions of the will till about sixteen months

after testator's death. The remaining sixty-odd acres of the farm were disposed of by the will to certain of the testator's adult children.

This suit is by the widow against the executor and the devisees, to have set apart to her and the infant children the whole of the 160 acres as a homestead, under section 1706, Kentucky Statutes, as well as to have the personal property devised (about \$300 worth) also set apart to her and the infant children, under section 1408, subsection 5, Kentucky Statutes.

It is well settled in this State that a widow who is given anything by her husband's will must renounce it within one year from its probate unless the time should be extended by the chancellor for proper reasons shown. (*Smithers v. Smithers*, 9 Bush, 270), or she will be deemed to have accepted its provisions. (Section 1404, Kentucky Statutes; *Smith v. Bone*, 7 Bush, 367; *Chenault v. Scott*, 28 Ky. Law Rep., 1974.) Where she has accepted its provisions she can not thereafter renounce it and claim her dotal and distributive share of the estate. (*Hazelt v. Farthing*, 94 Ky., 429; *Schnable v. Schnable*, 22 Ky. Law Rep., 234; *Kiesewetter v. Kress*, 34 Ky. Law Rep., 1239.) The last case on this subject, *Bayes v. Howes*, 24 Ky. Law Rep., 263, seems to be decisive of the one at bar.

In this case the widow pleads that she was illiterate and ignorant of the law and of her rights; that she did not know that by failing to renounce her husband's will within a year of its probate she was thereby accepting it and electing to take under it; that the provisions made for her and the infant by the will was less than she was entitled to under the statute, and that the whole of her husband's estate was less than under the statutes she, as widow, and her three infants would have been entitled to have set apart to them during her life and their minority.

The maxim, "ignorance of the law excuses no one," has not been applied in this State with the rigor that it has been elsewhere. For example, we hold that where one pays money under a mistake as to his legal liability therefor, "which in law, honor or conscience ought not to be retained, it ought to be recovered back." (*Ray v. Bank of Ky.*, 3 B. Mon., 518; *City of Louisville v. Zanone*, 1 Met., 153; *Underwood v. Brookham*, 4 Dana, 309; *City of Newport v. Ringo*, 87 Ky., 636.) But we have never carried this liberalized doctrine further than that. This court has never held that one's nonaction, through ignorance of the law, could extend or enlarge his legal rights. Such a practice would be not alone to put a premium upon ignorance, but would be an inducement to perjury, as well as would unsettle and render insecure titles which the statute had aimed to fix, as of a definite period and by not uncertain evidence.

The widow's interest in the personal estate of her deceased husband depends on the fact of his intestacy. (Section 1403, Kentucky Statutes.) Of course, if she had renounced his will within the time prescribed by law he would have died intestate as to all of his estate so far as she was concerned. The rights of the infant children in the estate are not involved in this appeal, and consequently are not passed upon.

The judgment of the circuit court dismissing the widow's petition is affirmed.

Whole court sitting.

WARDEN, &c. v. TROUTMAN, &c.

(Filed June 10, 1903—Not to be reported.)

Fraudulent conveyances—Judicial sales—Execution—Equity of redemption—I. and his wife conveyed to their daughter, the appellant, a tract of land, containing 85 acres, for the recited consideration of \$1,200. Afterwards creditors of grantor instituted an action against the grantor and grantees, and had it adjudged that said conveyance was fraudulent and void. A homestead was set apart to I., containing 40 acres, and the remainder was sold for \$531, and appellees became the purchasers. Afterwards other creditors obtained a judgment and execution against I., which was levied upon the equity of redemption in said land and appellees became the purchasers at the sale. Within twelve months from the first sale appellant attempted to redeem the land by paying to the circuit court clerk the amount of said purchase money and interest. Appellees filed the transcript of the proceedings, in which execution was issued in the original action, and claimed to be the owners of said land, and moved for a writ of possession for the land. Appellant objected to the relief sought on the ground that she had no notice of the motion. Held—That as appellant was a party to the action no notice to her of the motion was necessary. The other question involved in this action is whether appellees are entitled to the conveyance and writ of possession. Held—That appellant was not the "defendant in the execution" within the meaning of sections 2364 and 2365, Kentucky Statutes, who was entitled to redeem the property. I. was the party who was entitled to redeem. Even if appellant had the right under her fraudulent deed to redeem this land it was necessary for her to redeem from appellees by paying the amount of both of their purchases and the interest fixed by statute. Appellants are entitled to conveyance of said land and a writ of possession for same.

Little & Slack for appellants.

Sweeney, Ellis & Sweeney for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1896 W. H. Iglehart and wife conveyed to their daughter, Josie Warden, a tract of land containing 85 acres, lying in Daviess county, Kentucky, for the recited consideration of \$1,200. Leona Tichenor and others, creditors of W. H. Iglehart, brought suit in the Daviess Circuit Court to set aside this conveyance on the ground that it was without consideration, fraudulent and void. Issues in the case were formed, and in the year 1900 the Daviess Circuit Court adjudged that the conveyance was actually fraudulent, void and without a valuable consideration. The case was appealed to this court and on October 24, 1901, was affirmed. On the return of the case to the lower court, a homestead was set apart to W. H. Iglehart and wife, containing 40 acres, the same being valued at \$1,000. The balance of the tract, 45 acres, was sold by the master commissioner for the price of \$531, being the amount of the debts of Leona Tichenor and others, the creditors of Iglehart, who were parties to that action. At that sale the appellees, J. P. Troutman, &c., became the purchasers and executed bond therefor, and the sale was reported to the court by the commissioner and afterwards confirmed.

This 45 acres of land was appraised before the sale and valued at \$1,067.

As will be seen, the land at that sale did not bring two-thirds of its appraised value, which left an equity of redemption in this land. Prior to this sale another creditor of Iglehart, to wit, the Keystone Manufacturing Co., had brought suit against him in the Davless Quarterly Court, in which action a judgment was rendered against him for \$200, with interest. An execution was issued thereon and returned "no property found." A transcript of the proceedings in the case was taken and recorded in the office of the circuit court clerk and an execution issued on this judgment from that office and placed in the hands of the sheriff, and was by him levied upon the equity of redemption of the defendant in the execution in the land above described. It was advertised and sold by the sheriff, and these appellees became the purchasers thereof at the price of \$200.

Before the expiration of twelve months from the date of the first sale the appellant, Josie Warden, claiming that she had the right to redeem the land from the first sale, tendered to appellees, the purchasers, \$584.66, the purchase price with the interest fixed by the statute, and demanded a receipt therefor, which money they refused to accept. She then went to the circuit clerk's office and made the necessary affidavit of such tender, and deposited the money with the clerk and took his receipt, as required by statute. On the 21st day of February, 1902, the appellees filed in the Davless Circuit Court a duly certified copy of the proceedings and execution in the case of the Keystone Manufacturing Co. v. Iglehart, in the action of Tichenor, &c. v. Iglehart and the appellants, as evidence that they were the owners of the equity of redemption in this land. The appellees then moved the court for a deed in conformity with their purchase at the commissioner's sale, and asked that a writ of possession be awarded them for the land. The appellant, Josie Warden, by counsel, objected to the motion, first, because no notice was given to her of such intended action; second, because J. P. and E. Troutman (appellees), were not entitled to a conveyance or writ of possession.

She at the same time filed what she called a response, in which she undertook to set up a defense to the proceedings of appellees, and, in substance, alleged that the Troutmans did not purchase the equity of redemption; that Iglehart did not own the equity of redemption, but if they did purchase the same they had never redeemed the land. Then she undertook to repeat her plea that she had prior thereto filed in the same action, as against the claim of Leona Tichenor and others, and then set forth her effort to redeem the land, as heretofore explained, and asked that the court compel appellees to accept the money deposited by her with the circuit court clerk, and that she be adjudged the owner of the land. We deem it unnecessary to discuss the question of want of notice to her of appellees' motion as she was a party to that action, and filed a pleading going to the merits, and did not ask the court for time to make further preparation in defense of same.

We will now discuss the only other question necessary to be considered, and that is whether the appellees were entitled to the conveyance and writ of possession. Appellant claims that the equity of redemption and right to redeem was in her, and that she did redeem by the deposit with the circuit court clerk as required by statute in such cases. Section 2364 and 2365 of the Kentucky Statutes gives the right of redemption to the "defendant and his representatives" and to the "defendant in the execution." These expres-

sions in the statutes evidently refer to defendants, who have been adjudged to pay money and their land sold in satisfaction, or in part satisfaction, thereof, and do not refer to fraudulent vendees.

In the case of *Scott's Ex'or v. Scott*, 85 Ky., 892, a case similar to this, the court, in discussing the rights of a creditor, in a case of a fraudulent conveyance by his debtor, used this language: "He (referring to such creditor) has a right to treat it (the fraudulent conveyance) as a nullity. This is so because the law regards the title as still in the debtor, and will not consider it as having passed from him by means of a fraud. * * * As against the fraudulent transferee, however, the creditor may seize the property as that of the fraudulent debtor; and the title that may be thus acquired is not a mere equity or right to control the legal title, and have the fraudulent sale vacated by appropriate proceeding, but it is the legal title itself against which the fraudulent transfer is no transfer at all. The legal title remains in the debtor, as to his creditor, notwithstanding the fraudulent transfer, and the possession of the fraudulent transferee may properly be regarded as that of the debtor."

In the same book, in the case of *Yankey v. Sweeney*, page 62, the court said: "Because the conveyance to Mrs. Montgomery, being without any valuable consideration, was void as to the then existing liabilities of Sweeney, that is, the deed of conveyance passed to Mrs. Montgomery no title whatever to the land as against the then existing liabilities of Sweeney. As against those liabilities the land was the property of Sweeney, and subject to them as though no conveyance had been made and might have been levied on and sold to satisfy them, notwithstanding the conveyance, and without reference to it. * * * As to that debt, Mrs. Montgomery was a mere volunteer, and had no right or equity in the land that could be violated by subjecting it to its payment."

It appears from the record that the debt of the Keystone Manufacturing Co. as well as the debts of Leona Tichenor and others were all created prior to, and were debts owing by, W. H. Iglehart at the time he made the fraudulent conveyance to his daughter, the appellant. This being so, as to those debts the land was the property of Iglehart, and the appellant is to be regarded as a mere volunteer, and had no right or equity in the land against these debts.

After the sale of the equity of redemption, by virtue of the exception of the Keystone Manufacturing Co. and the purchase thereof by appellees, even if appellant had the right under her fraudulent deed to redeem this land, it was necessary for her to redeem from appellees by paying the amount of both of their purchases and the interest fixed by statute. Under these authorities we are of the opinion that the lower court was right in adjudging the appellees entitled to the deed and writ of possession, and the appellees having purchased at the sale became parties to the motion in so far as it was necessary to obtain their rights and to be proceeded against as purchasers of the land, and by this proceeding they adopted the proper mode for relief.

Perceiving no error prejudicial to the rights of appellant the judgment of the lower court is, therefore, affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. HARROD.

(Filed June 10, 1908.)

Railroads—Negligence—Instructions—Appellee was injured by the handle of a derrick striking him while he was unloading a hogshead of tobacco at a depot on appellant's road, and this action was brought to recover damages for said injuries, caused, as alleged, by the negligence of appellant in not keeping said derrick in proper order for use of shippers. A plea of contributory negligence was relied on for the defense, and a verdict for \$1,000 damages resulted for plaintiff. On appeal appellant urges as error the failure of the court to give an instruction on contributory negligence, as appellant offered such an instruction, which was refused. Held—That the instruction on contributory negligence, as offered, was defective, but the court should have given a proper instruction presenting this defense, as there was evidence tending to support it. The rule is that where a party in a civil case fails to offer an instruction upon a point of law involved in the case it is not error in the court to fail to instruct on that point; but if a party offers an instruction upon some point of law involved which is refused by the court, because of defect in form or substance, then it is the duty of the court to prepare, or have prepared, and give a proper instruction on that point.

Ira Julian and Edward W. Hines for appellant.

J. A. Scott and W. C. Marshall for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

The appellee filed this action in the Franklin Circuit Court, among other things, alleging, in substance, that while he was engaged in delivering a load of tobacco to the appellant, a common carrier for hire, at its depot in Frankfort, Ky., and while lifting the hogshead from the wagon by means of a derrick he was struck upon the face and chin with the handle thereof, which cut through his lower lip and chin, knocked out several of his teeth, out his tongue, greatly disfiguring him, destroying his speech, and otherwise permanently injuring him, and that his injuries were the result of the defective, unsafe and dangerous condition of the derrick, which was known to appellant, or could have been known to it by the exercise of ordinary care, in time to have prevented the injury, but was unknown to appellee, and could not have been known to him by the exercise of ordinary care.

The appellant by its answer traversed the allegations of the petition, and alleged that appellee's injuries were received as the result of his own contributory negligence. This affirmative matter was traversed by the appellee. A trial was had, which resulted in a verdict and judgment in favor of appellee for the sum of \$1,000. The appellant's motion for a new trial was overruled by the court, and the case is here on appeal. The only grounds urged for a reversal are alleged erroneous instructions given by the court, and the failure by the court to give the instruction offered by it on contributory negligence. The appellant contends that the instructions given by the court might well have been construed by the jury as assuming that appellant had negligently permitted the derrick to be and remain out of repair. Even if the contention of appellant is correct, it was not an error prejudicial to the appellant for the reason that the evidence both for appellant and for appellee showed that the derrick was out of repair and defective

at the time of the injury, and had been in such condition for a long period of time prior thereto.

The evidence of appellee was that he was using the derrick in unloading his hogshead of tobacco, at the time of his injury, in a careful and prudent manner; that by means of the derrick he had raised the hogshead from the wagon, had turned it preparatory to lowering it to appellant's platform, and commenced lowering it. The chain, or something about it, caught for an instant, and then suddenly gave way, and the hogshead went down with such force as to jerk the handle out of his hand and hit him in the face and injure him, as stated. The appellant introduced one or more witnesses, who stated that some time after the appellee's injuries were received the appellee, in relating how he received his injuries, stated that he was lowering the hogshead, and he thought it had reached the platform when it had not, and he turned the handle loose, and then it hit him in the face.

The appellee denied this, and said he did not make such statements, nor did he receive his injuries under such circumstances. The court did not give any instruction on contributory negligence on the part of appellee. The appellant offered one, which the court properly refused, because, as drawn, it did not contain the law of contributory negligence. The court should, however, have given an instruction on contributory negligence, and, under the evidence, it was error prejudicial to the appellant in failing to do so.

That part of section 317 of the Code which is applicable to the question before us reads as follows: "Either party may ask written instructions to the jury on points of law, which shall be given or refused by the court before the commencement of the argument to the jury."

It appears from this record that the court, on its own motion, gave such instructions as were given to the jury. According to the opinion of this court in the case of *Clark v. Baker*, 7 J. J. M., 197 (giving it a strict construction), the lower court did not err in failing to give an instruction on contributory negligence after it had refused the improper one offered by appellant. But it appears from later decisions of this court that the opinion in the case *supra* has been to some extent modified. (The case of *Swope v. Schaffer*, 9 Ky. Law Rep., 161.) In that case counsel for appellants contended as the lower court assumed the province of instructing the jury unasked, it should have given the whole law of the case suited to every state of fact upon which the jury might have properly found a verdict for either party. The court, in discussing this question, said: "This rule has never been applied to the trial of civil cases to the extent stated by counsel. For though the court may, in such case, instruct the jury without being moved so to do, it is not bound to instruct. (*Clark v. Baker*, 7 J. J. M., 197.) Nevertheless it seems to us that if the court does, on its own motion, instruct in a civil case, it should not direct the jury unconditionally to find against a party upon a given hypothesis, when there may be another alike supported by the evidence, but withheld from the consideration of the jury, upon which they might find in favor of such party."

The rule upon this question now is that where a party in a civil case fails to offer an instruction upon a point of law involved in the case, it is not error in the court to fail to instruct on that point; but if a party offers an in-

struction upon some point of law involved, which is refused by the court because of defect in form or substance, then it is the duty of the court to prepare, or have prepared, and give a proper instruction on that point.

For these reasons the case is reversed and the cause remanded to the lower court for further proceedings consistent herewith.

MORRIS, &c. v. HILL, &c.

(Filed June 10, 1903—Not to be reported.)

Bills and notes—Vendor's liens—P. purchased from B. a farm for \$12,110, \$5,000 of which he paid cash and executed his seven notes for the unpaid purchase money, due respectively each year thereafter, secured by lien on the land. These notes are known as the "Barclay" series, and P. afterwards sold the land for \$16,000 to H, who agreed to pay off the Barclay notes and executed notes for the remainder to P., which are known as the "Hill" notes. M. owns one of the Barclay notes and appellant Morris owns another, both for \$1,000 each. In an action to enforce the liens to secure said notes it is contended that said two notes held by M. and Morris were paid off and afterwards reissued by P., and that they are not secured by any lien on said land. Held—The evidence fails to show that P. paid off said notes, and they are equal liens with the other Barclay notes.

John M. Galloway for appellants.

Wright & McElroy and W. L. Dulaney for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Nunn.

On the 20th day of December, 1897, one L. R. Porter purchased from N. P. and J. E. Barclay a survey of land lying near Bowling Green, Ky., for the price of \$12,110, \$5,000 of which he paid in cash, and executed his seven notes for the balance, the first one due January 1, 1899, and the last one January 1, 1906, with a provision in the deed that if anyone of the notes should not be paid within sixty days after maturity, then the whole to become due and payable. It appears from this record that the Barclays had, prior to the institution of this action, disposed of these notes, the appellants holding two of them, and the appellees holding the others. On the 14th of January, 1898, L. R. Porter sold this tract of land to appellee, H. B. Hill, for the price of \$16,000. In this trade, as shown by the deed, Hill assumed and obligated himself to pay for Porter the seven notes executed by Porter to N. B. and J. E. Barclay, and a lien was retained in the deed to secure their payment, and for the balance of the purchase price, to wit, \$9,000. Hill executed to Porter five notes; four of them for \$2,000 each, and one for \$1,000. The first one was due January 14, 1900, and the others due the same day yearly after that. There was also the provision that if Hill should fail to pay any one of these notes within sixty days after its maturity, that all of them should become due and payable.

The record shows that H. B. Hill assumed to pay all the notes referred to above; that he executed his individual notes for five to L. R. Porter, representing \$9,000, and for convenience we will hereafter refer to them as the "Hill" notes, and as he also assumed to pay the seven notes executed by L.

R. Porter to the Barclays for the \$7,110, we will hereafter refer to them as the "Barclay" notes. It also appears that there was default in the payment of some of the notes of both series before the institution of this action.

On the 6th of February, 1901, the appellant, W. G. Morris, instituted this action in equity in the Warren Circuit Court against H. B. Hill, L. R. Porter and others, holding the lien notes above described, defendants. He asked a personal judgment against Hill and Porter, and asked that his lien on the land be enforced to pay the \$1,000 which he owned and held of the Barclay series, which was then past due, and a \$2,000 note of the Hill series, which notes he claimed to be the owner of by purchase. He filed both these notes as exhibits with his petition. The appellant, Sue M. Myers, filed her answer, and set up and claimed to be the owner of a note for \$1,000 of the Barclay series. The appellees, except Porter and Hill, owned all the other Barclay and Hill notes, except a \$2,000 note of the Hill series owned by appellant Morris.

The appellees, in substance, allege that this note held by Sue M. Myers, and the note held by appellant Morris, both of the Barclay series and for \$1,000 each, were paid off at maturity by their maker, L. R. Porter, and that any lien that was retained in the deed to secure their payment was, by such payment, released and discharged; that after L. R. Porter paid them, he, without authority, reissued them. These allegations were traversed by appellants, trial was had and the special judge who tried the case below sustained appellees' contention, and appellants have appealed from that judgment. It also appears from the record that it is agreed between the parties that the Barclay notes were a superior lien on the land to the Hill notes, and that prior to the trial and judgment complained of, by an agreed order, the land had been sold by the commissioner, and only brought between \$11,000 and \$12,000, not enough to pay all the notes. The only question in this case is whether these two notes of the Barclay series held by appellants, Morris and Myers, occupy the position they formerly held, to wit, superiority over all the notes of the Hill series. On this issue the burden of proof rested on the appellees, and it appears from the record that the parties only took the depositions of four witnesses, and they failed to take the depositions of witnesses who must have known all about the question at issue. The reason for their failing to take these depositions we are at a loss, from the record, to understand. Two of the witnesses who testified were bookkeepers for banks.

George Willis, the bookkeeper for Potter & Sons, bankers, stated that the banks of Bowling Green had daily settlements of matters between them, and that on the 17th of January, 1900, the bank that he was bookkeeper for, Potter & Sons, had in its possession the note for \$1,000, now claimed by appellant, Sue M. Myers, and in the settlement that day between the banks this note was put into the settlement and charged to Warren Deposit Bank at \$1,122.88. This sum included the interest; that the note was not stamped "paid" because directed not to so stamp it. Browning, the bookkeeper of the Warren Deposit Bank, stated that he represented his bank on that day in the settlement, and that he was told by L. R. Porter, cashier of the Warren Deposit Bank, that this note would be in the settlement of that day's business between the banks and not to suffer it to be stamped "paid;" that when the settlement was completed he carried back to the Warren De-

posit Bank all papers taken up in that day's settlement, including the note referred to, and turned them over to L. R. Porter, cashier of the Warren Deposit Bank; that the books of the bank show that it paid that note upon that date; that L. R. Porter had an individual account with the bank and that his account was not charged with that amount.

The appellant, Sue M. Myers, stated that she informed L. R. Porter that she had some money that she would like to invest in some good interest-bearing paper, and in a few days afterwards she met Mr. Porter in Mr. Sims' law office, and he had this note and another note, secured by a mortgage, executed to Edgar Grider, and being informed by Porter and Sims that they were good and safe paper in which to invest money, she bought the two notes for \$1,626.35, and gave a check, payable to Edgar Grider, for that sum, and then and there received the two notes.

As to the note for \$1,000 held by appellant Morris, P. J. Potter became the owner of it prior to the date it fell due, and he gave it to his daughter, Mrs. Willis, the wife of his bookkeeper. Mr. Willis took it to the Warren Deposit Bank and presented it to L. R. Porter individually for payment. Porter informed him that he was not able to take it up then, and made the same statement on one or two other occasions during the same month. Willis then returned it to Mr. Potter, his father-in-law, and after that it became the property of Potter again. Potter received the money on it about the last day of January, 1899, but from whom he received it he had no recollection whatever. Mr. C. L. Nichols, another witness of appellees, stated that at one time he owned this Morris note for \$1,000, and owned it for about a year and a half; that he got it from one Jim Young; that he gave Young the money with which to get it from Porter; that he did not remember whether he received the note in person from Young or got it from Porter. He stated that Mr. Porter took up the note and gave him the money on it, and then afterwards stated that Porter handed him a check for the note. He then stated that the check he received for the note was signed by G. W. Morris, appellant, dated October 24, 1900, payable to the order of C. L. Nichols for \$1,170 for land note dated December 20, 1897.

It is evident from the testimony in this case that appellants, Myers and Morris, paid full value for each of these notes, believing at the time that they were genuine and valid notes. There is not the slightest testimony that L. R. Porter had ever paid either of the notes, or any part of either.

The only inference or conclusion to be drawn from the testimony in this record is that Porter was hard pressed for means and unable to meet these notes when they became due, and being pressed by the owners thereof for their payment, he interested himself in finding persons with means to take them and hold them, and in this way they reached the appellants in this case. There is no proof in the record that Porter had anything to do with those notes, except as above stated, other than as an official of the Warren Deposit Bank, and the settlement by the bank of one of these notes was not a payment by L. R. Porter, and did not make it the property of L. R. Porter, although he was the cashier of the bank.

Even if Porter had paid these notes, it did not extinguish them, nor absolve Hill from the payment of them, and they still remained a lien on the land. As to the question as to whether they were an equal lien with the

Barclay notes or the Hill notes, or whether they were subordinate to both series of notes, is immaterial, and not necessary for us to decide, as we have come to the conclusion that, under the evidence as presented in the record, they were not paid or extinguished by L. R. Porter, and that they are equal liens with the other Barclay notes.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v.
DODD, &c.

(Filed June 10, 1903.)

Appeal from Jefferson Circuit Court, Chancery division.

The court delivered the following extension of the opinion herein:

What was meant by the expression in the opinion regarding taxes is, appellants will be required to pay the taxes alluded to in this litigation. But in so far as they have paid them, they will not be required to again pay that amount. Appellants will be credited by the amounts they have paid to the bridge company on the taxes in litigation. In other words, they will have to pay to the bridge company the balance of the sum necessary for appellants to have paid to enable the bridge company to pay its taxes in question.

The court adheres to the opinion that the contract of 1872 was terminated by the notice of 1897, and came to an end in 1899 as to all parties to that notice. But we do not, of course, undertake to pass upon the rights and liabilities of the parties since the termination of the old contract.

And in all other respects the petition for an extension and modification of the opinion is overruled.

The whole court sitting.

HOFFMAN, &c. v. MANN.

(Filed June 10, 1903—Not to be reported.)

Forcible entry—Amendment of warrant—After an inquest by a jury in a proceeding on a warrant of forcible entry in favor of plaintiff a traverse was prosecuted to the circuit court. The warrant was fatally defective in that it failed to allege that plaintiff was in the peaceable possession at the time of the forcible entry complained of, and plaintiff was permitted to file an amendment in the circuit court curing the defect, to which defendant objected. A trial resulted in finding the inquest to be true. On appeal the only question presented is the error of the court in permitting the warrant to be amended. Held—That said amendment was properly allowed under section 134, Civil Code of Practice, as it did not change the cause of action but perfected the cause already pending.

D. A. Glenn for appellants.

Hall & McLean for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

The appellee in March, 1903, caused a justice to issue a writ of forcible entry against appellants. The jury in the justice's court found by their request that appellants were guilty of the forcible entry complained of. Appellants filed, within three days, a traverse, and the justice stayed all further proceedings on the inquisition and delivered to the clerk's office of the circuit court of that county the whole of the papers and proceedings with reference thereto. In the circuit court the traversee joined issue on the traverse. The appellants, in the circuit court, moved to dismiss the writ because it was failed to be stated therein that appellee, at the time of the forcible entry complained of, was in the peaceable possession of the real estate therein described. During the pendency of this motion the appellee filed an amendment curing this defect, to all of which appellants objected and excepted, and this is the main ground presented by appellant for a reversal of this case. On the trial in the circuit court the jury, under proper instructions, found that the inquisition in the justice's court was true, and that the appellants were guilty of the forcible entry complained of.

The defect in the warrant before amended in the circuit court was fatal. (Taylor & Speed v. Monahan, 71 Ky., 239; Powers, &c. v. Sutherland, 62 Ky., 152; Burbage v. Squires, 60 Ky., 79.) In the last case the court, in effect, said that the same case should be tried anew, and that no new case should be tried, and that the claim sued for could not by amendment be increased in amount beyond the jurisdiction of the inferior court. In the case 71 Ky., 239, the same defect existed in the writ as existed in this case, but no amendment was offered or allowed at any time, and the Court of Appeals determined that the warrant was fatally defective. In the case in 62 Ky., 152, this court used this language: "Nor did the court err in refusing to allow the filing of the 'amended petition and warrant,' as it is styled. Without deciding whether a warrant in forcible entry and detainer is amendable at all—especially after a traverse to the circuit court—we deem it sufficient to say that the amendment offered was not only defective in failing to show that the relation of landlord and tenant existed between the parties, but it presented an entirely new case, by introducing a number of new parties plaintiff. This can not be allowed."

In this case we see that the court refrained from saying whether or not an amendment in proper form was allowable. Section 184 of the Code of Practice, so far as applicable to this case, is as follows: "The court may at any time in furtherance of justice, and on such terms as may be proper, cause or permit a pleading or proceeding to be amended, * * * or a mistake in any respect, or by inserting over allegations material to the case. * * * And if a proceeding taken by a party fail to conform in any respect to the provisions of this Code, the court may permit an amendment of such proceeding so as to make it conformable thereto. * * * The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The court, in the case of Allen v. Brown, 4 Met., 844, in discussing this section of the Code, used this language: "It is clear that the plaintiff in this case may be allowed to amend on proper terms, if that section applies

to proceedings by attachment on affidavit. * * * It speaks of proceedings and not of their character and form, and it authorizes the amendment of 'any pleading or proceeding' in certain respects or 'in any other respect.' As the affidavit forms part of the proceeding, and as the section authorizes the amendment of any proceeding 'by correcting a mistake in the name of a party, or a mistake in any other respect,' it is difficult to escape the conclusion that the section was intended to apply to a defective affidavit."

The proceeding by writ of forcible entry is one authorized by the Code of Practice, and certainly section 134 of the Code, the same as section 161 of the old Code, authorizes the amendment of such a proceeding within the limitations as prescribed in that section, to wit, that it does not materially change the cause of action or defense. This view is sustained by this court in the case of *Bailey v. Kelley*, 18 Ky. Law Rep., 719. In that case the court said: "It would be, we think, exceedingly technical to say that this warrant could not be amended to make it conform to the form laid down and required by the Code of Practice."

The only question remaining is whether it can be amended after the traverse and in the circuit court. We understand the rule to be that the same action must be tried anew, but no new action can be tried; that any amendment changing the cause of action could not be permitted on the appeal. The amendment in the case did not change the cause of action or make any new action to be tried. It only perfected the action or proceeding, and made certain her proceeding defectively stated.

The case of *Puff, &c. v. Huchter*, 78 Ky., 146, was where Huchter made and filed his affidavit for an attachment on a claim for \$50 without filing a petition or any other memorandum or statement of his cause of action. In the justice's court his action was dismissed on account of these defects. He appealed to the circuit court. In the circuit court Puff moved to dismiss the action on the ground that no petition had been filed in the justice's court; but the motion was overruled and the plaintiff was allowed, over the objection of the defendant, to file what was styled an amended petition. This court, in discussing that case, used this language: "The common pleas judge seems to have regarded the affidavit as intended for a petition, and on that idea to have allowed an amendment to be filed. The affidavit did not contain all that was necessary to be alleged in the petition, and was insufficient to authorize a judgment. But its defects were in matter of form rather than of substance, and in view of the rule that proceedings in justices' courts are to be construed with great liberality (*Long v. Ray*, 1 Dana, 430), and that appeals from their judgments are to be tried de novo, we think there was no error in overruling the motion to dismiss or in allowing the plaintiff to set forth his demand in a formal pleading." To the same effect is the case of *Forsythe v. Huey*, ante, 147, decided by this court on the 4th day of the present month, in which case a writ of forcible entry was permitted to be amended after traverse by the circuit court.

Perceiving no error prejudicial to the rights of appellant the judgment of the lower court is, therefore, affirmed.

RANKIN v. McFARLANE CARRIAGE CO.

(Filed June 10, 1903—Not to be reported.)

Mortgages—Liens—Agents—Appellee shipped over twenty vehicles to B. at Lawrenceburg under a written contract that the title to them should remain in appellee until the same should be paid for. B. was to pay for each vehicle at invoice price, less 3 per cent. This writing was not recorded, and the railroad company refused to deliver them to B. without payment of \$326.59 charges. In order to pay these charges B. borrowed the money from appellant and executed a mortgage to him on five of the vehicles as security. This mortgage was duly recorded. In an action to foreclose this mortgage lien appellee became a party, and claims a lien on said vehicles prior to the mortgage. Held—That as appellant became the holder of the mortgage lien without notice of the prior lien claimed by appellee he has a superior lien. B., as agent, might have legally been presumed to have been authorized to borrow sufficient money to pay the charges of the railroad company for the transportation of the vehicles. Such a transaction is certainly within the scope of an agent's apparent authority.

Ira Julian and L. W. McKee for appellant.

F. R. Feland for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

In January, 1901, the appellee, the McFarlane Carriage Co., shipped some twenty-odd vehicles, including the five in controversy, to Clay Brown, who was engaged in the business of buying and selling buggies, carriages, surries and other vehicles in his own name at Lawrenceburg, Ky., under a contract that provided: "That the title to and ownership of all goods shipped under this contract, or the proceeds of the sale thereof, should be and remain the property of the McFarlane Carriage Co., and subject to their order at any time they may deem themselves unsecured, and until all the conditions of this contract are complied with, including the final payment in full in money for all said goods. But nothing in this contract is to serve as a release from making payment in full as herein agreed. * * * Notes taken by the McFarlane Carriage Co. under this contract are not accepted by this company as payment, but merely as evidence of liability and of the amount due."

Brown further stipulated that he was to pay for each vehicle shipped at invoice price in cash less 3 per cent. discount as soon as sold, and to keep the vehicles fully insured for the benefit of the McFarlane Co. This instrument was not recorded. And on the 18th of May, 1901, Brown representing himself to be the owner of these vehicles, executed a chattel mortgage on five of them to appellant as security for the loan of \$326.59, which was borrowed for the purpose of paying freight on the shipment to the railroad company. On the 27th of May, 1902, the appellant, Rankin, brought this suit for an enforcement of his lien against Brown, and also alleged that the defendant had sold two of the mortgaged vehicles, but had failed to account for the money received thereon, and that unless prevented, the whole would be disposed of, and asked for a specific attachment against the mortgaged property. The McFarlane Carriage Co., on their own petition, were made

a party to this proceeding, and filed an answer and cross petition in which they set up the contract of sale with Brown, and alleged that he owed them \$335.50 for the vehicles mortgaged to appellant, and they asked the court to adjudge them a superior lien to the mortgage made by Brown to the appellant.

The uncontradicted testimony shows that the entire lot of vehicles shipped by appellee to Brown were held by the railroad company for \$326.50, for freight thereon; and that when Brown, the consignee, and ostensible owner thereof, applied to appellant for a loan of sufficient money to pay the bill, he had the records of the county court clerk's office examined for liens against the property, but failed to find any. It is also uncontradicted that Brown was doing business in his own name; and that appellant had no notice of its contract with appellee or the alleged agency. Under this state of fact the chancellor upon final submission adjudged that the McFarlane Co. were the owners of the five vehicles mortgaged to appellant, and directed their sale; and that the proceeds should be paid to appellee, and plaintiff has appealed.

Section 496 of the Kentucky Statutes provides: "No debt or deed of trust, or mortgage conveying the legal or equitable title to real or personal estate, shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors, until such deed shall be acknowledged and proved according to law and lodged for record."

This court has uniformly held that pocket mortgages, similar to that relied on by the McFarlane Co., were inferior to the lien acquired by a mortgagee, who gave credit on the faith of the property without notice of such liens. This question was exhaustively considered in *Wicks v. McConnel*, 102 Ky., 434, and all previous cases cited and discussed, and in that case the court said: "While we adhere to the decision and reasoning in the *Baldwin* case, we are not inclined to push the doctrine further than we are required by the language of that opinion in support of secret liens as against creditors whose liens were created, or may be reasonably supposed to have been created, upon the faith of the property being, so far as they could by any possibility discover, unincumbered. If this be not the construction, then the statute is entirely nugatory."

The principle in this case brings it clearly within the rule laid down in *Wicks v. McConnel*, and we think the chancellor erred in adjudging appellee's lien superior to the mortgage of appellant. But even if it be conceded that Brown was only an agent, and that appellant knew the conditions of the contract under which he received the vehicles, still he might have legally been presumed to have been authorized to borrow sufficient money to pay the charges of the railroad company for the transportation of the vehicles, as without this being done he could not get possession of them at all. Such a transaction is certainly within the scope of an agent's apparent authority.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. HARROD.

(Filed June 10, 1908.)

Railroads—Negligence—Instructions—Appellee was injured by the handle of a derrick striking him while he was unloading a hogshead of tobacco at a depot on appellant's road, and this action was brought to recover damages for said injuries, caused, as alleged, by the negligence of appellant in not keeping said derrick in proper order for use of shippers. A plea of contributory negligence was relied on for the defense, and a verdict for \$1,000 damages resulted for plaintiff. On appeal appellant urges as error the failure of the court to give an instruction on contributory negligence, as appellant offered such an instruction, which was refused. Held—That the instruction on contributory negligence, as offered, was defective, but the court should have given a proper instruction presenting this defense, as there was evidence tending to support it. The rule is that where a party in a civil case fails to offer an instruction upon a point of law involved in the case it is not error in the court to fail to instruct on that point; but if a party offers an instruction upon some point of law involved which is refused by the court, because of defect in form or substance, then it is the duty of the court to prepare, or have prepared, and give a proper instruction on that point.

Ira Julian and Edward W. Hines for appellant.

J. A. Scott and W. C. Marshall for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

The appellee filed this action in the Franklin Circuit Court, among other things, alleging, in substance, that while he was engaged in delivering a load of tobacco to the appellant, a common carrier for hire, at its depot in Frankfort, Ky., and while lifting the hogshead from the wagon by means of a derrick he was struck upon the face and chin with the handle thereof, which cut through his lower lip and chin, knocked out several of his teeth, cut his tongue, greatly disfiguring him, destroying his speech, and otherwise permanently injuring him, and that his injuries were the result of the defective, unsafe and dangerous condition of the derrick, which was known to appellant, or could have been known to it by the exercise of ordinary care, in time to have prevented the injury, but was unknown to appellee, and could not have been known to him by the exercise of ordinary care.

The appellant by its answer traversed the allegations of the petition, and alleged that appellee's injuries were received as the result of his own contributory negligence. This affirmative matter was traversed by the appellee. A trial was had, which resulted in a verdict and judgment in favor of appellee for the sum of \$1,000. The appellant's motion for a new trial was overruled by the court, and the case is here on appeal. The only grounds urged for a reversal are alleged erroneous instructions given by the court, and the failure by the court to give the instruction offered by it on contributory negligence. The appellant contends that the instructions given by the court might well have been construed by the jury as assuming that appellant had negligently permitted the derrick to be and remain out of repair. Even if the contention of appellant is correct, it was not an error prejudicial to the appellant for the reason that the evidence both for appellant and for appellee showed that the derrick was out of repair and defective

at the time of the injury, and had been in such condition for a long period of time prior thereto.

The evidence of appellee was that he was using the derrick in unloading his hogshead of tobacco, at the time of his injury, in a careful and prudent manner; that by means of the derrick he had raised the hogshead from the wagon, had turned it preparatory to lowering it to appellant's platform, and commenced lowering it. The chain, or something about it, caught for an instant, and then suddenly gave way, and the hogshead went down with such force as to jerk the handle out of his hand and hit him in the face and injure him, as stated. The appellant introduced one or more witnesses, who stated that some time after the appellee's injuries were received the appellee, in relating how he received his injuries, stated that he was lowering the hogshead, and he thought it had reached the platform when it had not, and he turned the handle loose, and then it hit him in the face.

The appellee denied this, and said he did not make such statements, nor did he receive his injuries under such circumstances. The court did not give any instruction on contributory negligence on the part of appellee. The appellant offered one, which the court properly refused, because, as drawn, it did not contain the law of contributory negligence. The court should, however, have given an instruction on contributory negligence, and, under the evidence, it was error prejudicial to the appellant in failing to do so.

That part of section 317 of the Code which is applicable to the question before us reads as follows: "Either party may ask written instructions to the jury on points of law, which shall be given or refused by the court before the commencement of the argument to the jury."

It appears from this record that the court, on its own motion, gave such instructions as were given to the jury. According to the opinion of this court in the case of *Clark v. Baker*, 7 J. J. M., 197 (giving it a strict construction), the lower court did not err in failing to give an instruction on contributory negligence after it had refused the improper one offered by appellant. But it appears from later decisions of this court that the opinion in the case *supra* has been to some extent modified. (The case of *Swope v. Schaffer*, 9 Ky. Law Rep., 161.) In that case counsel for appellants contended as the lower court assumed the province of instructing the jury unasked, it should have given the whole law of the case suited to every state of fact upon which the jury might have properly found a verdict for either party. The court, in discussing this question, said: "This rule has never been applied to the trial of civil cases to the extent stated by counsel. For though the court may, in such case, instruct the jury without being moved so to do, it is not bound to instruct. (*Clark v. Baker*, 7 J. J. M., 197.) Nevertheless it seems to us that if the court does, on its own motion, instruct in a civil case, it should not direct the jury unconditionally to find against a party upon a given hypothesis, when there may be another alike supported by the evidence, but withheld from the consideration of the jury, upon which they might find in favor of such party."

The rule upon this question now is that where a party in a civil case fails to offer an instruction upon a point of law involved in the case, it is not error in the court to fail to instruct on that point; but if a party offers an in-

LITER v. FISHBACK.

(Filed June 10, 1903—Not to be reported.)

Infants—Void judicial sales—Appellee brought this action to recover possession of a house and lot which he alleges belongs to him, and which he alleges was sold under a void judgment, and that the property was subsequently transferred to appellant. Appellee alleges that his father claimed to be the owner as tenant by the curtesy in said property in which appellee, who was then an infant, owned the remainder. The action was brought under section 490, Civil Code of Practice, on the allegations that the property was not susceptible of a division. Appellee insists that the court had no jurisdiction in such action to render a judgment of sale. Held—That the authority to sell land of an infant is statutory, and must be strictly construed. Section 490 only authorizes a sale where the parties are joint tenants, and does not authorize a sale in such a case as this. A sale was only authorized under section 491 for the purpose of reinvestment, but this was not a proceeding under that section, and the sale was void, and appellee is entitled to recover the property.

Lane & Harrison for appellant.

E. L. McDonald, John M. Scott and Chas. Bowser for appellee.

Appeal from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Chief Justice Burnam.

The appellee, Claude L. Fishback, who was plaintiff in the court below, instituted this suit against the appellant, W. W. Liter, for the possession of a tract of fifteen and six-tenth acres of land lying in Jefferson county. He alleges, in substance, that on the 11th day of October, 1888, his father and statutory guardian, Edward P. Fishback, brought a suit against him in the Louisville Law and Equity court, when he was an infant, in which he alleged that he was the owner as tenant by the curtesy of a life estate in the land, and that plaintiff was the owner of the remainder in fee; that he sought to have the property sold and out of the proceeds the value of his life estate paid to him and the remainder reinvested in other real estate for plaintiff; that a judgment was rendered in this proceeding on the 18th of March, 1890, decreeing a sale thereof, and under which judgment the marshal of the court sold the property to William B. Mann at the price of \$530, which was confirmed, and that thereafter a deed conveying the property was made to Mann in consideration of the purchase price; that subsequently, on the 11th day of January, 1896, Mann and wife conveyed the property to the defendant, Liter, who was in possession thereof. The defendant in his answer alleged that the suit of Edward P. Fishback against plaintiff, in which the decree for the sale of the land was entered, was brought pursuant to the provisions of section 491 of the Code for a reinvestment of the proceeds in other real estate, and that the Louisville Law and Equity Court had jurisdiction of the subject-matter of the suit and persons of the plaintiff and defendants prior to the rendition of the judgment; and that its judgment had never been vacated, set aside, modified or appealed from, and is in full force and effect, and plead the judgment in that case and the proceedings had thereunder as a bar to plaintiff's cause of action. The plaintiff in his reply denies that the Louisville Law and Equity Court, in the action of Edward

P. Fishback v. C. L. Fishback, had jurisdiction for a sale of the property for purposes of reinvesting the proceeds in other real estate, and denies that he ever received the benefit of the purchase price paid into court in that action, or any part thereof, or that he now keeps and retains same. In the second paragraph of his reply he denies that the judgment of sale was made in pursuance of section 491 of the Civil Code, but that it purported to be rendered in pursuance of section 480 of the Code, as it ordered a sale of the property because it was indivisible, and that the proceeds might be divided between Edward P. Fishback and the plaintiff. He alleges that the court had no jurisdiction to render the judgment, and that it was void, and charges that no reinvestment was ever made of the proceeds, but that his father and guardian was permitted to withdraw the entire purchase money from the court and appropriate it to his own use; that both Edward P. Fishback and John Hawkins, the security on the bond, which was given by Fishback as guardian, had both died many years ago, insolvent.

The case was submitted on the pleadings, and the chancellor held that the judgment under which plaintiff's lot was sold was void; and that no title passed, and directed that a writ of possession should issue therefor in favor of the plaintiff, and the defendant has appealed.

The question for decision is, did the Louisville Law and Equity Court have jurisdiction to decree a sale of the infant's real estate under the allegations of the petition? The law is well settled in this State that the powers of courts of equity to sell and reinvest infants' real estate are not inherent, but statutory. (*Falls City Real Estate, &c. v. Van Kirk*, 71 Ky., 499; *Paul v. Paul*, 66 Ky., 484; *Bridgeford v. Beck*, 74 Ky., 540; *Walker v. Smyser*, 80 Ky., 620; *Henning v. Harrison*, 76 Ky., 725; *Swearingen v. Abbot's Ex'or*, 18 Ky. Law Rep., 185; *Hicks v. Jackson*, 24 Ky. Law Rep., 218.) In *Ogden v. Stephens*, 17 Ky. Law Rep., 1115, the court, through Judge Pryor, said: "This court has frequently held, and particularly in the late case of *Kinslow v. Grove*, 17 Ky. Law Rep., 845, that the jurisdiction of the chancellor to sell infants' real estate is derived solely from the Code or statutes, and any other mode is void, and passes no title."

In *Isert, &c. v. Davis*, 17 Ky. Law Rep., 686, the court, in considering the question of the sale of an infant's real estate, said: "The statutes regulating proceedings of this kind are clear and explicit; they are designed for the protection of the class of persons who are unable to protect themselves, and unless rigidly adhered to by the courts the persons who are the peculiar objects of the chancellor's care will constantly be made the victims of injustice and wrong."

And the question was considered at length in *Elliott v. Fowler*, 28 Ky. Law Rep., 1676. Section 489 provides that a vested estate of an infant may be sold, first, to pay the debt of an ancestor; second, for the payment of the infant's debt or liability; third, for the maintenance and education of the ward; fourth, for the reinvestment of the proceeds. The sale was clearly not made under this section of the Code. Section 491 provides that the owner of a particular estate may institute proceedings for the sale of real estate belonging to infants in remainder, or the remainderman may sue the life tenant in the same way, provided the entire proceeds are held for reinvestment in other real estate. There is no pretense that the provisions of

this statute as to the reinvestment of the entire proceeds were followed, as was held in *Dineen v. Hall, &c.*, 23 Ky. Law Rep., 1615, to be an indispensable requisite. Section 490 of the Code provides that "a vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity in an action brought by either of them, though the plaintiff or defendant be an infant, if the estate be in possession, and the property can not be divided without materially impairing its value or the value of the plaintiff's interest therein."

Sales can only be ordered under this section when the estate is jointly held and in possession of all the joint owners, and it has no application where the life tenant has the sole possession, as in the case at bar. This section was considered in *Malone v. Commonwealth*, 95 Ky., 93.

It is apparent from the pleadings that the sole purpose of the suit instituted by E. P. Fishback in October, 1888, was to procure a sale of the land in which he held a life estate for the purpose of reducing his interest to cash.

This the court had no jurisdiction to decree. (*Dineen v. Hall, &c.*, 23 Ky. Law Rep., 1615, and the judgment directing it was void as against the rights of the infant remainderman.

Judgment affirmed.

HUTSELL v. COMMONWEALTH.

(Filed June 10, 1903—Not to be reported.)

1. Criminal law—Continuance—Appellant was convicted of manslaughter and sentenced to confinement in the penitentiary for eighteen years. At the term at which he was indicted he was granted a continuance on the grounds of the absence of a witness in the State of Indiana, and other witnesses at the succeeding term. When the case was set for trial a postponement was had for ten days on account of the absence of the same witness in Indiana. When the case was again called for trial a continuance was asked on account of the absence of the same witness. The court refused to grant a continuance, and this is urged as error on appeal. Held—That the court did not err in refusing to grant a continuance, as the affidavit failed to show that appellant had made any effort to obtain the attendance of said witness or to take his deposition.

2. Evidence—The court did not err to appellant's prejudice in allowing evidence as to his intoxicated condition, the exhibition of his pistol, of his firing it, and of insulting and threatening remarks made by appellant from ten to thirty minutes prior to the killing, as his actions and words for some time before the homicide indicated a mind filled with general malice and a purpose to injure or kill some one.

3. Instructions—The instructions given were not prejudicial, and the conviction will not be disturbed.

Clare, Dickerson & Clayton and B. F. Menefee for appellant.

McKenzie R. Todd and Clifton J. Pratt for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Nunn.

On the 26th of July, 1902, the appellant shot and killed one David Barton with a pistol, at the house of James McMillan, in Pendleton county, Ky.,

and at the October term, 1902, of the Pendleton Circuit Court the appellant was indicted by the grand jury for the willful murder of Barton. Upon the return of the indictment by the grand jury the court fixed a day in that term for the trial, and on that day, when the case was called for trial, the appellant filed his affidavit, asking for a continuance until the next term of the court; asking for further time for the preparation of his defense, and also stating what he could prove by absent witnesses, facts material to his defense. The court granted the continuance, and set the trial for a day in the following January term. On that day the appellant again announced not ready for trial on account of the absence of one Leslie Gowers and other witnesses named in his affidavit. He alleged that he could prove by Gowers, if present, that he was at the scene of the killing and saw it, and that Barton was advancing on appellant rapidly with an uplifted hand, with something in his hand, and that Barton made a stroke at appellant at or about the time appellant fired the first shot; that he learned for the first time what he could prove by this witness about two or three weeks before the date of the affidavit, and that he learned then that he was in the State of either Ohio or Indiana; that he learned on that morning that he was in the State of Indiana.

The court refused the application of appellant for a continuance until the next term of court, but set the case for trial at a day ten days later in the term. On that day the appellant filed another affidavit for a continuance on the grounds of the absence of the witness, Gowers, and other witnesses named in the affidavit. The court overruled this application for a continuance, a trial was entered into, the evidence was heard, and the jury returned a verdict finding him guilty of manslaughter, and fixing his punishment at confinement in the penitentiary for eighteen years. The court overruled appellant's motion for a new trial, and granted him an appeal to this court.

The facts of the killing, as appear from the record, are, in substance, as follows: On that day James McMillan gave a dancing picnic in his yard, at which there was an attendance of about seventy-five persons. There was a pavillion of sufficient size to accommodate three dancing sets at one time.

About twenty feet from it, in a southerly direction, was a booth, at which confectionery, etc., was sold. The yard was enclosed by a fence, a barn making a part of the fence on the east. Appellant went from near Flingsville, in Grant county, to this picnic, a distance of about seven miles, and reached there about dusk. To some extent he participated in the dance, and after a few hours became partially intoxicated; that he fired his pistol in the yard which he claimed was an accident. Then with his pistol in his hand he walked across the dancing pavillion, which was at that time filled with ladies and gentlemen. As he walked across the pavillion he made offensive remarks, such as "I live in Grant county, and all the rakes live in Pendleton," and "I am not afraid of white stockings and white gloves," and when some one told him to stop talking that way and go with him, he said: "I don't have to; no one can stop me, and I won't go anywhere with any d—n son of a ———," and said that that picnic would be long remembered by others as well as himself. David Barton, the man he killed, approached him and said to him that he was his friend, and for him to come

go with him and get a drink of lemonade, and he answered him that he would not go any place with any d—n son of a ——. About that time the appellant started toward the front gate; some one in the crowd made some noise, and appellant thought it was in derision of him, and turned and made some remark; he started again, and a similar noise was made, and he stopped and turned again and commenced waiving his hat, and Barton started in his direction. Some of the witnesses stated that Barton walked leisurely, and some rapidly, but all, both for the Commonwealth and for the appellant, who testified on that point, state that he was walking with his hands by his side, without anything in them, and that appellant began to back away with his hand behind his hip; that about the time Barton got within from three to eight feet, the witnesses varying, the appellant fired a shot at him, which it seems missed him, and they suddenly ran together and clinched, it appearing that Barton was trying to get hold of the pistol. While clinched, and going round and round in the direction of the fence, the appellant fired two more shots. They fell, the appellant backwards, and Barton on him. Barton rolled off of him upon the ground, dead. Appellant was severely wounded in the back. He was put under arrest and put in the smokehouse during the remainder of the night.

There were two physicians present, and dressed the wound of appellant on the next morning. They found a wound under the left shoulder blade, the skin was galled about three inches in length and one-half inch in width; there was an open wound for about two inches, and below both there was a cross-tear; that they probed the wound between the skin and muscles, and they gave it as their opinion that the wound was made by something blunt, and not by a knife. They were shown the place where the appellant and deceased fell, and the blood upon the ground indicated that it was the place. They stated that they found some broken glass and two stubs from cherry sprouts, which appeared to have been cut slanting with an axe—the larger one about the size of the finger, five or six inches long, and the other one much shorter and smaller, and within about two inches of the larger one.

The appellant pleaded self-defense, and when put upon the stand denied all the improper conduct testified to against him, and stated that Barton and two others were approaching him in a menacing manner, and that he believed that he was in danger of losing his life when he fired one shot and missed. Then Barton grabbed him and cut him, when he fired two shots and killed him. The evidence further shows that the deceased was about sixty two years of age at the time he was killed.

The appellant contends that the court erred to his prejudice in allowing evidence, over his objection, to go to the jury, in that it permitted evidence of his intoxicated condition, the exhibition of his pistol, of his firing it, and the insulting and threatening remarks made by appellant from ten to thirty minutes prior to the killing; that this was no part of the *res gestæ*, and had a tendency to prejudice the minds of the jury against him and his defense.

We are of the opinion that the court did not err in this. He exposed his pistol on the pavilion in the presence of the crowd of ladies and gentlemen using oaths. He showed a desire to start trouble. He was armed, prepared for it, and appeared to be inviting an attack from some one of those present. His actions and words for some time before the homicide indicated a mind filled with general malice, and a purpose to injure or kill some one.

The case of *Whittaker v. Commonwealth*, 13 Ky. Law Rep., 505, was one in which the error complained of was very similar to the one before us. In that case the court said: "The evidence of these threats and this conduct was not competent as part of the subsequent *res gestæ*; they were not a part of the bloody transaction; but it was competent as showing general malice and a purpose to injure or kill some one; and the deceased became the victim."

The court, in its instructions, defined willful and willfully; malice and malice aforethought. The appellant does not complain of the definitions of these terms, as given by the court, but complains that the court erred in failing to define "feloniously," and claims that it was prejudicial error to define those terms without also defining this one. This was not error. The definitions given by the court could not have had any influence on the jury's understanding of the term "feloneously," or their conception of its meaning.

The appellant complains that the court erred in the use of the expression "good faith believe," and "had reasonable grounds to believe," in its instruction on self-defense. The criticism on the words "good faith" is not well taken. By the expression "good faith believe," the court evidently meant, and the jury could not have understood otherwise, than that it meant real or actual belief, and not pretended or assumed belief by appellant. The appellant further contends that the court erred in refusing to grant him a continuance on account of the absence of Leslie Gowers. All the other witnesses named in his affidavit were present at the trial before the evidence was completed. The appellant, in his last affidavit for a continuance, did not state any fact showing any effort on his part to obtain the presence of Gowers. He had stated in his former affidavit that he had been able to locate Gowers in the State of Indiana. The court then continued the case for ten days, and neither the affidavit nor the record discloses any effort upon the part of appellant to obtain the presence of the witness, nor any attempt to take his deposition, which, under ordinary circumstances, might have been obtained within the ten days. And in addition the record shows that he had over five months in which to prepare his defense.

We are of the opinion that he did not show proper diligence; and in addition to this, there were many eyewitnesses to the killing. The Commonwealth introduced eight or ten, and the defense about the same number, and from all these eyewitnesses we feel that the jury were enabled to arrive at a just conclusion as to all the circumstances and facts connected with and surrounding the killing.

Perceiving no error prejudicial to the rights of the appellant, the judgment of the lower court is affirmed.

Whole court sitting.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v. ROBERTSON.

(Filed June 10, 1903.)

Railroads—Negligence—Parties to actions—Removal of actions—Appellee was a locomotive engineer in appellant's employ. B. was foreman for appellant in charge of its shops, whose duty it was to direct repair of engines

and was an employe superior in authority to appellee and the injury resulted from the bursting of a glass tube which was not properly protected by a metal shield for that purpose. Appellee brought this suit for damages against B. and appellant company jointly, and the company moved for a transfer of the action to the Federal court on the ground of nonresidence. No cause of action was alleged against B. as it was not alleged that the master had furnished him with better shields for the protection of glass tubes than he had used, or that he had failed in any other respect to perform his duty, and as the cause of action existed against appellant company alone, the motion to transfer the case to the Federal court should have prevailed.

Gaither & Vanarsdall and John Galvin for appellant.

W. C. Bell and Robt. Harding for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee Robertson was a locomotive engineer in appellant's employ. One Dennis Brown was general foreman for appellant. He had charge of the roundhouse at Somerset, Ky., an end of a division on appellant's road. Brown was a citizen of Kentucky. It was his duty to direct the repair of such engines coming into that roundhouse as needed repairs, and to see to their proper equipment. He was a superior servant to appellee. This suit was brought by appellee against appellant and Dennis Brown to recover for the injury to appellee's eye by the bursting of a glass tube, which was a part of the machinery of a lubricator on the locomotive which was in his charge. The negligence complained of was that the glass tube was of an unsafe material; and that it was not properly protected by a metal shield, necessary for that purpose. This tube is called a sight tube, and is necessarily of glass because the engineman must know that his engine is being properly oiled, and can only know this by seeing the oil as it passes through the water, drop at a time. This tube through which the oil passes is held in place by means of screws at the top and bottom of the tube. The screws do not press directly against the glass, but upon rubber gaskets that go around the tube. The steam that heats the oil and forces it into the tubes is taken directly from the boiler. Consequently the tubes are liable to high pressure of steam. The tube being liable from various causes to be broken, a shield is provided that can be fitted around this glass, and furnishes protection both to the glass itself and to the engineman in case the glass should break.

The petition is brought in two paragraphs. The first charges that it was the duty of the company to furnish shields for the glass tubes, and that Brown was required by the company to see that the tubes were furnished; that Brown was in a different and superior class of service from appellee, and that appellee was an engineer. Appellee further alleges that Brown had promised him to have the shields placed upon the engine, but had failed to do so, and that appellee, relying upon this promise, continued in the use of the engine, and that while upon the engine after this promise the tube burst, and a portion of it flew into appellee's eye, causing the injury, and that except for the absence of the shield it could not have happened.

The second paragraph avers that it was the duty of the company to furnish safe material, and that Brown was required by the company to see that safe material was furnished; that the glass tubes furnished by the company were not of good material, but were defective, and that this fact was, or with reasonable diligence could have been, known to the company and to Brown, but that it was not known to appellee; and that by reason of unsafe and defective material in the tube it burst and caused the accident.

The appellant filed a motion to remove the case to the United States Court. This motion the court overruled. The petition nowhere avers that Brown was supplied by the master with any other or better tube than the one actually furnished to appellee; nor that Brown was supplied at all with a shield or shields by the master so that he could in turn furnish them to the enginemen. This is not wholly a technical criticism of the pleading. The facts developed upon the trial were that in fact Brown furnished to appellee precisely the tubes that he was provided with by the master; and that he had not any shield provided him by the master. So that the question comes to this point: Can a servant be made liable to one of another grade for the master's failure to provide safe and suitable machinery, although it was the superior servant's duty to look after the condition of the machinery? For such servant's careless or negligent act, which is called a misfeasance, he is liable to any one injured thereby. In its nature it is or becomes a trespass; and the fact that he is acting for another, or even under the positive directions of another, will not excuse him. But where the injury results to some third person because the servant failed to act, that is, because of his nonfeasance, it is held upon authority that generally the servant is not personally liable, though his master is. (*Lane v. Cotton*, 12 Mod., 472; *Murray v. Usher*, 117 N. Y., 542; *Henshaw v. Noble*, 7 Ohio St., 226; *Burns v. Pethcal*, 75 Hun., 442, and cases therein cited.) Whether this doctrine, in its fullest extent, can be sustained in sound reason it is unnecessary for us to examine. Whether the nonfeasance of Brown was a negative act, in that it was a failure to do what he had undertaken to do, and, therefore, had done it imperfectly, we are relieved from considering by the state of the pleadings and of the record, for it is not charged that Brown had it in his power to do anything other than exactly what he did. To hold him liable in this state of case would be to hold that every servant is personally charged with the same liability as his master, although the sole fault was that of the master, over whose action the servant, of course, had no control. Such a rule would be unreasonable. Its obvious injustice necessarily condemns it, and makes it impossible of acceptance.

The allegation that Brown agreed to appellee to furnish the shield can add nothing to Brown's legal liability or duty to appellee. Without other necessary averments showing at least that Brown had it in his power by the master's having supplied him with appropriate appliances so that he could do that which it is alleged he ought to have done, and agreed to do, his agreement was nudum pactum. Really the office of the allegation concerning the agreement was not to create a liability against Brown that did not exist before, but was to excuse appellee in the use for a reasonable time of a known, patently, defective piece of machinery.

The petition having failed to show any cause of action against Brown; or,

so far as it stated anything, showed that he was not liable personally to appellee, the averments regarding his alleged liability and seeking to hold him personally responsible should have been disregarded as surplusage. This would have left but one real defendant sued, namely, the appellant, and as the controversy was then wholly between a citizen of Kentucky and one of another State, and the amount in controversy more than \$2,000, the petition for removal of the action into the circuit court of the United States should have been granted as a matter of right, a sufficient bond having been tendered and approved.

Having arrived at this conclusion, and as the case will have to be tried in another forum, it is unnecessary, as well as improper, for us to discuss the questions arising upon the trial in the circuit court.

The judgment is reversed and cause remanded, with directions to remove this cause to the United States Circuit Court for the Eastern District of Kentucky.

The whole court sitting.

WESTERN UNION TELEGRAPH CO. v. CROSS' ADM'R.

(Filed June 11, 1903.)

Telegraph companies—Negligence—Evidence—Instruction—C. was a negro woman residing more than one-half mile from the office of appellant company in Madisonville, and on October 21, 1899, a telegram was sent to her from Kansas City announcing the death of her daughter. The telegram was received at the office of the company in Madisonville at 11:40 o'clock a. m. the same day, and was delivered to the messenger, who for several hours made an unsuccessful effort to find the party to whom it was addressed, as there was no street or number given by which she might be found. It was then returned to the office and a service message was sent to Kansas City requesting a more definite address. A telegram was afterwards, on October 23, 1901, sent to the son of C., and by this means the telegram to C. was delivered to her on that day, but too late to enable her to attend her daughter's burial, although it is conceded that she would have attended the burial if she had received it the day it was first sent. An action to recover damages from appellant was instituted on the ground of alleged negligence of appellant in delivering the message. In its answer appellant denied the negligence, and pleaded the facts attending its efforts to deliver the message. It also pleaded a rule of the company which provided a free delivery district in cities of less than five thousand inhabitants, limited to a radius of one-half mile from the office. On the trial the lower court refused to permit this rule to be given in evidence or to give an instruction based on it. It is also urged as error that the lower court gave an instruction authorizing punitive damages. Held—That the company seems to have made a reasonable effort to deliver the telegram to an obscure person where no address was given. The rule of the company fixing a limit for free delivery of telegrams was reasonable, and it should have been allowed in evidence, and an instruction based thereon. The giving of an instruction authorizing punitive damages was error.

Richards & Ronald for appellant.

C. J. Waddill for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the Hopkins Circuit Court by Sophia Cross to recover damages from the Western Union Telegraph Co. for its failure to deliver to her a telegram sent from Kansas City, Mo., conveying the information of the death of her daughter, Emma Baxter, in time to enable her to attend the funeral, whereby she was caused great mental pain and distress and suffered damage in the sum of \$1,500. The failure of the telegraph company is alleged to have been caused by its gross negligence.

The company by its answer denied the negligence charged in the petition, and pleaded the existence of a rule adopted by it which established in cities containing less than five thousand inhabitants a free delivery boundary or limit, consisting of all the territory within a radius of a half mile of the office of the company; that outside of this free delivery limit it would not deliver telegrams without the payment of an extra delivery fee; that Madisonville is a city of less than five thousand inhabitants, and that Sophia Cross lived therein at a greater distance than one half-mile from the office of the company, and that the sender of the message in question had not prepaid or guaranteed the extra delivery fee required by the rule. After the issues were made up, but before a trial of the case, Sophia Cross died, and the action was revived in the name of her administrator. Upon the trial the jury awarded a verdict of \$300 in damages against the company, and its motion for a new trial having been overruled it is here on appeal.

Sophia Cross was a negro woman living in Madisonville Ky. Her daughter, Emma Baxter died in Kansas City Mo., on the 21st day of October, 1899. On the day of her death her husband, James T. Baxter, sent the following message to the mother:

"Kansas City, Mo.

"To Mrs. Sophia Cross, Madisonville, Ky.:

"Emma Baxter is dead. Please come.

"JAMES T. BAXTER."

This message was received at the company's office in Madisonville on the same day that it was sent at 11:40 a. m.; immediately upon its receipt at the delivery office it was written out, and delivered to a messenger, with instructions to find the addressee, and deliver the message to her. The telegram contained no street, number nor address, nor any information as to the color or nationality of the person to whom it was addressed. The messenger, upon receiving the telegram, proceeded to search for the whereabouts of Sophia Cross. He states—and in this he is not contradicted—that he inquired at the postoffice, the hotels, and of various persons, white and colored, whom he met upon the streets, or whom he suspected might know something of the residence of the addressee of the message; he further states that after a diligent search and inquiry he was wholly unable to locate the address of appellee's decedent; that after the expiration of several hours' search he returned the telegram to the office, with the information that he could not locate the person entitled to it. The operator at the delivery office then sent what is called a service telegram to the office at Kansas City, stating that Sophia Cross could not be found, and asking for a more definite address. This service telegram was sent on the morning of the 22d of October. On the morning of the 23d of October there was received at the office

in Madisonville a telegram from Kansas City, concerning the death of Emma Baxter, directed to David Cross, stating that he worked at the Monarch mines. On receiving this telegram the operator telephoned David Cross at the Monarch mines, and he at once called at the office and obtained the message. Struck by the similarity of the names, the operator inquired of him if he knew Sophia Cross, in answer to which interrogatory he responded that she was his mother; whereupon the telegram for her was delivered to him, and he in turn delivered it to his mother.

Emma Baxter was buried in the afternoon of October 23, 1899, and at the time Sophia Cross actually received the telegram conveying the information of the death of her daughter she could not have attended the funeral; although we think the evidence shows that she could, and would, have attended it, had the telegram addressed to her been delivered during the day of October 21st. The verdict rendered, as compared with verdicts usually awarded by juries in such cases, can not be considered excessive.

The appellant complains of two errors of the court, which we think are well taken: First, that the court erred in instructing the jury on the subject of gross negligence and punitive damages; second, in excluding from the consideration of the jury the existence of the rule as to a free delivery limit, and the failure to give an instruction predicated thereon. We have been cited to no authority holding that in a case like this, based wholly upon a breach of contract, unattended with any physical injury, the defendant is liable for anything more than compensatory damages, and we think the trial court erred in giving the instruction on gross negligence, authorizing the infliction of punitive damages; moreover, we think the evidence in this case wholly failed to show gross negligence on the part of appellant in failing to deliver the telegram. The uncontradicted evidence shows that upon its receipt in Madisonville, without street address or number, it was written out and delivered at once to the messenger; that this messenger spent nearly all of the afternoon of the day on which it was delivered to him in searching for information as to the whereabouts of the addressee, without being able to find her, and he thereupon returned it to the office, and a service message was sent to Kansas City for more specific information in regard thereto. It was evidently in response to this service message that the telegram was sent to David Cross, the son of appellee's decedent, through whom the telegram to Sophia Cross was finally delivered.

There is evidence in the record to show that David Cross, the husband of Sophia Cross, worked in some menial employment not far from the office of appellant; also that one of his sons had, several years before, been a messenger in appellant's service, but the messenger who had charge of the telegram in question did not know these people or their relationship to Sophia Cross.

We are unable to see, considering that Sophia Cross was an obscure colored woman living nearly a mile from the office of appellant, how it could be charged with gross negligence, in the face of the uncontradicted testimony showing that its servants had made the effort herein set forth to deliver the message on the day that it was received at Madisonville.

Upon the trial of the case appellant introduced in evidence rule 50, which is as follows: "Messages will be delivered free within a radius of one-half

mile from the office in any city or town of less than 5,000 inhabitants, and within a radius of one mile from the office in any city or town of 5,000 or more inhabitants. Beyond these limits only the actual cost of the delivery service will be collected. The manager will, however, see that such cost is as reasonable as possible.

In the case of the Western Union Telegraph Co. v. Daniel, 15 Ky. Law Rep., 813, on this subject the Superior Court said: "Where a person to whom a telegram was addressed resided two miles from the telegraph station of a small town, in an action by him against the company to recover damages on account of delay in delivering the message it was error to instruct the jury that if the telegram could have been received by plaintiff 'by the exercise of ordinary diligence in searching for him in the town' in a reasonable time 'after it should have been received at the office,' the law was for the plaintiff. As the plaintiff did not reside in town, and the company is not required to deliver messages to persons residing as far as two miles in the country, unless it is paid, or especially undertakes to do so, the only duty of the operator was to use ordinary diligence to learn whether the plaintiff was in town, and, if so, then to use ordinary diligence to deliver the message to him. It is too much to require the company in such cases to make diligent search for the party."

In the case of the Western Union Telegraph Co. v. Matthews, 21 Ky. Law Rep., 1406, the court said: "The telegram, the failure to deliver which promptly is sought to be made the basis of recovery in this case, was sent during the afternoon of November 12th, 1896, from Springfield, Ky., to appellee at Shelbyville, Ky. The operator at Shelbyville received it promptly, but ascertaining that appellee lived in the country some four and a half miles, so notified the agent at Springfield. At about 1 o'clock on the next afternoon (the 13th) the Shelbyville agent was notified that the charges for delivering in the country were guaranteed, and to deliver by special messenger.

"There was a failure to do this under circumstances which conduce to show negligence on the part of the company's agent, but it is clear there was no obligation on the company to deliver in the country until after a guarantee of charges. The instructions to the jury are not explicit in this respect; indeed, the second instruction imports to the contrary. An instruction offered by the appellant on this behalf (No. 5) should have been given. The error in refusing it was clearly prejudicial."

The uncontradicted evidence of the surveyor of Hopkins county showed that Sophia Cross lived more than a half mile from the company's office, on an air-line, and that, by the nearest route by which that distance could be traveled, she lived four-fifths of a mile from the office. The company rule, establishing the free delivery limit, is entirely reasonable, if not absolutely necessary, and as the addressee lived outside of the free delivery limit of Madisonville, it was the duty of the sender of the message either to prepay, or guarantee, the extra delivery fee.

The trial court should not have excluded the evidence of this rule from the jury, and should have given the instruction asked by the appellant, based upon its existence.

For these errors the judgment is reversed for proceedings consistent with this opinion.

Whole court sitting except Judge Nunn.

McINERNEY, SHERIFF v. HUELEFELD.

(Filed June 11, 1903.)

Taxation—County levy—Improper division of magisterial districts—Appellee, a taxpayer of the City of Covington, filed this action to enjoin the sheriff of Kenton county from collecting a county levy tax of thirty-eight cents on the \$100 of property in the county. One of the grounds relied on for the injunction is that in the division of the county into magisterial districts only two districts were laid off in the city of Covington and five in the county outside of the city, and this apportionment was unfair and unjust. Held—That the taxpayer can not raise this objection to defeat the tax. The division of the county into magisterial districts was made in conformity to section 1090, Kentucky Statutes, and no exceptions were made to the division as could have been done by appellee or any other citizen. In addition to this remedy, if the division was unjust, under section 1082, Kentucky Statutes, a reapportionment could have been made in the same way four years after the apportionment. Another objection urged is that the levy is excessive. Held—That a court of equity will not interfere with the levy on this ground, as it is within the limit prescribed by the Constitution, and the levy is sufficiently definite. Another objection urged is that the city of Covington is by law separated from the balance of the county of Kenton for governmental purposes. Held—That there is nothing in any of the special acts relied on which constitute contracts between the city and State which recognize the city and county as separate for governmental purposes, and there is no separation of the county and city for governmental purposes.

Frank M. Tracy and Herbert Jackson for appellant.

Francis J. Hanlon, W. S. Pryor and A. G. Simrall for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the appellee, H. B. Huelefeld, a citizen and taxpayer of the city of Covington, against the appellant, M. D. McInerney, sheriff of Kenton county, to enjoin the collection of a tax of thirty-eight cents on each \$100 of property in the county, which was levied by the fiscal court of Kenton county, composed of the county judge and seven magistrates, five of whom reside outside of the city of Covington, and two within the city limits, at the regular meeting of the fiscal court for that purpose in April, 1903, upon three grounds: First, because the commissioners appointed, pursuant to section 1079 of the Kentucky Statutes, to divide the county into justices' districts, only allotted to the city two magistrates, while five were allotted to the county outside of the city, notwithstanding the fact that the city greatly exceeded the rest of the county both in wealth and population. It appears from the record that in 1892 the county judge of Kenton county appointed three commissioners to divide the county into magisterial districts, and that they performed this duty in strict conformity with the provisions of section 1080 of the Kentucky Statutes, and that no exceptions were made to the division as made by them, and their report was regularly confirmed by the judgment of the Kenton County Court at its January term, 1893, and so far as this record shows this apportionment has never been called in question in any way. If, as contended, this apportion-

ment of the county into magisterial districts was unjust to the city of Covington, they could have filed exceptions to the confirmation of the report, and in addition to this remedy section 1082 of the statutes provides that the county may be reapportioned into justices' districts at any term of the court, in the same way four years after the first apportionment. As the city of Covington has not complained of this apportionment in the manner pointed out by the statute, a court of equity can not regard it as a sound contention at the suit of an individual citizen to enjoin the collection of the tax against him.

The next ground complained of is that the levy made by the fiscal court is in excess of the requirement of the county, and was not itemized in the manner required by law. Section 1839 of the Statutes, which was passed in conformity with the requirements of section 157 of the Constitution, provides: "The fiscal court shall have jurisdiction to levy each year for county purposes an ad valorem tax on all property subject to taxation within the county, whether belonging to natural persons or corporations, companies or associations, not to exceed fifty cents on each \$100 in value thereof as assessed for State purposes. The tax complained of in this action is only for thirty-eight cents on each \$100 in value of taxable property in the county, and is, therefore, clearly within the limit. The law is well settled that so long as municipal governments make levies of taxes within the limits prescribed by the Constitution courts of equity will not undertake to inquire into the necessity of the levy at the hands of an individual taxpayer. (*Mayfield Woolen Mills, &c. v. City of Mayfield*, 22 Ky. Law Rep., 1676, where the question was recently and thoroughly considered by this court, and the conclusion there reached is supported by the overwhelming weight of authority on the question; *High on Injunctions*, 2d edition, section 544; *Cooley on Taxation*, 2d edition, page 372.) Nor does the record sustain this contention of appellee as to the alleged excessive levy, and it does not bear out appellee's contention that the fiscal court did not specify with sufficient distinctness the purposes for which the levy was made. The resolution of the fiscal court on this point recites that thirty-eight cents was apportioned as follows: Three cents for the purpose of creating a sinking fund with which to purchase a poor farm and erect suitable building thereon; ten cents for the maintenance and repair of the public roads and bridges of the county, and twenty-five cents to defray the general county expenses. The language of the resolution is in substantial compliance with the provisions of the State revenue act, which provides that an annual tax of fifty cents on each \$100 of value on all property shall be levied for the following purposes: "Twenty-two and one-half cents for the ordinary expenses of the government; twenty-two cents for the schools; five cents for the sinking fund, and one-half of one cent for the A. & M. College."

In our opinion the levy was sufficiently definite. The third and most important ground upon which appellee assails the levy is that the city of Covington is by law separated from the balance of the county of Kenton for governmental purposes, and that in consequence thereof the fiscal court of the county had no legal power or authority to levy a tax for county purposes upon the property of citizens living within the city of Covington, and incidentally to this contention it is insisted by appellee that the decision ren-

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Frank M. Tracy and Herbert Jackson for appellant.

Francis J. Hanlon, W. S. Pryor and A. G. Simrall for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the appellee, H. B. Huelefeld, a citizen and taxpayer of the city of Covington, against the appellant, M. D. McInerney, sheriff of Kenton county, to enjoin the collection of a tax of thirty-eight cents on each \$100 of property in the county, which was levied by the fiscal court of Kenton county, composed of the county judge and seven magistrates, five of whom reside outside of the city of Covington, and two within the city limits, at the regular meeting of the fiscal court for that purpose in April, 1903, upon three grounds: First, because the commissioners appointed, pursuant to section 1079 of the Kentucky Statutes, to divide the county into justices' districts, only allotted to the city two magistrates, while five were allotted to the county outside of the city, notwithstanding the fact that the city greatly exceeded the rest of the county both in wealth and population. It appears from the record that in 1892 the county judge of Kenton county appointed three commissioners to divide the county into magisterial districts, and that they performed this duty in strict conformity with the provisions of section 1080 of the Kentucky Statutes, and that no exceptions were made to the division as made by them, and their report was regularly confirmed by the judgment of the Kenton County Court at its January term, 1893, and so far as this record shows this apportionment has never been called in question in any way. If, as contended, this apportion-

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dered by this court in the case of *Richardson v. Boske, Sheriff, &c.*, 23 Ky. Law Rep., 1209, should be overruled. In that case *Richardson*, a citizen of Kenton county residing outside of the corporate limits of the city of Covington, sought to enjoin *Boske*, the then sheriff, from collecting a tax which the magistrates of the county residing outside of Covington, assuming to be the fiscal court of the county, had levied on property located in the county outside of the city of Covington for the year 1899, for county purposes, on the ground that the magistrates residing in the city of Covington did not act as members of the fiscal court, which made the levy, and that the tax was, therefore, levied by an illegally-constituted fiscal court. The sheriff resisted the granting of the injunction upon the ground that the city of Covington was separated from the residue of the county for governmental purposes, and was, therefore, not liable for any part of the tax sought to be enjoined, and that the magistrates residing within the city limits did not constitute any part of the fiscal court, and to support this contention relied upon certain special acts of the general assembly running through a series of years, which exempted the citizens of Covington from any charge for maintaining the public roads of the county outside the city, and for other expenses for the maintenance and improvement of the county outside of the city, and are the identical acts relied on to support the contention of appellee in this proceeding. In that case it was not necessary for the court to decide whether the separation of the city of Covington from the residue of the county for governmental purpose actually existed by virtue of these acts or not, but the court did decide that in so far as they were inconsistent with or repugnant to the act of October, 1892, which is embraced in sections 1833 to 1851, inclusive, of the statutes, which define and prescribe the duties of fiscal courts, that they were repealed by the concluding section of that act, and that the fiscal court consisted of the county judge and seven magistrates, and that as such they had the jurisdiction to appropriate county funds for all the purposes defined in section 1840 of the Kentucky Statutes, and to levy a sufficient tax within the statutory limit upon all the property within the entire county, whether located inside or outside of the city of Covington for this purpose. The decision in the case of *Richardson v. Boske, Sheriff*, has been referred to and approved by this court in quite a number of cases which have since been decided. (*Campbell County v. Newport & Cincinnati Bridge Co.*, 23 Ky. Law Rep., 2056; *City of Covington v. Highland District*, 24 Ky. Law Rep., 434; *Commonwealth v. Porter*, 24 Ky. Law Rep., 366; *Jackson v. Bowski*, 23 Ky. Law Rep., 1845.) And that case followed the rule which had been previously announced in *Campbell County v. Commissioners, &c.*, 19 Ky. Law Rep., 890; *Joyce v. Jefferson Fiscal Court*, 21 Ky. Law Rep., 199. And we still adhere to the law as therein announced. In addition we will say that there is nothing in these various special acts which sustain the contention that the general assembly intended thereby to separate the city of Covington from the county of Kenton for governmental purposes. They are in no sense contracts between the city and State. The general assembly always had the power to repeal them when they saw fit, and did so by the general act of October, 1892, which was passed in conformity with the mandate of the Constitution requiring uniformity and prohibiting special legislation. The city of Covington maintains its separate

municipal government like every other city in the Commonwealth, and in addition thereto permits the use of its city courthouse by the circuit court while it is holding its session within the city. But there is nothing to support the contention of a separation between the city and county for governmental purposes. On the contrary, the county government is administered by county officers, who are elected by the entire county, and whose jurisdiction extends over the entire county, including the city of Covington.

The general assembly has plenary power to create counties, and it can not be doubted that if they had intended to establish a separate county government in the city of Covington that they would have done so in a clear, explicit and unequivocal act passed for that purpose. In our opinion the contention rests upon no substantial basis, and can not be maintained.

For reasons indicated the judgment is reversed and cause remanded, with instructions to dissolve the injunction granted by the circuit judge and for an order dismissing plaintiff's petition with cost, and for such other proceedings as may be necessary to carry out the views indicated in this opinion.

PATTON v. CAMPBELL, SR.'S, TRUSTEE.

(Filed June 11, 1908—Not to be reported.)

Street improvement—Liens—Process—Pleading—Clerical misprision—This action was brought to enforce a lien under an apportionment warrant issued for street improvement against the property of Robert Campbell, Sr., for whom the L. S. V. & T. Co. was trustee. The action was brought against the L. S. V. & T. Co., trustee for Robert Campbell, Sr., and against Robert Campbell, Sr., and the petition wound up with a prayer for judgment against the F. T. & S. V. Co., trustee for Robert Campbell, Sr., and Robert Campbell, Sr. The process was served upon the L. S. V. & T. Co., trustee for Robert Campbell, Sr., and Robert Campbell, Sr. A judgment by default was rendered and the property sold thereunder, when appellant became the purchaser. Motion was made and sustained setting aside the judgment as a clerical misprision, as authorized under section 763, Civil Code of Practice, from which this appeal is prosecuted. Held—That the judgment was properly set aside, as it was unauthorized under the pleading, and section 90, Civil Code of Practice, which only entitles the plaintiff to the relief prayed for in case of judgment by default. The service upon the L. S. V. & T. Co., by delivering a copy to H. V. Loving, president of the L. S. V. & T. Co., was insufficient to bring before the court the L. S. V. & T. Co. as trustee.

R. T. Colston for appellant.

Harris & Marshall for appellee.

Appeal from Jefferson Circuit Court, Chancery division, No. 1.

Opinion of the court by Chief Justice Burnam.

On the 11th day of July, 1894, the General Council of the City of Louisville ordained that the carriage way of 24th street, from the north line of Broadway to the south line of Magazine street, should be improved by curbing and paving with brick. This work was performed by E. L. Colston under contract with the city. The L. S. V. & T. Co. held title to a thirty-foot lot which abutted the improvement as trustees for Robert Campbell,

Sr. On the 32d day of November, 1894, an apportionment warrant was issued against the trust company as trustee for Campbell in favor of Colston for \$53.41, their proportionate cost of improving the street. This warrant was assigned by Colston to the appellant, Geo. C. Patton, who, on the 12th day of June, 1896, instituted this suit in the Jefferson Circuit Court against the L. S. V. & T. Co., trustee for Robert Campbell, Sr., and Robert Campbell, Sr., to collect the amount thereof. After the usual recitation of facts as to the issuance and delivery of the warrant, the petition wound up with a prayer for a judgment against the F. T. & S. V. Co., trustee for Robert Campbell, Sr., and Robert Campbell, Sr., for \$53.41, and that his lien against the property should be enforced and the lot sold to pay it. Summons issued on this petition against this L. S. V. & T. Co., trustee for Robert Campbell, Sr., and Robert Campbell, Sr., which the return of the sheriff shows was executed by delivering a copy of the summons to H. V. Loving, president of the L. S. V. & T. Co., and on the 21st of September, 1894, a judgment was rendered by default, directing the sale of the lot to pay the apportionment warrant, and at the sale made pursuant thereto appellant became the purchaser at the price of \$77.25. The sale was reported and confirmed in June, 1898, and on the 1st of June, 1901, the Louisville Trust Co., as trustee of Campbell, moved the court to set aside the judgment of September 21, 1897, on the ground that the judgment was a clerical misprision, and in compliance with the provisions of section 763 of the Code. At the same time they paid into court \$94, the amount of appellant's bid, with interest. Their motion was sustained and the judgment set aside and plaintiff's petition dismissed, to which he excepted, and has brought his case to this court for review. Section 90 of the Civil Code provides that "the petition must state facts which constitute a cause of action in favor of the plaintiff against the defendant, and must demand the specific relief to which the plaintiff considers himself entitled, and may contain a general prayer for any other relief for which the plaintiff may appear entitled. If no defense be made, the plaintiff can not have judgment for any relief not specifically demanded. But if defense be made, he may have judgment for other relief under the prayer therefor."

It appears from the recitation of facts above that whilst the plaintiff made the L. S. V. & T. Co. a defendant, it asked a judgment against the F. T. & S. V. Co., as trustee, and took judgment for the sale of the lot as the property of the L. S. V. & T. Co., the summons being served upon that company individually. We are informed by counsel that the letters L. S. V. & T. Co. stand for Louisville Safety Vault & Trust Co., and the letters F. T. & S. V. Co. stand for the Fidelity Trust & Safety Vault Co., two entirely separate and distinct institutions, doing the same general character of business in the city of Louisville. There is no suggestion of any legal authority for proceeding against either of these companies by the use of the initial letters of the various words which constitute their corporate name, nor is there any evidence in the record of any custom which authorized proceedings to be instituted against them in this way. And, in our opinion, the service issued in this way upon H. V. Loving was not sufficient to bring the L. S. V. & T. Co. before the court, especially in view of the fact that the plaintiff in his prayer asked a judgment against a wholly different corpora-

tion, or to have authorized the entry of the judgment complained of. We, therefore, conclude that the trial court properly vacated the judgment on appellee's motion and upon the payment into court of money sufficient to cover appellant's claim dismissed their petition.

Judgment affirmed.

HIBLER v. COMMONWEALTH.

(Filed June 11, 1908—Not to be reported.)

Criminal law—Instructions—Appellant prosecutes this appeal from a conviction for murder and sentence to imprisonment for life in the penitentiary. He insists that the lower court erred to his prejudice in failing to instruct the jury that if they had a reasonable doubt as to whether the defendant had been guilty of murder or manslaughter they should give him the benefit of that doubt, and find him guilty of manslaughter. Held—That the failure to give that instruction was prejudicial, as it was the duty of the court to give instructions embracing all the law of the case, whether defendant requested particular instructions to be given or not.

T. Hiter Crockett and Guy H. Briggs for appellant.

M. R. Todd for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Squire Hibler, who was a convict serving a term of twenty-one years in the penitentiary at Frankfort, Ky., in an altercation with a fellow prisoner, Alex. Smith, killed him, by stabbing him in the heart with a knife. For this offense he was indicted by the grand jury of Franklin county, charged with willful murder. Upon trial he was found guilty by the jury, and his sentence fixed at confinement in the penitentiary for the term of his natural life. His motion for a new trial having been overruled, he has appealed to this court. As a ground for reversal he assigns error of the trial court in failing to instruct the jury that "if they have a reasonable doubt as to whether the defendant has been proven guilty of manslaughter or murder, they shall give him the benefit of that doubt, and find him guilty of manslaughter.

The attorney-general insists that this error was waived by the failure of the defendant to except to the instruction when given. In this we can not concur. In the case of *Buckles v. Commonwealth*, 24 Ky. Law Rep., 571, this court reviewed the whole subject of what exceptions have to be reserved at the time of the ruling of the court in order to be available on appeal, and in regard to the very matter under discussion, said: "But when we come to the question of instructions, a different rule obtains. A trial court is required, without request, to give the law, the correct law, and the whole law. It is not necessary to call the judge's attention to an error; the law requires his attention. It is not only not necessary to specify the error which he is committing, but it is not required that he be requested to give all the law of the case. Again and again, in cases in which the law was given with absolute correctness, so far as the court undertook to give it, this court has, upon a general exception to the correct law thus given, reversed because the court

failed to give law which was not asked for, and to which, as it was not given, and was not given incorrectly, an exception could not apply.

"A general exception does not point out error in law which is not given. It does not even call attention to the fact that it is not given. It does not even specify the error complained of in the law laid down, and yet, under such general exception to instructions given, we reverse for failure to give others which were not asked. There is no policy which requires such an exception, for the exception has no effect, and can accomplish no purpose. Where the reason fails, the rule also fails."

Section 239 of the Criminal Code is as follows: "If there be a reasonable doubt of the degree of the offense which the defendant has committed he shall only be convicted of the lower degree."

This court, in *Arnold v. Commonwealth*, 24 Ky. Law Rep., 1921, and in *Williams v. Commonwealth*, 80 Ky., 313, held that the failure of the trial court to give an instruction substantially embracing the provisions of section 239 of the Criminal Code, where it was applicable, was error prejudicial to the rights of the defendant.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

SMITH v. DOYLE, &c.

(Filed June 11, 1903—Not to be reported.)

Office and officer—Elections—Appellant was on January 8, 1902, appointed to fill a vacancy in the office of assessor of the city of Lexington, and at the November election following appellee Doyle was elected to said office to fill the vacancy. Appellant contested said election on the ground that same was not authorized by sections 148, 152 and 167 of the Constitution, as only a member of congress was authorized to be elected at said election, and no county, State or municipal officers were elected in Lexington at said election. Held—That said election was illegal and void.

R. C. Stoll, Breckinridge & Shelby and Butler Southgate for appellant.

W. P. Kimball for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson.

At the regular election in November, 1899, H. C. Foushee was elected city assessor of Lexington for four years, the term beginning on the first Monday in January, 1900. He qualified, but died in December, 1901, and on January 8, 1902, appellant Smith was appointed to the vacancy. At the regular election in November, 1902, appellee Doyle was elected to fill out the unexpired term, and on November 10 appellant filed his petition enjoining the election commissioners from issuing to Doyle a certificate, on the ground that at the election in November, 1902, a member of congress was elected, but no county, State or municipal officers were then elected in Lexington. The main question in the case arises upon the proper construction of sections 148, 152 and 167 of the Constitution.

In *Neeley v. McCullom*, 107 Ky., 143, it was held that an election in November, 1898, to fill a vacancy in the office of sheriff of Owsley county was

void, as no city, county, district or State officers were elected in Owsley county at that time, but only a member of the house of representatives of the United States. This ruling was followed in *Eversole v. Brown*, 21 Ky. Law Rep., 925, and also in *Wilson v. Brown*, 23 Ky Law Rep., 708. The same question was before us in the case of *Ferguson v. Hackett*, ante, 120, decided at this term. In that case a police judge in the town of Lockport and a marshal were elected at the November election, 1901, and both, after qualifying, resigned. In March, 1902, the vacancies were filled by appointment, and at the November election, 1902, Hackett was elected police judge to fill the vacancy. The only officer to be elected at that election in the district, of which Lockport was a part, was a representative in congress. It was held that the election was unauthorized, and that the vacancy could not be filled at that election. That case is conclusive here. The case of *Shelly v. McCullough*, 97 Ky., 178, does not lay down a different rule. At that election a judge of this court was elected in Louisville and, therefore, an election to fill a vacancy might properly be held at that time in the city. The question that is made in this case was not, therefore, presented there.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

DAVIS v. KELLAR, &C.

(Filed June 11, 1908—Not to be reported.)

Contracts—Appellant owning a lot which cost him \$1,895, made an arrangement with a contractor to erect a house on the lot at practically cost, which was fixed at \$4,350, and that when the house was built they would sell the house and lot and divide the net profits equally. Three thousand dollars of the cost of the building was to be paid to the contractor as the work progressed, and the balance when the house was sold. After the house was built a contract of sale of the property was made to M. for \$7,500, but the purchaser failed to complete the purchase. After the property had been rented out for some time this litigation was instituted for a settlement of the rights of the parties. Held—That an equitable and fair adjustment of the rights of parties can best be had on the basis of the price fixed at the proposed sale to M., as both parties were willing to accept it. The cost of the improvements, \$4,350, added to the cost of the lot, \$1,895, makes \$6,245, this deducted from the price M. was to pay leaves \$1,255, after deducting minor items, leaves \$1,200 as profits, one-half of which, or \$600, is appellant's profits on the transaction. The contractor is also entitled to judgment for the balance owing him, \$1,200, with interest from August 6, 1894, subject to a credit of \$1,000 paid March 20, 1895, \$3,150 having been paid while the work was going on. Interest will be allowed on the \$600 from August 6, 1894.

M. A., D. A. & J. G. Sachs for appellant.

Bodley, Baskin & Flexner for appellees.

Appeal from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Judge Hobson.

In the year 1894 appellant Davis owned a lot on Second street in Louisville, which cost him \$1,895, and an arrangement was made between him and

appellees, who were contractors, about the time he bought the lot, by which it was agreed between them that appellees would erect a house on the lot at cost, or practically at cost, and that when the house was built they would sell the house and lot and divide the net profits equally. A written contract was made between them by which the cost of the improvement was fixed at \$4,350, of which \$3,000 was to be paid by appellant to appellees as the work progressed, and the balance, \$1,350, when the house was sold. They built the house, and after it was finished the property was sold by them to J. H. Millikin for \$7,500. But Millikin declined to take the property on account of a supposed flaw in the title, and they then rented it to him at \$50 a month. When the title was cleared up he declined to take it altogether, and it was then rented to another. This suit was filed after several years to settle the rights of the parties. Appellees contend that they are entitled to one-half of the rents of the property until it is sold, and appellant is entitled to no interest on his money paid for the lot or paid appellees for the improvements. The chancellor sustained this view, and appellant appeals.

It is shown by the evidence that when the parties had agreed upon the terms of the contract appellant's son reduced it to writing, making two copies, which were delivered to appellees to show their attorney. Shortly afterward they returned two papers, which appellant supposed to be the two he had given them, and these papers were signed, but it turned out that one of the papers so signed was drawn by appellees' attorney and one by appellant's son, and they differ somewhat in purport. Much evidence has been taken as to how this occurred, but we do not regard it material in the view we have taken of the case. Both papers set out the contract as above stated, and both the parties agree as to the sale to Millikin, and both were willing to settle on the basis of that sale if it had been carried out. Under all the circumstances we have determined that the ends of justice will be best met by settling their rights now as though that sale had been carried into effect. Appellees can not complain, for they made the contract with Millikin and were then willing to adjust their rights on that basis. Appellant can not complain, as the property was in his name and has been retained by him, and we think the proof fairly shows that it was worth the amount Millikin was willing to pay for it. If we add the cost of the lot, \$1,895, to the cost of the improvements, \$4,350, it makes \$6,245. This, deducted from the price Millikin was to pay, leaves \$1,255 as the profit on this basis. To cover any minor items of cost not given in detail we drop the \$55 and fix the net profit at \$1,200, one-half of which, or \$600, is appellees' profit on the transaction. They are also entitled to judgment for the balance owing them of \$1,200, with interest from August 6, 1894, subject to a credit of \$1,000 paid March 20, 1895, appellant having paid appellees \$3,150 while the work was going on, and \$1,000 afterwards, on March 20, 1895. Interest will also be allowed on the \$600 from August 6, 1894. Judgment will be entered for these sums in favor of appellees, and for a lien on the property to secure their payment.

Appellant also made a contract with appellees to build him a residence on Third street, and asserts a claim for damages against them for \$1,000 for the improper construction of the house. They deny all the items of his account, and plead a counterclaim of something over \$500 for extra work done on the house. The commissioner to whom the case was referred set-off these claims, one against the other, and refused to allow anything on account of either

After a careful reading of the evidence we concur in the commissioner's finding of fact and adopt it.

Appellant will recover cost in this court and appellees in the circuit court. Judgment reversed and cause remanded for a judgment as herein indicated.

CURRY v. COMMONWEALTH.

(Filed June 11, 1908—Not to be reported.)

Criminal law—Evidence—New trial—This is an appeal from a conviction for robbery, and one of the grounds relied on for a reversal is the surprise at the testimony for the Commonwealth. Held—That as appellant made no motion for a continuance on the ground of surprise, and made no affidavit as a basis for such motion, he is not entitled to a new trial on such ground. Appellant was not entitled to a new trial on the ground of newly-discovered evidence, as the same would be merely cumulative. This court can not inquire into the refusal of the lower court to grant a new trial.

B. B. Golden for appellant.

M. R. Todd for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Henry Curry, was indicted in the Clay Circuit Court, with Johnson Roberts, upon the charge of the crime of robbery. Upon the trial Roberts was acquitted and appellant found guilty by the jury, and his sentence fixed at confinement in the State penitentiary for a period of two years; of this he now complains in this court.

The grounds for reversal are, first, error of the court in failing to award him a new trial because he was surprised at the testimony of the prosecuting witness, Jarvis Pinner; second, that the court erred in refusing to grant his motion for a new trial on the ground of newly-discovered evidence. In support of the first ground he filed in the court below his affidavit as to the difference in the testimony of the prosecuting witness in the examining trial and that given in the final trial. At the time the testimony was given by the prosecuting witness, which appellant complained surprised him, he made no motion for a continuance on this ground, or filed any affidavit as a basis for such motion. After the Commonwealth's testimony was in he introduced his evidence, and the fact that he was surprised, appears for the first time in his motion for a new trial. In the case of Jackson v. Commonwealth, 12 Ky. Law Rep., 575, it was held that the surprise of the defendant at the testimony of the prosecuting witness was not ground for a new trial.

Appellant also filed his affidavit, showing the substance of the newly-discovered evidence, and this affidavit demonstrates the fact that what purports to be newly-discovered evidence is merely cumulative. This court, in Williams v. Commonwealth, 18 Ky. Law Rep., 753, held that the discovery of new evidence, which was merely cumulative, was not sufficient ground for a new trial.

An insuperable objection to both of the grounds relied upon to reverse this case is that they only constitute, at best, grounds for a new trial, and we

have held, over and over again, that the refusal of the trial court to grant a new trial was not an error into which this court could inquire. (*Farris v. Commonwealth*, 14 Bush, 368; *Kennedy v. Commonwealth*, 14 Bush, 340; *Terrell v. Commonwealth*, 13 Bush, 246.)

Perceiving no error in the record, the judgment is affirmed.

SIMS v. COMMONWEALTH.

(Filed June 11, 1903.)

Construction of statutes—Attorneys' fees—Appellant was indicted in the Daviess Circuit Court for the offense of soliciting life insurance as agent of a foreign company without having procured a license from the insurance commissioner. An appeal was prosecuted to the Court of Appeals and was regarded as a test case. Hazelrigg & Chenault represented the Commonwealth, on the appeal, having been employed by the insurance commissioner, and they have made a motion for an allowance of \$500 as a fee for their services. Held—That the insurance commissioner has no authority, under section 762, Kentucky Statutes, to employ attorneys to attend to legal matters arising in his department, as under the law it is the duty of the attorney-general to prosecute all appeals in cases taken to the Court of Appeals.

Hazelrigg & Chenault for petitioners.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson.

James Sims was indicted in the Daviess Circuit Court for the offense of soliciting life insurance as the agent of a foreign company without having first procured a license from the insurance commissioner authorizing him to act as such. He was fined \$100; he prosecuted an appeal to this court, and the judgment of the Daviess Circuit Court was affirmed. (*Sims v. Commonwealth*, 24 Ky. Law Rep., 1591.) It was a test case. Messrs. Hazelrigg & Chenault, attorneys, who appeared for the Commonwealth on that appeal, have now entered a motion that this court enter an order allowing them the sum of \$500 as a fee for their services in the case, payable out of the State treasury, on the ground that they were employed by the insurance commissioner to prosecute the case. The only question we deem it necessary to consider is whether there is any authority of law for the allowance. The statutes to which we have referred are the provisions of subdivision 8, chapter 32, Kentucky Statutes, creating the insurance department (section 744-762). The only sections that seem to have any bearing on the case are these: "There is hereby established in connection with the office of auditor of public accounts a department to be designated the Insurance Department, which shall be charged with the enforcement of the laws heretofore passed or which may hereafter be passed relating to insurance." (Section 744.)

"The Governor may allow such reasonable compensation to attorneys or agents of the insurance department for services rendered and for expenses incurred in enforcing the laws relating to insurance companies as he may deem proper: Provided, That in all cases tried by any court of competent jurisdiction such compensation shall be adjudged by the court." * * * (Section 762.)

The statute forbidding an agent of a foreign company from soliciting life insurance without having first obtained a license from the insurance commissioner comes within the purview of section 744, and the commissioner is, under that section, charged with its enforcement. But whether section 762 contemplates the employment of attorneys to prosecute criminal cases or appeals in those cases in this court is a different matter. These sections must be read in connection with the other provisions of the Kentucky Statutes. By section 118 it is made the duty of the attorney-general to attend in behalf of the Commonwealth to all cases and proceedings in which she may be interested, except where it is made the duty of the Commonwealth or county attorney to represent the Commonwealth. And by section 117a a taxed attorney's fee of \$20 is provided in each case in which it is his duty to represent the State, to be taxed against the unsuccessful party and paid into the State treasury. By section 118 it is the duty of the Commonwealth attorney to prosecute all violations of the criminal and penal laws in the circuit court. In section 354 of the Criminal Code the same provision, in substance, is made as in section 117a, Kentucky Statutes, as to the taxed attorney's fee, and a like provision is made in section 356 as to the damages awarded in such cases. These statutes taken together clearly make it the duty of the attorney-general to prosecute appeals in criminal and penal cases, taken by the defendant to this court, and when the State had thus provided its legal machinery it is hard to conceive that it was contemplated that the insurance commissioner should employ counsel in this court to discharge the duties imposed by law upon the attorney-general. The rule is elementary that claims upon the public treasury are never allowed on doubtful inference. To open the door of the treasury, there must be a clear warrant of law for the payment of the claim. It is also elementary that the provisions of the different sections of the revision, known as the Kentucky Statutes, must be read together, and that one section will not be read in conflict with another, if this can be fairly avoided. Under this rule we do not think that section 762 can be held to warrant the employment of counsel in this court to represent the Commonwealth on appeals taken in criminal or penal cases. (*Coulter, Auditor v. Denny*, 23 Ky. Law Rep., 1619.)

The motion for an allowance is, therefore, overruled.

TRAYNOR v. BECKHAM, GOVERNOR.

(Filed June 11, 1903.)

Office and officer—Vacancy—Constitutional law—In March, 1903, a vacancy occurred in the office of police judge of Nicholasville, a city of the fourth class, and thereafter the board of council appointed appellant to fill the vacancy, and his certificate was presented to the governor, who refused to issue him a commission. Appellant instituted this action for a mandamus to compel the governor to issue a commission to him. One of the questions presented on this appeal is: "Did the board of council have the right to make the appointment?" As sections 3551 and 3553, Kentucky Statutes, provide for filling a vacancy in the office of police judge, they control because section 3758 authorizes the governor to fill a vacancy in the office of police judge where there is no provision of law for filling the same, it follows that the board of council had the right to fill the vacancy. Under sec-

tion 3758, Kentucky Statutes, it is made the duty of the governor to issue a commission to a police judge who has been duly appointed or elected. The court is of the opinion that the act of issuing the commission which is enjoined by the law is purely ministerial, and the writ of mandamus will lie to compel the governor to perform it. But when the law imposes a duty on the chief executive of a State which is ministerial in character, involving neither discretion nor judgment, a mandamus will lie to compel him to perform it. But a mandamus will not lie against a governor to compel the exercise of governmental, political or discretionary powers.

N. L. Bronaugh for appellant.

A. O. Stanley for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Paynter.

In March, 1903, a vacancy occurred in the office of police judge of Nicholasville, a city of the fourth class, by the death of the incumbent, T. B. Crutcher. On the 20th of that month the board of council appointed the appellant, John Traynor, to fill the vacancy, and issued to him a certificate of appointment. On the 23d of the same month it was presented to the Hon. J. C. W. Beckham, with the request that, he, as governor of the Commonwealth of Kentucky, issue to him a commission authorizing him to enter upon the discharge of the duties of the office to which he had been appointed; the governor declined to issue the commission. This action was instituted by the appellant against the appellee, asking that a mandamus be issued to compel he governor to issue a commission to him.

Three questions are presented on this appeal: First. Did the board of council have the right to make the appointment? Second. Was it the duty of the governor under the law to issue the commission? Third. Have the courts authority to issue a mandamus against the governor to compel him to issue the commission?

Among other provisions section 152 of the Constitution contains the following: "Vacancies in all offices for the State at large, or for districts larger than a county, shall be filled by appointment of the governor; all other appointments shall be made as may be prescribed by law." It will be observed that by this provision of the Constitution the exclusive authority is conferred upon the governor to fill vacancies in all offices for the State at large, or for districts larger than a county. Vacancies in other offices shall be filled as prescribed by law, which means in such manner as the general assembly may provide.

Section 3551, Kentucky Statutes, reads as follows: "If a vacancy shall occur in any office which the board of council has the right to fill by appointment, such vacancy may be filled by the board for the remainder of the term of such vacant office."

Section 3552 reads as follows: "If a vacancy shall occur in any elective office, including the office of councilman, such vacancy shall be filled by the board of council, subject to the provisions of the Constitution applicable thereto. If the election of any elective officer in cities of this class be contested, such contest shall be conducted and determined as provided by law in cases of the election of county officers."

The office of police judge may be filled by election, or by appointment of

the board of council, as the board may determine by ordinance. (Section 3510, Kentucky Statutes.) Where the board of council shall have provided by ordinance, as required by section 3510, for the appointment of police judge, then, under section 3551, if a vacancy occurs, the Board of Council may by appointment fill it for the rest of the term. If it is made elective, then the board of council is authorized to fill it subject to the provisions of the Constitution applicable thereto. Whether the office of police judge is filled by election or by appointment, if a vacancy occurs therein, it is to be filled by the board of council. Sections 3551 and 3552 were enacted subsequent to section 3758, which reads as follows: "The following officers shall have commissions issued to them by the governor, that is to say: Secretary of state, register of the land office, auditor of public accounts, treasurer, commissioner of agriculture, labor and statistics, superintendent of public instruction, judges of the Court of Appeals, clerk of the Court of Appeals, judges of the circuit courts, county judges, police judges, railroad commissioners, Commonwealth's attorney, justices of the peace, notaries public and all officers of the militia of rank and grade higher than and including the rank and grade of captain. Should a vacancy occur in any of said offices, by reason of the death, resignation or removal of the officer, or from any other cause, or should a like vacancy occur in any other office where there is no provision of law for filling same, such vacancy shall be filled by the appointment of the governor, subject to the provisions of the Constitution applicable thereto."

As sections 3551 and 3552 provide for the filling of a vacancy in the office of police judge, they control, because section 3758 only authorizes the governor to fill a vacancy in the office of police judge, "where there is no provision of law for filling the same." It follows, therefore, the board of council had the right to fill the vacancy.

When a police judge has been duly appointed or elected, it is made the duty of the governor by section 3758 to issue such one a commission, authorizing him to enter upon the discharge of the duties of the office. For it is written in that section that certain officers (including police judges) "shall have commissions issued to them by the governor."

The third, and last, question involved is more delicate and difficult of solution. It is one upon which the supreme courts of the States of the Union hold widely divergent opinions, which have been expressed in a plausible, scholarly and forceful manner. These differences of opinion result from the fact that our National and State governments are divided into judicial, legislative and executive branches. To maintain the independence and efficiency of each, one must not usurp or encroach upon the rights of the others; each must steadfastly pursue its constitutional and other duties with due regard and consideration of the other branches of government. In the matter of enacting laws the legislative department is supreme, and the other branches must obey them. It is the business of the executive department to enforce the laws thus enacted. To determine whether legislative enactments are violative of the organic law, to interpret the laws and decide controversies, is the peculiar province of the judiciary. It is no encroachment upon the rights of the congress for the Federal courts to determine whether or not its enactments are constitutional. Those courts time and time again have done so.

Neither is it an encroachment upon the rights of the legislative branch of State governments for their courts to declare legislative acts to be in violation of State Constitutions. State courts frequently do so. The assertion of individual rights often calls in question the validity of legislative enactments, and the courts never allow an unconstitutional enactment to stand in the way of the enforcement of such rights. This court has likewise had in review executive acts in determining the rights of individuals, and has not failed to determine whether they were valid or invalid. In *Bruce v. Fox*, 1 Dana, 447, the court decided the act of the governor in appointing Horatio Bruce Commonwealth's attorney to be void. In *Justices of Jefferson County v. Clark*, 1 Mon., 86, it held the appointment by the governor of a justice of the peace to be void. In *Page v. Hardin*, 8 B. M., 648, the court held invalid the act of the governor declaring a vacancy in the office of the secretary of state and appointing another to fill it. The courts regard that they are acting within their appropriate sphere under our system of government when they pass upon the constitutionality of an act, or declare upon the validity of an act of the executive department. In those cases the court did not pretend to have direct control over the action of the legislative or of the executive departments. They passed upon the validity of the act affecting private rights. Attention has been called to instances of the exercise of judicial power over legislative and executive acts to show that the judiciary has in certain cases reviewed and held void such acts.

We pass from the general observations to the question more directly before us. The supreme courts of some of the States have held that a mandamus will not lie to compel a governor to perform a ministerial act imposed by law, refusing to discriminate between those duties which are governmental and political in their character, involving discretion and judgment, and those which are ministerial, the performance of which no judgment or discretion need be exercised. The supreme courts of other States discriminate between those duties which are governmental or political in their character, involving discretion and judgment, and those which are ministerial, the performance of which no judgment or discretion need be exercised. In the latter view we concur. All courts agree that a mandamus will not lie against a governor to compel the exercise of governmental, political or discretionary powers.

In *Page, Second Auditor v. Hardin*, 47 Ky., 648, the court said: "Where, by the Constitution or by the law, the governor has a discretionary power, or where on any ground his act is made conclusive as to all rights involved it is of course not within the province of a court to inquire into the propriety or impropriety of the act. Such a power controls all rights which it may affect, and a properly authenticated act done in pursuance of it can not be questioned, for the reason that there can be no legal right coming in conflict with it. Rights dependent upon a discretionary power can not exist in opposition to it, but terminate at its will: The question, however, whether there is such a power in a given case, or whether any particular power or act is of the character referred to, is a judicial question, whenever the right in litigation before a judicial tribunal depends upon it and require its decision." * * *

When the law imposes a duty on the chief executive of a State, which is

ministerial in character, involving neither discretion nor judgment, a mandamus will lie to compel him to perform it.

Section 477, Civil Code, reads as follows: "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law, and is granted on the motion of the party aggrieved, or of the Commonwealth when the public interest is affected."

The language of the Code embraces all ministerial and executive officers; the governor is not excepted from its operation. No man is or should be above the law. That he should not be is in accord with the spirit of a republican form of government. There is no royal prerogative or official position in this country which exempts one from yielding obedience to the law. There is nothing in the Constitution which forbids the suing of the governor. While courts can not control executive acts of the governor or executive powers conferred upon him, yet they can control ministerial powers. Ministerial power is certainly inferior to judicial power. If one officer can be controlled in its exercise, why not another; it may be conferred upon one person as well as another. Whether it be conferred upon a governor of a State, or some minor official is the recipient of it, the exercise of it does not require the exercise of judgment or discretion any more by the one than the other. The question as to whether a mandamus will lie is not determined by the office of the person against whom it is sought, but the nature of the thing to be done.

In *Marbury v. Madison*, 1 Cranch, 170, the court said: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

It is no more an invasion of the executive department, whether the writ be issued against the chief executive, than it is when issued against a subordinate executive officer. The difference is only in degree, not in principle. In Great Britain the king is sued, and it is said he always complies with the judgment of the court. The State and Federal governments are governments of laws, not of men. The citizen only gets the shadow of civil liberty, not its essence, when he has a legal right and is denied the right to enforce it. The greatest duty of government is to afford such redress.

In *Kendall v. United States*, 12 Peters, 610, the court recognized the doctrine stated by Chief Justice Marshall in *Marbury v. Madison*, and said: "The mandamus does not seek or control the postmaster general in the discharge of any official duty partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control. * * * There are certain political duties imposed upon many officers in the executive department, the discharge of which are under the direction of the president. But it would be an alarming doctrine that congress could not impose upon an executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution, and in such cases the duty and responsibility grows out of and is subject to the control of the law, and not to the direction of the president. And this is em-

phatically the case where the duty enjoined is of a mere ministerial character. The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding a particular case bring it within the law which permits the writ to be issued, where a mere ministerial duty is imposed upon the executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances a mandamus will lie to compel him to perform his duty."

In *Page v. Hardin* the court said: "There can be no reasonable ground for denying it the power and duty of declaring upon the legal validity of any act of the executive department, whether done by an inferior or by the supreme executive officer. The executive department and all of its officers are as much bound by the constitutional laws as the legislative, and have no more power to violate the right of individuals secured by the laws. The power obviously judicial of ascertaining and enforcing the legal rights of individuals, is in effect the power of protecting those rights from violation by the act or authority either of individuals or of the legislative or executive departments, and it necessarily involves the function of deciding every case properly before it, what are the legal rights of the parties, and how far in point of law, that is, under the Constitution and laws, those rights have been affected by any and every act relied upon for their support or destruction." * * *

In *United States v. Blaine*, 139 U. S., 306-319, the court said: "The writ of mandamus can not issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty, involving the exercise of judgment or discretion. When by special statute, or otherwise, a mere ministerial duty is imposed upon the executive officer of the government, that is, a service which they are bound to perform without further question, then if they refuse, the mandamus may be issued to compel them."

By some of the courts which hold that a mandamus will not lie it is urged that if the governor opposes the judgment of the court it can not be enforced, because he has entire control of the militia. A court should not anticipate that the governor will not obey its judgment. If there was a well-grounded fear that a governor would resist the enforcement of the judgment, that should not excuse the court for a failure to perform its duty, by adjudging to an individual the rights which the law of the land vouchsafed to him. By some courts it is urged that the only relief that can be obtained is by impeachment or an appeal to the electors. These courses may result in the removal of the governor from office, or in supplanting him by another, but it absolutely gives no relief to the individual, whose rights have been invaded or denied. He can only appeal to the judiciary for the protection of his individual rights; the public may have recourse to other remedies. On the general question of the rights of the judiciary to compel executive officers by writ of mandamus to perform ministerial duties, we quote with approval from the dissenting opinion of Chief Justice Agnew in *Hartcraft's Appeal*, 85 Pa. St., 433. He said: "It is said the governor is the representative of the people, and, therefore, not responsible. This is true of executive duties, for therein the Constitution, the adopted will of the people, is his warrant of authority, but it is untrue of judicial powers, for therein the judiciary represents the people by the same warrant of authority; and if he violate the law, which it is

the province of the judiciary to enforce by their authority, he is liable to the law. In a government of law, instituted by a free people for their own benefit, there is no royal prerogative to do anything wrong, and, therefore, there can be no representation of their dignity, such as can strike down their law and prevent its administration by its appropriate functionary."

The court is of the opinion that the act of issuing the commission, which is enjoined by the law, is purely ministerial, and the writ of mandamus will lie to compel the governor to perform it. This opinion is not predicated upon the idea that the governor does not desire to comply with the statute, but to announce the rule which the judiciary will follow. The governor only desires to be advised as to the proper interpretation of the statute, and when interpreted will cheerfully discharge his duty under it.

The judgment is reversed for proceedings consistent with this opinion.

Whole court sitting.

Judges O'Rear and Barker dissenting from so much as awards a mandamus.

WARREN DEPOSIT BANK v. FIDELITY AND DEPOSIT CO. OF MARYLAND.

(Filed June 12, 1903.)

Surety—Fraud—Appellee became bound as surety on a bond of P. as cashier of appellant, by which it agreed to be bound to the extent of \$20,000 for such loss as it might sustain by any fraudulent act or acts committed by P. in the performance of his duties as cashier. An action was instituted upon this bond to recover the sum of \$20,000. One of the defenses relied on is that previous to becoming bound as surety on said bond said bank, by its president, made certain material representations concerning the account and conduct of said P., which he signed as a condition precedent to their undertaking. The same conditions were referred to in said bond. Said representations were false, but appellant in its reply admitted that they were false, but denied the authority of the president to make such representations. Held—That appellant having accepted the result of its president's action in procuring the bond for it, and being required to take notice of all material statements and conditions contained in the bond, appellant is as much bound by these statements and the concurrent representations made by its president and referred to in the bond, as if his actions and statements had been expressly authorized by the most solemn and specific entry of record upon the minutes of the board of directors' book of proceedings. This contract was one of insurance, and these representations were material to the risk, and, therefore, warranties, and same were not changed to mere representations by reason of section 639, Kentucky Statutes, and the bond was invalid for this reason. A peremptory instruction for defendant was properly given.

C. U. McElroy and Lewis McQuown for appellant.

Fairleigh, Straus & Fairleigh, St. John Boyle and Sims & Grider for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge O'Rear.

This action was brought in the Warren Circuit Court by the Warren De-
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posit Bank against Luther R. Porter and the appellee, Fidelity and Deposit Co., of Maryland, upon a bond given to the bank by Luther R. Porter as principal and the surety company as his surety, conditioned that the surety company should, within three months after the receipt of satisfactory proof, reimburse the bank to an amount not exceeding \$20,000 for such pecuniary loss of money, securities or other personal property belonging to the bank as the bank might sustain by any fraudulent act or acts committed by Porter in the performance of the duties of cashier of the bank during the term beginning May 1, 1900. Upon the trial, on motion of the surety company, the court, at the conclusion of the evidence for the plaintiff, peremptorily instructed the jury to find for the defendant. Accordingly the jury so found, and a judgment was entered dismissing the petition as to the surety company, and from that judgment this appeal is prosecuted.

The petition avers the fact that Porter was cashier of the bank, the execution of the bond and its terms, and then avers the breach of the bond as follows: "That while the said bond was in full force and effect, and within the term beginning May 1, 1900, and ending May 1, 1901, the plaintiff suffered pecuniary loss by reason of the fact that the defendant, Luther R. Porter, fraudulently and unlawfully, while acting as cashier aforesaid, and in violation of his duties as such cashier, embezzled, appropriated and used twenty thousand (\$20,000) dollars of the money of the plaintiff, and fraudulently failed and refused, upon demand, to pay the same, or any part thereof, to plaintiff, or, in whole or in part, to reimburse the plaintiff for said loss, or to any one for its use and benefit."

The answer of the surety company, beside traversing the allegations of the embezzlement charge in the petition within the period covered by the bond, pleaded a number of matters in avoidance of its liability. The only one of them that we have found it necessary to determine in this case is contained in the fourth paragraph of the answer, which avers that, before making the bond, the defendant required the bank to answer certain questions in writing relating to the duties and accounts of Porter, cashier: that the bank, through and by its president, C. G. Smallhouse, did make and deliver to the company written answers to such questions; that the bond sued on was made upon the faith of such answers, and that the company believed them to be true; that the written paper upon which the questions were propounded and answers made, and the bond itself, provided that the answers to the questions should be conditions precedent and the basis of the bond; that certain stated answers which were material were untrue, and that, therefore, the bond is void.

The reply by its third paragraph denies that the bank made the answers to the questions propounded by the company, but admits that its president did so, and that the answers were false in fact, although, as it avers, the president did not know the answers were false at the time he made them. The effect of the reply in this respect is to deny the authority of the president to make the answers and to contend that his act did not bind the bank. The written questions and answers delivered by Smallhouse, the president of the bank, to the surety company, and alluded to in the pleadings above mentioned, are set out at length by the pleading. Although the special judge who tried this case refused to permit this evidence to go to the jury, and

predicated his peremptory instruction upon other facts, we are of opinion that this matter is sufficiently pleaded to have justified its consideration by the court in determining whether the case should have gone to the jury, for it is not material what was the basis of the trial court's action in granting the peremptory instruction, if it should have done so for any reason apparent upon the state of the record.

At the time the bond sued on was made C. G. Smallhouse was the president of the bank, and had been for many years. Before the bond was made the surety company required the bank to answer in writing certain questions relative to the duties and accounts of Porter as cashier, in order that it might determine whether it would or would not make the bond which had been applied for. For this purpose the surety company sent to the bank, or to its president on its behalf, a printed form containing the questions which it wished the bank to answer. This printed form was returned to the surety company with the answers to the several questions written thereon, and signed "Warren Deposit Bank, by C. G. Smallhouse, President, Official Capacity."

The printed form was appended to the following communication:

"Baltimore, April 18, 1900.

"To the President of the Warren Deposit Bank,

"Bowling Green, Ky. :

"Application has been made to this company to issue a bond of security for Mr. Luther R. Porter, cashier, in your service, to the amount of \$20,000.

"The company desires to have answer to the following questions, and these answers will be taken as the basis of the bond, if issued.

"Very respectfully yours,

"EDWIN WARFIELD, President."

The printed form closed with this statement and signature:

"It is agreed that the above answers are to be taken as conditions precedent and as the basis of the said bond applied for, or any renewal or continuation of the same that may be issued by the Fidelity and Deposit Co. of Maryland to the undersigned, upon the person above named.

"Dated at Bowling Green, this 14th day of April, 1900.

"WARREN DEPOSIT BANK,

"By C. G. SMALLHOUSE,

"President, Official Capacity."

Among the questions which were required to be, and which were, answered by the president of the bank on its behalf were the following:

Has the applicant uniformly given satisfaction in his personal conduct and habits? Yes,

Has he kept his accounts correctly and made proper settlements of all cash and securities entrusted to his care? Yes,

At what date and by whom were applicant's books and accounts (including cash, securities and vouchers, if any), last inspected and examined. Board of Directors, Sept. 6, 1899,

by--

Were they at that time in every respect correct and proper securities and funds on hand to balance? Yes,

It is admitted that these answers were false; that in fact at the time they

were made Porter had not kept his accounts correctly, or made proper settlements of all cash and securities entrusted to his care, and at the date of the last inspection of the books, on September 6, 1899, they were not correct in every particular, nor were proper securities and funds on hand to balance. On the contrary, at that time Porter had abstracted from the bank, and had used without its consent or the knowledge of its board of directors, about \$30,000 of its cash. This fact was apparent at that time from even a casual inspection of the books of the bank and the counting of its cash on hand and inspection of its securities. The evidence did not show, nor was it pleaded, that any one acted for the bank in the matter of contracting for this bond other than its president, Smallhouse. The only person who is shown to have acted for the bank at all in this transaction was its president.

It is pleaded, and most earnestly argued on behalf of appellant, that the president had not the inherent power by virtue of his office to represent the bank in this matter, and that it was not a duty pertaining to his office, either by the powers conferred by the charter or by-laws of the bank, or by its usage or custom, or by vote or resolution of its board of directors. It is claimed that, on the contrary, the board of directors alone had the power and authority under appellant's charter and under the law to represent the bank in the transaction of contracting bond for its cashier, and of making statements and representations to the surety on behalf of the bank regarding same.

While it may be true that, as a matter of law, answering questions such as those propounded to the president in this case, and making the representations therein contained, were not within either the actual or the apparent scope of the duties of that office, and that the president was not authorized expressly, either by the charter or by anything appearing upon the minutes of the proceedings of the board of directors, to make such representations on behalf of the bank, yet it does not follow from these premises that the president did not act in the bank's behalf in making them.

There is no principle of the law of agency truer or more familiar than that although an agent may act in fact without authority, express or implied, from his principal, his act may become binding upon the latter by its ratification. The contracting parties in this matter were three, to-wit, the bank, Porter, its cashier, and appellee, his surety. Each of these contracting parties, by the terms of the bond sued upon, engaged to one or both of the others to do or not to do certain things. To have been binding upon any of them it must have been executed, or its execution must have been ratified, in a manner binding upon each.

Appellant asserts, by seeking to recover upon the bond, that the contract was made on its behalf, and that it was authorized. It is not claimed, nor is it attempted to be shown, that the board of directors acted at all in that matter so far as any proceeding by their body is concerned. The action of Smallhouse then was that which represented the bank in that transaction. If the bank would avail itself of the benefit of his actions, it must take them subject to his representations and statements, that induced the execution of the contract by the surety. Furthermore, the bond itself recites: "Whereas, the employer has delivered to the company certain statements and declarations relative to the duties and accounts of the employe, which, together

with any statements or declarations hereafter required by or lodged with the company, do, and shall, constitute an essential part, and form the basis of this contract."

If the board examine the bond at all, they are bound to have taken notice of these statements, which is enough to have reasonably put them upon inquiry as to the character of the statements therein referred to. But whether they actually examined the bond or not, they must, in all fairness and reason, be held to have assented to its statements, when appellant elects to claim a recovery upon it. It manifestly would not do to impose upon one party to a contract an obligation in favor of another, which was made to depend upon a condition stated in the contract, and yet relieve the latter from the condition because he had not noticed it. Having accepted the result of its president's action in procuring the bond for it, and being required to take notice of all material statements and conditions contained in the bond, appellant is as much bound by these statements and the concurrent representations made by its president and referred to in the bond as if his action and statements had been expressly authorized by the most solemn and specific entry of record upon the minutes of the board of directors' book of proceedings.

We can not regard the case of *American Surety Co. v. Pauly*, 170 U. S., 133, as announcing a different rule from the above. In that case it was shown that the president of the bank, who made the representations as to the character, etc., of its cashier, was in collusion with the cashier to loot the bank, and that these statements were but a step made toward consummating that end. It would scarcely need such eminent authority to sustain the conclusion that when an agent steps aside from the duty enjoined by his position to commit a fraud upon his principal, that his representations and acts in that affair are not those of the principal. (*Guarantee Co. of North America v. Mechanics Saving Bank and Trust Co.*, 183 U. S., 402.)

In *Rice, & Co. v. Fidelity and Deposit Co.*, 103 Fed. Rep., 427, as to the effect of the representations contained in a similar statement to that now being considered, the United States Circuit Court of Appeals, upon a very full consideration and treatment of the subject, thus fairly stated the law: "The parties expressly agreed in writing that the statement of the employers was a part of their contract that it should be not only the basis of the bond, but a condition precedent, without compliance with which there could be no recovery upon the obligation. The conclusion is irresistible that under this agreement the declaration in this case was of the nature of a warranty and not of a representation, and our conclusion is: A written statement made by employers to the obligor in a bond of indemnity against the dishonest acts of their employe, to the effect that they will invariably apply certain checks to his action, which the parties expressly agree, by the statement itself and by the bond, shall be the basis of the latter, and a condition precedent to a recovery upon it, is of the nature of a warranty, and not of a representation, and a failure to comply with the promise it contains is fatal to an action upon the bond. (*Indemnity Co. v. Wood*, 19 C. C. A., 264, 73 Fed., 81, 84; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.*, 36 C. C. A., 671, 95 Fed., 111, 113.)"

Appellant contends that the provisions of section 639 of Kentucky Stat.

utes, as follows: "All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentations, unless fraudulent or material, prevent a recovery on the policy," should apply, and that the representations contained in the statements made by Smallhouse can not under that section be treated as warranties.

Previous to the enactment of that section of the statute, and in those jurisdictions where similar statutory provisions do not exist, such representations were held to be warranties, and, consequently, if untrue to any extent, whether or not material, the policy or contract was invalidated. The case of *Rice v. Fidelity, &c. Co.*, supra, proceeds upon that theory, and its citation is subject to the statutory modification obtaining in this State. The provisions of the section just quoted ought to be applied to this class of contracts. It is found in the chapter of the statutes relating to insurance. The nature of the contract beside is so clearly akin to, if indeed, it is not a species of insurance, that its classification with other matters of insurance was likely enough purposely done by the legislature. It is not material, though, whether the statute does or does not apply to bonds made for sureties, as the statute, properly construed, in no way affects the result and ultimate effect of a materially false representation. (*Farmers & Drovers Ins. Co. v. Curry*, 18 Bush, 312, modified in its extent by *Germania Ins. Co. of New York v. Rudwig*, 80 Ky., 228.)

That these misrepresentations were material to the risk in this case there can be no manner of doubt; that they were indisputably false is equally clear. Whether they were fraudulent or not is not, therefore, particularly material.

We are of opinion that the effect of these material misrepresentations was to invalidate the bond.

The judgment is, therefore, affirmed.

The whole court sitting, except Judge Settle.

COMMONWEALTH v. McCARTY.

(Filed June 12, 1903—Not to be reported.)

Criminal law—Indictment—Insufficient indictment for suffering gaming on premises.

Clifton J. Pratt and M. R. Todd for appellant.

Hall & McLean for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

The appellee was indicted by the grand jury of Kenton county for suffering gaming on his premises. That part of the indictment necessary for the determination of this appeal is as follows: "The said D. Mason McCarty, on the — day of February, 1902, in the county and city aforesaid, and for one year next before and up to the finding of this indictment, did unlawfully suffer and permit to be set up, kept, operated and conducted a game, contrivance, machine, commonly known as nickel-in-the-slot-machine, in a room

in a house near the Bank Lick Station, in said county, the room and house being then and there in the possession and under the control of the said D. Mason McCarty, whereby and whereon divers persons (naming them) were, and are, accustomed to play, wager, bet, win and lose money thereon, etc."

The appellee demurred to this indictment, and the court sustained the demurrer, and the Commonwealth has appealed. The appellee contends that the indictment does not charge him with any offense. We are of the opinion that the court properly sustained the demurrer.

The words, "whereby and whereon divers persons (naming them) were, and are, accustomed to play, wager, bet, win and lose money thereon, etc.," do not charge that the persons named played, wagered, bet, won or lost any money or other thing on this machine, when in appellee's house, or in any house under his control, or that such persons, or any persons engaged in playing, betting or won or lost anything of any value thereon with the knowledge of or by the permission or sufferance of the appellee.

Wherefore, the judgment of the lower court is affirmed.

ILLINOIS CENTRAL R. R. CO. v. COMMONWEALTH.

(Filed June 12, 1908—Not to be reported.)

Criminal law—Failure of railroad company to furnish separate coaches—Appellant was indicted and convicted under section 795, Kentucky Statutes, for failing to furnish separate coaches for white and colored passengers, from which this appeal is prosecuted. The proof on the trial showed that a coach for white passengers and a caboose not equal in convenience or accommodations to the car furnished for white passengers was provided for colored passengers, and that but one colored passenger was traveling in the caboose at the time charged. Held—That appellant was not guilty as charged in the indictment, and it was not indicted under section 796 for discriminating in accommodations.

Pirtle & Trabue and P. H. Darby for appellant.

McKenzie R. Todd and Clifton J. Pratt for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant was indicted under section 795 of the Kentucky Statutes for failing to furnish separate coaches for the transportation of white and colored passengers on one of their trains, known as the Princeton and Paducah accommodation, on which both white and colored passengers were carried and accustomed to travel. The case was submitted to the court under an agreed statement of facts which disclose that there was attached to one of appellant's freight trains a passenger coach which was used exclusively for white passengers and an extra caboose car, which was placed in front of it, for the use of colored passengers; that the caboose had seats at the side with cushions upon them, and was the same character of car as that usually attached to freight trains for the use of the train hands, and such passengers as choose to travel by freight trains; that there was no car for colored passengers connected with the train which was equal in convenience or accommodations to the car furnished for white passengers; that the car ordinarily

used for this purpose had been taken to the shops at Paducah for repairs; that only one passenger occupied the caboose on the trip for which the defendant was indicted. Under this state of fact the trial court found the defendant guilty, and imposed a fine upon it of \$500, and they have appealed.

The indictment is not drawn under section 796 of the Kentucky Statutes, for discriminating in the quality, convenience or accommodations in the coaches set apart for white and colored passengers, but under section 795, for failing to furnish separate coaches.

The agreed facts show conclusively that defendant is not guilty of violating section 795, under which the indictment was framed, and the judgment must, therefore, be reversed and cause remanded for further proceedings consistent with this opinion.

CULVER v. CULVER'S ADM'R.

(Filed June 12, 1903—Not to be reported.)

Title—Adverse possession—Statute of limitation—W. and J. were brothers, who inherited a joint interest in land from their father, and J. claimed to hold said land openly and adversely to his brother for 30 or 40 years, and claiming to have purchased same more than fifteen years before this action was brought. Held—That the claim of J. will not be disturbed.

John D. Wickliffe for appellant.

Nat W. Halstead for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge O'Rear.

William Culver and Jacob Culver were brothers. Their ancestor owned a tract of land which descended to his children, including the two just named. Jacob Culver bought the interest of all the others except Wm. Culver, and took conveyances, and complete possession of the land. He continued to occupy it and claim solely as his own for 30 or 40 years before his death. During that time, and for more than fifteen years, he had claimed that he had bought William Culver's interest, and that he held same exclusive of William Culver's claim. They lived within a short distance of each other, within a mile or so. Jacob Culver's claim was open and notorious. His possession was actual, adverse and hostile especially to William Culver. After the death of Jacob, William has brought a suit to have set apart to him his undivided interest as an heir of their father in the lands. The court dismissed his petition.

Under the circumstances shown we are convinced that, although originally the parties were co-parceners and joint tenants, and that although Jacob Culver's possession under those circumstances unexplained would have been held to be amicable to William Culver, yet it was such that it was in fact adverse and hostile to William Culver's claim and right, and after the statutory bar of fifteen years Jacob Culver's title became complete without regard to whether he had or not bought William Culver's interest. (*Gossoms v. Donaldson*, 18 Ben Mon., 241; *Russell v Marks*, 3 Met., 45.)

The judgment is affirmed.

ILLINOIS CENTRAL R. R. CO. v. COMMONWEALTH.

(Filed June 12, 1908—Not to be reported.)

1. Criminal law—Failure of railroad company to whistle or ring its bell at a crossing—This appeal is prosecuted from a conviction of appellant under section 786, Kentucky Statutes, for failure to sound its whistle or ring its bell at a highway crossing, and it is urged as error that the court failed to instruct the jury at the close of the testimony to find for defendant. Held—That the court properly refused to peremptorily instruct the jury as the evidence was conflicting.

2. Evidence—When a party fails to except to evidence when it is introduced, or does not make a motion to exclude it until after the conclusion of all the testimony in the case, his motion comes too late.

Pirtle & Trabue and P. H. Darby for appellant.

S. C. Molloy, C. J. Pratt and M. R. Todd for appellee.

Appeal from Lyon Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant was indicted and convicted under section 786 of the Kentucky Statutes for failure to sound its whistle or ring its bell at a highway crossing, and fined \$250 by the verdict of the jury. Upon this appeal it asks a reversal of the judgment rendered pursuant thereto on two grounds: First. Because the trial court at the conclusion of the testimony refused to exclude parol testimony that the road was a public highway, on the ground that it was not the best evidence. The bill of exceptions fails to show that the testimony complained of was excepted to at the time it was introduced, or that any motion was made by appellant to exclude it until after the conclusion of all the testimony in the case. The motion came too late. (*Helton v. Commonwealth*, 16 Ky. Law Rep., 464.) Second. Because of the alleged error of the court in refusing, at the conclusion of the testimony, to instruct the jury to return a verdict for the defendant.

The testimony in the case was very conflicting, and witnesses for the Commonwealth conclusively prove the alleged offense, while the testimony of the employees of the defendant is to the effect that the proper signals were given. In this conflict of testimony the question was one of fact for the determination of the jury. These are the only errors complained of in the brief of counsel, and on examination of the record we perceive none which authorize a reversal.

Wherefore, the judgment is affirmed.

HARRIS v. COMMONWEALTH.

(Filed June 12, 1908—Not to be reported.)

1. Criminal law—Continuance—This appeal is prosecuted from a conviction for manslaughter. A reversal is asked on the ground that the court erred in refusing to grant appellant a continuance; also in refusing to permit the affidavit filed to be read as the deposition of absent witnesses. Held—That the court did not err in refusing to grant a continuance as the court had allowed ample opportunity for appellant to obtain the attendance of his

witnesses, nor was it error to refuse the affidavit to be read as it did not disclose that appellant had exercised the proper diligence in obtaining the attendance of his witnesses.

2. Evidence—The declarations of appellant just before the shooting were competent as showing his state of mind and the anger he manifested, as well as to illustrate the motive with which the homicide was committed. It was competent to prove that the deceased was a deputy sheriff, although same was not material. It was not error to exclude the question asked a son of appellant who was indicted with his father if he had not been tried and acquitted. Questions laying foundation for contradiction are competent. It is never competent to inquire of a witness testifying in regard to character as to particular acts or instances of crime.

3. Limiting argument—The court did not err to appellant's prejudice in limiting the time of argument of the case to two hours on a side. No fixed rule or limit can be made to apply to all cases alike, but the power to regulate and restrict argument must nevertheless be left with the trial courts.

B. B. Golden, Wm. Lewis, H. C. Eversole and T. G. Lewis for appellant.

M. R. Todd and C. J. Pratt for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Lewis Harris, was indicted and tried in the Leslie Circuit Court for the murder of J. F. Napier. The jury returned a verdict finding him guilty of voluntary manslaughter. A new trial was refused him by the lower court, hence this appeal.

Complaint is made by appellant that the lower court erred to his prejudice, first, in overruling his motion for a continuance, and in refusing to permit his affidavit for a continuance to be read to the jury as the depositions of the absent witnesses named therein; second, in admitting incompetent evidence; third, in limiting the time of argument to two hours on a side. As to the first contention, we find from the record that the case was called for trial on the 7th day of the March term, 1908, of the court. As a number of the witnesses for both appellant and appellee were then absent, an order was made by the court laying the case over to the 11th day of the term for trial, that the parties might have a further opportunity to procure the attendance of their absent witnesses. The case was not again called for trial until the 12th day of the term, at which time the attorney for the Commonwealth announced ready for trial, but appellant again asked a continuance, filing in support of the motion therefor his affidavit containing the names of the absent witnesses, and the alleged facts to which it was claimed each would testify. The court regarding the affidavit insufficient, refused the continuance, and the trial was proceeded with.

We think the court properly refused to continue the case, or to allow the affidavit to be read.

It will be observed that though it is stated in the affidavit that some of the witnesses named therein were duly subpoenaed for the March term, and that upon the calling of the case for trial at the March term attachments whereby appellant's procurement issued for those upon whom subpoenas were served, it is not disclosed by the affidavit that the attachments or subpoenas last issued at appellant's instance were ever placed in the hands of an officer for service, or that service was ever had under them upon any of

the witnesses, and no steps are shown as having been taken under this process by the officer or other person having them in hand. The statement in the affidavit that none of the witnesses for whom the process was last issued had been arrested or brought into court is a mere conclusion. They may not have been arrested because there was no effort to arrest them by the officer entrusted with the process, or because the process was never given to an officer for service.

The affidavit should have stated the facts showing to whom the process was given, and when and what steps, if any, were taken to serve them, and when. There might have been, and doubtless was, ample time to execute the compulsory process upon the witnesses whose attendance was desired, if it had been placed in the hands of a diligent officer, but we are not informed by the affidavit whether this was done or not. We are unable, therefore, to determine from the affidavit that appellant exercised due diligence in the effort to procure the attendance of his witnesses. It appears also from the written statement in the record made by the trial judge, in explanation of his refusal to permit the affidavit to be read, that due diligence was not used by appellant in the effort to procure the attendance of his witnesses; and further, that one, at least, had been excused by him, and that others named in the affidavit were present at the trial, and were introduced by appellant. An examination of the bill of evidence contained in the record fails to convince us that there was any error in the admission of evidence that can be regarded as prejudicial to the appellant.

The statements of Felix Turner as to the conduct and declarations of appellant in and about the Napier store, and just before the shooting by him of Napier, were competent as showing his state of mind, and the anger he manifested, as well as to illustrate the motive with which the homicide was committed. The statements of Turner and other witnesses that the deceased, Napier, was a deputy sheriff, though not material, were not, in our opinion, incompetent. It is always admissible to prove the calling or occupation of one whose conduct is made the subject of judicial inquiry or investigation. We are unable to see that the statements of Tice Shepherd in regard to the conversation between appellant and Mrs. Shepherd, his daughter, were incompetent, for the conversation related to the sale of her interest in the land upon which he resided, at which he was greatly displeased, and with which, according to the proof, he thought Napier, the man whom he slew, in some way connected. This conversation occurred on the day of, and but a short time before, the killing of Napier, and at a time when appellant was inflamed with passion, and on his way to Napier's store. The declarations of appellant to Mrs. Shepherd were, therefore, competent as showing the state of appellant's feelings towards Napier, and as affecting the motive for the homicide. It was not error for the court to exclude the question asked the witness, Ransom Harris, who was jointly indicted with his father, the appellant, for the murder of Napier, if he had not been tried for that crime and acquitted. The fact of his acquittal could not affect the guilt or innocence of appellant. The son, though indicted with the father, may have been innocent and the father guilty.

The question asked Ransom Harris on cross-examination in regard to the statements made by him to Lloyd Turner and others were competent for the

purpose of laying the foundation to contradict him, as was done in one or two instances by the introduction of the persons to whom the statements were alleged to have been made. It was not proper to allow the witness, Wilson Lewis, who testified to the good character of appellant, to be asked on cross-examination if appellant had been indicted for murder in Harlan county, to which he answered that he "had heard of that." It is never competent to inquire of a witness testifying in regard to character as to particular acts, or instances of crime, but in view of all that was said by this witness in response to the question mentioned we do not think the appellant was prejudiced thereby, for the witness was unwilling to say that appellant's good character was injured by the charge, and further explained that it was not proved on him, but "finally came out on John Minnard and others."

It is earnestly contended that the lower court greatly erred in limiting the counsel in their arguments to the jury to two hours on a side. The trial judge is clothed with a wide discretion in the conduct of jury trials. While it is his duty, first of all, to see to it that every person charged with crime in the tribunal over which he presides is given a fair trial, it is likewise his duty to conduct the business of his court with all the dispatch possible consistent with the ends of justice. Every litigant and criminal has the constitutional right to be heard by counsel, before court and jury, but that right is to be exercised within reasonable bounds, and subject to reasonable judicial control. No fixed rule or limit can be made to apply to all cases alike, but the power to regulate and restrict argument must nevertheless be left with the trial courts. Its abuse by the court may be corrected upon appeal, as any other error is allowed to be corrected in a court of last resort.

We are of opinion, however, that the appellant has no just ground of complaint in this case. We are convinced from a careful consideration of the record that the two hours of argument to the jury allowed each side was sufficient to accord a full and fair discussion of the law and facts. No complaint is made of the instructions, and though the witnesses introduced were numerous, the material facts were few and simple, and they left no doubt of the appellant's guilt. Without just grounds of complaint, yet inflamed by passion, he armed himself with a pistol and went to the home of a neighbor and shot him to death as he entered his own door. The jury, out of regard, doubts, for his age, mercifully found him guilty of voluntary manslaughter, and inflicted upon him the minimum punishment allowed by law.

Finding in the record no error prejudicial to the substantial rights of the appellant, the judgment of the lower court is affirmed.

BOTTS v. BOTTS, &c.

(Filed June 12, 1903—Not to be reported.)

Alimony—Fraudulent conveyances—Appellant brought this action to set aside as fraudulent a deed of conveyance of the life interest of appellee, N. W. Botts, in a tract of land to W., alleging that she obtained a judgment of divorce and alimony from said N. W. Botts and held an unsatisfied judgment for \$220 alimony against him when his life interest was sold under execution for some small debt, and that said N. W. Botts afterwards redeemed said

land and conveyed it to W. for the price of \$170. Held—That said deed was fraudulent as to appellant's claim, as the price paid by W. was grossly inadequate, the value of the life interest purchased being about ten times the amount paid, and the deed should be set aside and the land subjected first to the payment of the costs of the action; second, to the payment of the purchase price paid by W., who seems to have had no actual notice of the fraud; and next to the payment of appellant's claim. The debtor having redeemed his land from execution sale, it stood subject to his debts.

S. W. Tolin and S. Gaines for appellant.

O. M. Rogers and N. E. Riddell for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by appellant in the lower court to set aside a deed made by appellee, N. W. Botts, to his co-appellee, J. J. Walton, conveying the former's interest as life tenant in two tracts of land lying on the Ohio river in Boone county.

The petition of appellant attacks the deed upon the ground of fraud, it being alleged therein that the conveyance was voluntary, without a sufficient consideration, and that it was made for the fraudulent purpose of hindering, delaying and defrauding the appellee, N. W. Botts', creditors, and especially the appellant, Sallie Botts.

The separate answers of the appellees traverse the averments of the petition, and in addition allege that some time prior to the conveyance in question the life estate passed thereby had been sold under execution in favor of one Stott for \$51.94 and interest, and to satisfy a judgment lien in favor of one Stamper of \$6.08 and interest, they becoming the purchasers at the amount of their debts; that appellee Botts being insolvent, was unable to redeem the land within the year allowed by law, and after the expiration of the year his co-appellee, Walton, furnished him \$130.19, with which to redeem the land from Stott and Stamper, and in addition paid him the further sum of \$32.81, in consideration of which he executed the deed complained of by appellant. Appellant was the former wife of the appellee Botts, whom she was compelled to sue in the Boone Circuit Court for a divorce and alimony, in which action she was granted a divorce and given a judgment for \$6.00 per month as alimony, to continue indefinitely.

At the time of the sale of appellee, N. W. Botts', interest in the lands under the execution and judgment of Stott and Stamper, appellant then had in the hands of the sheriff an execution for a considerable amount of the alimony due her from her former husband. It is contended by appellant that the matters set up in the separate answers of appellees constitute no defense to this action, and can not defeat the collection of her judgment debt, which at the time of the institution of this suit amounted to \$222, and in this we concur, if the conveyance herein attacked was made for the purpose of defrauding N. W. Botts' creditors. Stott and Stamper did not take from the sheriff or court a deed conveying to them, or either of them, the lands after their purchase of same under the execution and judgment sales respectively, as they might have done after the expiration of a year from the date of the sale. The legal title to the life estate of appellee, N. W. Botts, in the lands

sold, therefore, remained in him after the expiration of the equity of redemption, and Stott and Stamper, in permitting him to redeem it after the end of the year, merely extended the right of redemption beyond the statutory period. The redemption, therefore, though made beyond the statutory period, had the same effect as if made within the year, and by it all encumbrance was removed from the property, leaving it in all respects as if it had not been sold under the execution and judgment. This being true, the only question remaining to be determined is whether or not the deed from appellee, N. W. Botts, to his co-appellee, Walton, was and is fraudulent as to the former's creditors. We are of the opinion that it must, in the light of this record, be regarded as fraudulent.

In Freeman on Executions, section 321, it is said: "A redemption accomplished by the judgment debtor, or his grantee, has the effect of extinguishing the rights of the purchaser and of releasing the defendant's title from the consequences of the sale, but leaving it subject to all other valid rights and liens."

We think it clear from the record that the appellee, N. W. Botts, acted with fraudulent intent in making the conveyance to Walton. The consideration therefor, \$170, was so grossly inadequate as to furnish prima facie proof of such intent. (Carter, &c. v. Richardson, 23 Ky. Law Rep., 1209.) The land consists of 100 acres, the fee of which is shown by the evidence to be reasonably worth \$5,000. The present value of the appellee, Botts', life estate therein at his present age, 60 years, is, according to the Wiggleworth table, approximately worth ten times the amount paid him for it by Walton. The appellee, Botts, has persistently and wholly failed to pay any part of the judgment for alimony due appellant, though he appears from the record to own a home in the State of Indiana, and to be drawing a pension of \$12 a month.

His purpose in thus disposing of his interest in these lands at such a grossly inadequate price, in the light of all the facts and circumstances shown in the record, was to defraud appellant, and prevent her from subjecting the same to the payment of her claim for alimony. While there is evidence in the record tending to show that the appellee, Walton, had, or ought to have had, notice of the fraudulent intent of his co-appellee, N. W. Botts, in making to him the conveyance, we are unable to say that he was fully apprised thereof, and, therefore, do not think that he should be required to lose the \$170 paid by him for the interest in the land. (Diamond Coal Co. v. Carter Dry Goods Co., 20 Ky. Law Rep., 1444.)

Being of the opinion, therefore, that the lower court erred in dismissing appellant's petition, the judgment is hereby reversed and the cause remanded, with directions to enter judgment setting aside the deed from appellee, N. W. Botts, to his co-appellee, Walton, and subjecting the interest of the former in the lands thereby attempted to be conveyed, first, to the payment of costs of this action, and next to the payment of the \$170, with interest, which appellee Walton paid for the lands, and finally to the payment of appellant's claim for alimony herein sued on.

SIMMS v. SIMMS.

(Filed June 12, 1908—Not to be reported.)

Alimony—Pleading—In this action instituted by the wife to recover alimony without a prayer for divorce the lower court properly dismissed her petition as there was neither pleading nor proof that the separation was without fault of the wife.

L. J. Crawford for appellant.

F. V. Benton for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Nunn.

On the 4th of November, 1901, the appellant instituted this action in the court below against the appellee for alimony, and did not seek a divorce. She alleged that the appellee abandoned her on the 4th of October, 1900, and had not lived with her since that date. She failed to allege that such abandonment of her was without her fault, or that he was in fault; nor did she use in her petition any language importing that he left her without excuse, or that she was not in fault. She also alleged that after the separation they entered into the following agreement:

"Newport, Ky., June 1, 1901.

"Mary Sims being about to file suit for alimony against her husband, Samuel Sims, he hereby agrees to pay her \$5 per week as alimony, beginning with a payment of \$5 on the 1st day of June, 1901, and to pay \$15 toward the payment of her attorney's fees. In consideration of the foregoing she agrees to refrain from suing for alimony as long as he continues such payments. He shall mail her a check at the end of each two weeks for \$10. Each agrees to circulate no hurtful rumors concerning the other, or to harass the other in any way. Mrs. Simms shall retain and own, absolutely, all the furniture formerly used by us.

"MARY SIMMS,

"SAMUEL SIMMS."

She merely copies this contract in her petition. She does not sue upon this contract, nor ask the enforcement of it, nor does she allege that he violated his part of the contract in any particular. She states that he paid \$20 on the contract, but did not state that that was all he had paid, nor that he had refused to pay anything further. She alleged that appellee was receiving for his labor \$35 per week, and prayed that an allowance be made her, to be paid by appellee, to enable her to prepare her case for trial, and that suitable alimony be allowed her, and for costs and attorney's fees. The appellee answered, and did not cure any of the defects in the petition, but merely denied that he was receiving for his labor \$35 per week, and alleged that he was receiving for his labor, on an average, not more than \$12.50 per week. The proof was taken on this issue, and the court on the trial dismissed appellant's petition, and she has appealed. We are of the opinion that appellant's petition was defective. The rule in this State is that an action for alimony may be maintained without a prayer for divorce, but to entitle the wife to alimony she must allege in her petition that she was without fault.

The case of *Springer v. Springer*, 21 Ky. Law Rep., 1293, was a case where Mrs. Springer instituted an action for alimony against her husband, alleg-

ing that she was compelled to leave her home without fault on her part; that her treatment was such that she could not live there. She failed to prove that she was mistreated in any way by her husband. She was denied alimony.

In the case of Bulett v. Bulett, 80 Ky., 866, the court said: "When the facts of the case show that a separation was proper by reason of cruel treatment of the husband, the chancellor has the power to require him to support the wife during coverture, or until a reconciliation takes place."

The appellant having failed to allege or prove that appellee was in fault in the separation, and that he had violated the agreement in any particular, we are of the opinion that the lower court was right in adjudging against her.

Wherefore, the judgment is affirmed.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

SENN v. LOUISVILLE MALTING CO.

(Filed June 16, 1903—Not to be reported.)

Fraudulent conveyances—W. & B., sons-in-law of appellant, conveyed to him a brewery plant which they had been operating, and a part of the consideration was that appellant would pay all notes and accounts and debts created by them in the operation of the distillery. Afterwards appellee, a creditor, presented to appellant the balance of an account for hops sold W. & B., which was used by them in the brewery, which was denied by appellant. After this W. & B. executed another deed, in which the liability for this debt was omitted. This action was brought to compel appellant to pay this debt under his undertaking to do so. Held—That appellant was properly adjudged liable for said debt.

Lane & Harrison for appellant.

J. J. McHenry and E. W. Sprague for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 3.

Opinion of the court by Judge Nunn.

On the 4th day of August, 1898, Wegenast & Berger, sons-in-law of appellant, conveyed to him a brewing plant in the city of Louisville, together with all the wagons, carts, horses and mules used, in conducting the business of the firm, and all notes and accounts due the firm, in consideration that appellant surrender to them a note of \$5,000 which he held against them as the purchase price of the brewery (appellant had previously sold the brewery to them), and also that appellant would pay certain notes to one Walters, which were a lien on the brewery, and pay all the debts created by them in the conduct of the business of the brewery.

Appellee, by counsel, about the 22d of September, 1898, addressed a letter to appellant, referring to the stipulations of this deed of record, and demanded of him payment of the balance of their claim of \$300, which was created for hops sold Wegenast & Berger, and used by them in this brewery. Appellant did not respond to this letter, but went to his attorney, with Wegenast

& Berger, and claimed that in drafting the deed a mistake had been made; that he had not agreed or assumed to pay the debts which Wegenast & Berger had created in the brewing business, and caused the attorney to prepare another deed correcting or changing the first one, by stating that Senn, appellant, did not assume and was not to pay the debts referred to. They, however, failed to correct the deed wherein it stated that appellant was to take and become the owner of all the notes and accounts due the firm of Wegenast & Berger created in the business.

Appellee then brought this action against the appellant upon its account, alleging that he had assumed to pay it. Appellant answered, denying that he had assumed to pay it, except in the manner stated. The action was transferred to the equity docket and tried, and the lower court adjudged that appellant should pay the debt, and he has appealed from that judgment. The record discloses these facts in addition to those stated: That appellant had purchased from one Walters this brewery plant, and owed Walters a balance of the purchase price of over \$7,000, and that appellant was about to be sued by Walters for libel or slander, and, as claimed by him, to prevent the property from becoming involved with liens, he sold it to his sons-in-law, Wegenast & Berger, and conveyed to them the plant, together with all wagons, carts, horses, mules, notes and accounts contracted in the business, in consideration that Wegenast & Berger should pay him \$5,000, and assume the payment of the \$7,000 due Walters, purchase money, and to pay all notes and accounts due by appellant contracted in running the brewery. The title remained in Wegenast & Berger for about one year, and then, August 4, 1898, the property was reconveyed to appellant for the consideration stated, and thus remained until September 23, when the change or correction stated was made. Appellant and Berger both testify that their agreement was that the property should be reconveyed to appellant on the same terms as when he conveyed to them, and each made this statement more than once in their depositions. But when asked directly and pointedly whether it was a part of their agreement that appellant should assume and pay the debts of the partnership, they expressly denied that such was the trade, and that appellant did not assume or agree to pay the debts of the firm, or any part thereof, except he did agree to pay the debt due to Walters. Wegenast died before the proof was taken.

It is also shown by the record that the Walters debt had been reduced to the amount of \$3,000, and that Wegenast & Berger did not pay anything thereon. Therefore, appellant must have paid \$4,000 on this claim after his sons-in-law assumed to pay this claim.

From all the facts and circumstances admitted and proven we can not say that the lower court erred in adjudging that appellant should pay appellee's debt. The proof, as appears from the record, conduces to show that the cause of the change in the deed was brought about by the presentation of appellee's claim for payment, and also that the brewery plant was all the time really the property of appellant, and the contemplated action for libel or slander was the sole cause of the transfer.

Wherefore, the judgment of the lower court is affirmed.

WARING, &c. v. BERTRAM, &c.

(Filed June 16, 1903—Not to be reported.)

1. Schools, graded—Injunction to prevent collection of tax—Pleading—A judgment was entered in the Lewis County Court upon the petition of voters of the third and fourth common school districts of said county ordering a submission to the white voters as to the establishment of a graded common school district and the election of trustees and the imposition of a tax to maintain said school. The petition described the site of the school building in the village of Garrison. The vote resulted in favor of establishment of said graded common school district, the levy of a tax and the election of trustees. A tax collector was appointed by the trustees to collect said tax. This suit, to enjoin the collection of the tax, was brought by certain voters in the district, who alleged in their petition, as a basis for the injunction, that said proceeding to establish the district was void as it did not conform to section 4464, Kentucky Statutes, for the reason that when the petition was presented to and signed by the trustees of the two common school districts it did not describe the location of the school house, but that said petition was afterwards altered by fixing the location in Garrison. Both special and general demurrers to the petition were filed, and the special demurrer sustained and the petition dismissed. Held—That both the special and general demurrer to the petition should have been sustained as the petition alleged a material alteration in the petition of voters which would invalidate the proceeding.

2. Jurisdiction—The circuit court has jurisdiction to enjoin the collection of an illegal tax growing out of a judgment of the county court, but no attempt is made to interfere with the execution of the judgment itself which merely authorized the submission of the proposition to the voters.

Samuel J. Pugh, E. L. Worthington and W. H. Wadsworth for appellants.

W. C. Halbert and Thos. R. Phlster for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Chief Justice Burnam.

At the February term, 1902, of the Lewis County Court a judgment was entered upon the petition of voters of the third and fourth common school districts of Lewis county, looking to the establishment of a graded common school district, in which the site of the school building was described as follows: "Situated on the corner of a tract of land owned by T. S. Clark and George W. Stamper, jointly, in the village of Garrison, or Stone City, bounded as follows: On the east by the county road running from Garrison to the county road leading to Vanceburg; on the south by the land of Mrs. Thomas Underwood, and on the west and north by other lands of Clark and Stamper, containing one acre."

The judgment also provides that an election should be held on the 31st of March, 1902, for the purpose of taking the sense of the legal white voters residing in the boundary of the district upon the proposition to levy an ad valorem tax of 50 cents on each \$100 of all the taxable property situated within the district subject to taxation for State and county purposes, owned by white people and corporations within the district, and a poll tax of \$1 on each white male inhabitant of the district over twenty-one years of age, for the purpose of maintaining a graded school in the district and for the purchase of a site and erecting suitable buildings thereon for the school. It also

directed that six persons should be elected as trustees for the graded school district, and in all other respects conformed to the provisions of section 4464 of the Kentucky Statutes. By virtue of this judgment of the county court an election was subsequently held in the proposed graded school district, on the 31st of March, 1902, which resulted in a majority of the votes being cast in favor of the school, and at this election the appellees, Cornet, Howard, Carver, Keyser, Beckett and Glenn were elected trustees. Glenn declined to act, and the appellee, Fultz, was appointed in his place. The five trustees qualified and appointed a collector to collect the tax. Thereupon appellants instituted this suit to enjoin the collection, upon the ground that the written petition of voters, which was the basis for the judgment of the county court establishing the graded school district and calling the election, was a forgery to this extent, that when the document was signed and approved in writing by D. A. Cornett, J. W. Cotton and G. B. Sanders, trustees of common school district No. 4, and by Thomas Howard and M. Bertram, trustees of common school district No. 3, the petition did not set out or describe the site on which the proposed school building was to be erected, but simply recited that it was to be erected at some central place in the common school district to be selected by the county superintendent; and that after it had been signed by the trustees of common school district No. 4 it was changed and altered in this respect without the knowledge or consent of the signors, so as to fix the site of the common school building in the town of Garrison, on the Ohio river, and not in the center of the district, and that it was also changed in other important particulars.

The defendants filed both special and general demurrers to the petition. The special demurrer was sustained, and plaintiffs' petition dismissed, and they have appealed to this court. Section 4464 of the Kentucky Statutes provides the only way in which a graded common school district can be established, and that section contains this proviso: "That the proposition to establish any graded common school district and school, as provided for in this section, is approved in writing on the petition to the county judge, by a majority of the trustees in the common school districts included wholly or partly within the boundary of said proposed graded common school district."

The provision of the statute requiring the approval of a majority of the trustees of any common school district included wholly or partly within the boundary of the proposed graded common school district is a condition precedent. Without their approval the county court has no jurisdiction to enter a judgment calling for an election to take the sense of the voters as to the establishment of the district and the voting of a tax to erect and maintain a building. The demurrer admits the truth of the averment of the petition, that the petition of voters was fraudulently altered after it was signed, without the knowledge or consent of a majority of the trustees of common school district No. 4, one of the districts included in the graded school district. The alteration was material and important, and invalidated the petition. The presentation of a valid petition was a jurisdictional requirement for the entry of the judgment. There was nothing, therefore, before the court on which to rest the judgment calling the election, and it was consequently void.

It is contended for appellees that this proceeding can not be maintained

In the circuit court as it is in effect an attempt to enjoin the operation of a judgment rendered by the county court, and is, therefore, prohibited by section 285 of the Civil Code. We can not sanction this contention; the judgment of the county court was simply that an election should be held, and the election has been held; every requirement of that judgment has been complied with. This is a proceeding to enjoin the collection of an illegal tax, which grows out of the judgment of the county court, but no attempt is made to interfere with the execution of the judgment itself. It is in conformity with numerous similar proceedings which were instituted in the circuit court to enjoin the collection of taxes levied for school purposes under elections held in conformity with judgments of the county court, and of which this court has taken appellate jurisdiction. (*Williamstown Graded Free School District v. Webb*, 89 Ky., 272; *Doores, &c. v. Varnon*, 94 Ky., 502; *Webb, &c. v. Smith*, 99 Ky., 11, and *Mullins, &c. v. Andrews, &c.*, 20 Ky. Law Rep., 20.)

For reasons indicated the judgment is reversed and cause remanded, with directions to overrule the general and special demurrers.

McVAW v. SHELBY, &c.

(Filed June 16, 1908—Not to be reported.)

Judicial sales—Infants—Guardian and ward—A., B. and C. were infants over fourteen years, but under twenty-one years of age, owning jointly as heirs of their father a house and lot. M., their uncle, was duly appointed by the Jefferson County Court as their guardian, and A. and B., by their guardian, instituted this action for a sale of said property, on the ground of its indivisibility. Pending the action the guardian, with said infants, removed to the State of Texas. Said guardian resigned his trust, whereupon the Jefferson County Court appointed L. as guardian of said children, and an order was entered in said action noting the filing of the order of appointment of L. as guardian; also reciting that the guardian appeared in court and produced his bond, which was approved by the court. Thereupon the court adjudged a sale of said house and lot, when appellant became the purchaser, and the validity of said sale is presented on this appeal. It is urged as an objection to said proceeding that the order appointing L. as guardian was void. Held—That said appointment was not void, as section 2023, Kentucky Statutes, authorizes the county court of a county in which real estate belonging to infants who reside out of the State is situate to appoint guardians, although the infants are over fourteen years of age and may not have nominated a guardian. Appellant also insists that the action abated after the resignation of the first guardian as L., the second guardian, failed to file an amended petition setting up its appointment, and asking that it be substituted in lieu of the first guardian. Held—That while this would have been better practice, yet by the order that was made L. was made a party to the suit, and this irregularity would only make the proceeding erroneous and not void, and the purchaser would take a good title.

E. J. McDermott for appellant.

W. S. Pryor and Pryor & Sapinsky for appellees.

Appeal from Jefferson Circuit Court, Chancery division, No. 1.

Opinion of the court by Judge Nunn.

Reginald Shelby and his wife died in Jefferson county, Ky., prior to the year 1900, and left three, and only three, children, Evelyn, Alice N. and Albert Shelby, all of them being under twenty-one, but over fourteen, years of age. M. C. Marshall, their uncle, was appointed by the Jefferson County Court their guardian. These children were the owners of a house and lot in the city of Louisville, and these children, Evelyn and Alice N. Shelby, by their guardian, filed a petition in the Jefferson Circuit Court, Chancery division, against Albert Shelby for the sale of the property, alleging that it was a vested estate jointly owned by them and was in their possession, and that it could not be divided without materially impairing its value, and for other reasons alleged that it would be to their interest to have it sold. These children resided with their uncle, M. C. Marshall. Soon after the institution of this action he moved from the State of Kentucky and took up his residence in the city of Dallas, Texas. He took the children there and they resided there with him. Shortly thereafter he returned temporarily and settled his accounts and resigned as such guardian. Thereupon the court, on the written request of the infants, appointed the Louisville Trust Co. as their guardian, and it executed bond as such guardian, and, by its proper official, took the oath required by law. Immediately thereafter it filed a copy of the proceedings in the county, showing the resignation of Marshall and his settlement and the order appointing the trust company, as exhibits in this action. Thereupon the following order was made in this action: "Came the Louisville Trust Co., by counsel, and filed herein a duly attested copy of the order of the Jefferson County Court, of February 23, 1901, accepting the resignation of M. C. Marshall, as guardian of the infant plaintiffs, Evelyn Shelby and Alice Maud Shelby, and of the infant defendant, Albert Shelby, and showing the appointment and qualification of the Louisville Trust Co., as guardian of the three infants just named. And came the Louisville Trust Co. as such guardian and produced in court its bond, with its capital stock as surety, and the bond being examined and approved by the judge, is ordered to be certified by the clerk of this court to the clerk of the Jefferson County Court for record."

Thereupon the court adjudged the sale of the house and lot described in the petition. The commissioner sold the same, and the appellant, A. McVaw, became the purchaser at the price of \$4,675. The appellant filed exceptions to the report of sale, claiming that sale was void for the following reasons:

1st. That the resignation of M. C. Marshall as guardian of the infant plaintiffs and defendant abated that action, and that same was not revived by his successor within the time required by law.

2d. That the order of the Jefferson County Court, appointing the Louisville Trust Co. guardian of the infants, was void.

3d. That at the time of the submission of this action for judgment it was a "stale case."

As to the third proposition, it is agreed by counsel for both appellant and appellees that it has no merit in it, and can not avail the appellant. As to the second exception we are of the opinion that the order appointing the Louisville Trust Co. as such guardian was not void. Section 2022 of the

Kentucky Statutes authorizes the county court to appoint guardians for infants, who reside out of the State, even though the infants are over fourteen years of age, and who may not have nominated their guardian, that court having jurisdiction to make the appointment in the county in which the infant's real estate may be situated. But if no real estate, then in the county in which the infant may have personal estate.

As to the first exception, wherein the appellant claims that the action was abated by reason of the resignation of Marshall as guardian and the failure of the trust company to file an amended petition setting up its appointment and causing an order to be made reciting these facts and substituting it as plaintiff in lieu of Marshall, we are of the opinion that the action did not abate, and while this would have been the better practice, yet the filing by it of the copy of the proceedings named, the execution of the bond required by the Code, and the order of the court with reference to these matters, made the Louisville Trust Co. a party to the action. At most, this irregularity would only make this proceeding erroneous, and not void, and the judgment not being void, the purchaser takes a good title. In the case of *Bailey v. Fanning Orphan School*, 12 Ky. Law Rep., 645, the court said: "If the judgment is not void, but simply erroneous, in consequence of the alleged defects, the purchaser takes a title to the land, notwithstanding judgment may be reversed on account of these defects. But the judgment is not void in consequence of such defects. The judgment cures them, at least so far as the appellant (purchaser) is concerned."

There are several cases to the same effect decided by this court.

We are of the opinion that the appellant obtained a good title by the purchase of the land herein, and the judgment of the lower court is, therefore, affirmed.

BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT v. COMMONWEALTH.

(Filed June 16, 1908—Not to be reported.)

Criminal law—Indictment of city for permitting a nuisance—The indictment was properly brought against the board of councilmen as a body and not against the board personally. The city is not liable for permitting a nuisance on private property.

Ira Julian for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

It appears from the statutes governing cities of the third class, Frankfort being in this class, that such cities are subject to be sued and prosecuted under the provisions of their charters which were in existence prior to the enactment of this statute; that the charter of the city of Frankfort required, in the proceedings against the city by which it was sought to be made liable, that the proceedings be instituted against the board of councilmen as a body and not against the members of the board personally. From this record it appears the city of Frankfort is sought to be made liable for permitting a

nuisance to exist on private property. The question as to the liability of cities in such cases was considered by this court in the prosecution of the City of Georgetown v. Commonwealth, 24 Ky. Law Rep., part II, 2285. In that case the court decided that the city was not liable. The principles governing that case and this are the same.

For the reasons therein given the judgment in this case can not be sustained, and it is, therefore, reversed and the cause remanded for further proceedings consistent herewith.

COMMONWEALTH v. COLLIER.

(Filed June 16, 1903—Not to be reported.)

Criminal law—Indictment—The indictment herein charging appellant with suffering and permitting a water gap to be erected on his premises so as to injure a turnpike road was insufficient.

Clifton J. Pratt and M. R. Todd for appellant.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Nunn.

The appellee was indicted in the Lincoln Circuit Court and charged in substance as follows: That he did unlawfully suffer and permit a water gap to be erected and maintained on premises in his possession and under his control, and to remain in such condition as to force the water over a turnpike road and wash away the gravel and metal thereon, and make great holes and puddles in the road, and to remain in such condition for at least a period of sixty days prior to the indictment, and by reason of forcing the water back over the road made it dangerous and almost impassible for vehicles, horses and persons; and made it dangerous to the lives of divers good citizens who passed and repassed over the road, etc. The indictment is well drawn, and charges an offense except that it is failed to be alleged that appellee erected the water gap, or directed the erection thereof, or that he, with the knowledge of its erection, suffered and permitted it to remain.

For these reasons the lower court was right in sustaining the demurrer to the indictment.

Judgment affirmed.

KICE v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed June 16, 1903—Not to be reported.)

Common carrier—Appeals—This was an action instituted by appellant against appellee for breach of contract in shipping a mare, which resulted in the death of the mare. A verdict and judgment having been rendered in favor of appellee, this appeal is prosecuted. The bill of exceptions having been stricken from the record the only question presented is the sufficiency of the pleadings to support the judgment. The pleadings are sufficient to support the judgment.

Gardner & Moxley for appellant.

Edward W. Hines and Helm, Bruce & Helm for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 1.

Opinion of the court by Judge Nunn.

The appellant brought this action against appellee for an alleged breach of contract in failing to transport a fine and valuable mare for him from Beards Station, on its road, to Lexington, Ky., and by reason of its failure to comply with its contract in the time and manner of the shipment of the animal her death was the result. Her value was fixed at \$500. The appellee, by answer, traversed the allegations of the petition. A trial was had, which resulted in favor of the appellee.

As appears from the record the bill of exceptions was, upon motion of appellee, stricken from the record by order of this court, made on the 19th of February, 1908. This being true, the only question presented is as to the sufficiency of the pleadings to support the judgment. There is no room for contending that appellant was entitled to a judgment upon the pleadings, and his counsel make no such contention. It follows, therefore, that the judgment of the lower court, must be affirmed.

HINKLE v. COMMONWEALTH.

(Filed June 16, 1908—Not to be reported.)

Criminal law—Indictment—"Local option"—Appellant was indicted for violation of a special local option statute, in which it needlessly undertook to describe how the offense was committed. Held—That said indictment was insufficient.

B. B. Golden for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was indicted under an act approved May 7, 1886, entitled "An act to prohibit the sale of spirituous, vinous and malt liquors and intoxicating beverages within five miles of Union College in Knox county."

The indictment specifically charged in apt language the commission of the offense, but it needlessly undertook to say how the selling was done, wherein it averred that it was "by having in his (defendant's) possession and control a house and enclosure where spirituous liquors were at the time furnished and obtained in violation and evasion of law, the said Hardison (witness) obtaining same in said house and enclosure," etc.

The circuit court overruled a demurrer to this indictment. The evidence disclosed more of guilty knowledge and conduct than is charged in the indictment, and enough to have justified the submission of the case to the jury, and to have supported the verdict, if the indictment had been such as to have warranted its submission to the jury. Merely being in the legal possession and control of the house and enclosure where spirituous liquors were sold or furnished without guilty knowledge of the fact, or without personally participating in it, is not enough to sustain the charge attempted to be set up by the indictment.

The judgment is reversed and cause remanded, with directions to award appellant a new trial and to sustain the demurrer to the indictment and for further proceedings not inconsistent herewith.

COMMONWEALTH v. FERIEL.

(Filed June 16, 1903—Not to be reported.)

Criminal law—Obstructing public road—Appeal—Appellee was arrested under a warrant issued under section 4335, Kentucky Statutes, which imposes a penalty of not less than \$5 nor more than \$50 for such offense. A trial resulted in a verdict for defendant under a peremptory instruction in the county court. An appeal was prosecuted to the circuit court by the Commonwealth, where it was dismissed. An appeal is prosecuted to this court from that order of dismissal. Held—That said appeal was properly dismissed as section 4336, Kentucky Statutes, which regulates appeals in this case, only authorizes an appeal by either party where the fine imposed exceeds \$50.

H. W. Rives, Clifton J. Pratt and M. R. Todd for appellant.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Settle.

The appellee, W. D. Ferial, was arrested under a warrant charging him with the offense of willfully obstructing a public road in Marion county. Upon the trial before the county judge and a jury he was acquitted upon a peremptory instruction. The case was then appealed to the circuit court by the Commonwealth, and upon motion by the appellee it was dismissed by that court, and from that judgment this appeal was prosecuted.

The only question presented by the record is whether the appeal by the Commonwealth to the circuit court should have been entertained by that court. The warrant charged appellee with an offense under section 4335, chapter 110, Kentucky Statutes, which provides that "any person who shall willfully obstruct, injure, or destroy any of said public roads * * * shall be fined for each offense not less than \$5 nor more than \$50." * * *

Section 4336 provides that "in all prosecutions under this act the party shall be entitled to trial by jury. In all cases, when the party is fined more than \$50, an appeal shall lie to the circuit court. Either Commonwealth or defendant may prosecute the appeal; the appeal to be taken as now provided by law."

It will be observed that an appeal to the circuit court is permitted by the section supra only when the person accused is fined more than \$50. In that event the appeal may be taken either by the Commonwealth or defendant.

The appellee was not fined in this case at all, and could not have been fined more than \$50 if he had been found guilty, as the maximum fine named in section 4335, under which he was accused and tried, is only \$50. It would seem to follow, therefore, that the appeal did not lie to the circuit court, consequently that court did not err in dismissing the appeal. The right of appeal can exist only when allowed by statute, and section 4336 confers the only right of appeal in prosecutions resulting under section 4335

of the statute *supra*. In such a case, therefore, as that of appellee's, section 4396 must control, regardless of any other provision of the law that may confer the right of appeal as to other offenses. This view of the case makes it unnecessary for us to consider other questions urged in the brief of counsel.

Wherefore, the judgment is affirmed.

HUSSEY v. SARGENT, &c.

(Filed June 16, 1903.)

1. Wills—This suit was brought by appellant for a construction of the will of his father, who died resident in the State of New Hampshire, leaving an estate consisting only of personal property. Appellant was the only child and heir at law of said testator, and at the time of his father's death had one living child, Emily Hussey, Jr., then only two years of age. After making sundry bequests in the will, in the sixth clause thereof he gives and bequeaths to his wife two-fifths of the income of the remainder during her natural life, and to his son, the appellant, two-fifths of the income of the remainder, and from the remaining one-fifth of said income he directs his executors to pay to his sister during her natural life the annual sum of \$500, the balance of said one-fifth of said income to be allowed to accumulate for the benefit of the children of his son or their heirs, such accumulation and such income to be equally divided among said children when Emily Hussey, Jr., daughter of his son, arrives at the age of thirty-five years, if then living, or at that date when she would have been thirty-five years of age, had she lived, being then deceased. In the eighth clause of his will he provided that any remainder income theretofore received by the testator's wife should, after deducting such sums as the executors thought reasonable for the support of the children of his son, be allowed to accumulate for the benefit of said children as provided in the sixth clause. After testator's death there was born to appellant three other children, and the widow did not renounce the provisions of the will. Appellant qualified as executor and reduced the property to his possession, and the family, including the widow, removed to this State. The questions involved are whether the principal of the one-fifth, the income of which is directed to accumulate by the sixth clause, has been disposed of by the will, or whether, as to this fund, testator died intestate, and whether such provision as to the distribution of the remainder of the one-fifth interest is void as in contravention of the law of perpetuities; also whether the remainder of the two-fifths, the income of which is disposed of by the eighth clause, is a valid bequest, and if invalid, whether such portion of the estate is or will become vested in the appellant or his heirs by inheritance; also whether or not the provision for the accumulation of the income of any portion of the remainder is not in contravention of the statute against perpetuities, and if invalid whether or not the same is or will vest in the plaintiff or his heirs by inheritance. Appellant's children were made defendants, and in their answers filed by their guardian ad litem they claimed that said provisions were valid and enforceable, and that they are entitled to the principal as well as the income of said remainder interests. Held—That it is a rule of construction in regard to wills that when one undertakes to make a will it will be presumed that his purpose is to dispose of his entire estate and does not intend to die intestate or become intestate after death, and this inclination is most strong

with the courts when it is a residue of personalty which is the subject of the bequest and there is nothing in connection with the will which indicates that the testator expected to die intestate as to any part of his estate, and that he intended that the principal as well as the income should pass under the will to his grandchildren. This result would also follow from the application of the rule that where the interest of a fund is bequeathed to a legatee, or in trust to him without any limitation as to the continuance, the principal will be regarded as bequeathed also. The provisions of the will would, under our statute against perpetuities, be held void, but as the testator disposed of only personal estate the will should be construed according to the law of New Hampshire, the place of domicile of the testator. According to the law of that State, as decided by its supreme court, the provision of the will directing the accumulation of the income was valid and enforceable for a period of twenty-one years after testator's death, and that the funds disposed of in the sixth and eighth clauses of the will go to the grandchildren in twenty-one years after the probate of the will.

2. Jurisdiction—The courts of this State have jurisdiction to require an executor who has received funds in another State and removed to this State to settle his accounts, and to require him to distribute the estate in his hands according to the terms of the will.

St. John Boyle and L. R. Yeaman for appellant.

Jas. Quarles and W. O. Harris for appellees.

Appeal from Jefferson Circuit Court, Chancery division, No. 1.

Opinion of the court by Chief Justice Burnam.

The appellant, Frederick D. Hussey, brought this suit against the appellees, George W. Sargent, Ezekiel H. Sargent, Webster P. Hussey, Emily P. Hussey, Sr., Fannie R. Hussey, Emily P. Hussey, Jr., Catherine P. Hussey, Mabel W. Hussey, Dorothy Hussey and Sarah L. Hussey, for the purpose of obtaining a construction of certain clauses in the will of his father, Daniel P. Hussey, who died on the 25th of July, 1883, at his domicile in the county of Hillsborough in the State of New Hampshire, and whose will subsequent to his death duly admitted to probate in the probate office of that county. He alleges that Daniel P. Hussey's widow, the defendant, Emily P. Hussey, Sr., accepted the provision of his will; that he was his only child and heir at law; that at the time of the death of Daniel P. Hussey he was married to Mary W. Hussey, and at that time had only one child, the defendant, Emily Hussey, Jr., who was then two years old; that after the probation of the will of Daniel P. Hussey the defendants, Catherine, Mabel and Dorothy, children of plaintiff, were born; that after the birth of Dorothy his first wife, Mary W. Hussey, died, and he subsequently intermarried with the defendant, Fannie R. Hussey, but that he had no children by her. He further alleges that shortly after the death of his father, Daniel P. Hussey, he removed from the State of New Hampshire to the city of Louisville, in the State of Kentucky, with his mother and family, where they have since resided; that the debts and specific legacies of Daniel P. Hussey have all been paid except one to a public library in the city of Nashua, which is not yet due; that the estate of Daniel P. Hussey consisted entirely of personal property which came into the hands of the plaintiff as trustee and executor, and that he has since collected and received the entire income

of the estate; and that no part of it is within the State of New Hampshire; that he was born on the 9th of August, 1857. All of the defendants except Emily P. Hussey, Sr., and the infant children of the plaintiff are alleged to be nonresidents, and are proceeded against as such by warning order; and it is alleged that the infant children have no statutory guardian and asks that a guardian ad litem be appointed to defend for them. The special questions which we are asked to determine upon this appeal are: First, whether the principal of the one-fifth of the estate, the income of which was directed to be accumulated for the benefit of the children of plaintiff in the sixth clause of the will, has been disposed of by the will, or whether as to this fund testator died intestate; second, whether the provisions requiring that the balance of the income upon the one-fifth of testator's estate, which is directed to be distributed among the children when Emily P. Hussey, Jr., daughter of Frederick D. Hussey, arrives at the age of thirty-five years, if then living, or at that date when she would have been thirty-five years of age had she lived, being then deceased, is void as in contravention of the law against perpetuities; third, whether or not the bequest, contained in section eight, of the remainder of two-fifths of said estate, the income of which is now payable to testator's wife during life, is a good and valid bequest, in whole or in part, and if invalid whether such portion of the estate is or will become vested in the plaintiff or his heirs by inheritance; fourth, whether or not the provision that the income of any portion of the said remainder be allowed to accumulate is or is not void as against the rule against perpetuities, and if invalid whether or not the same is or will become vested in the plaintiff or his heirs by inheritance.

In the joint and separate answer of the infant defendants Emily P. Hussey, Jr., Catherine P. Hussey, Mabel W. Hussey and Dorothy Hussey, filed by their guardian ad litem, it is claimed that the trusts for accumulation in favor of his wards provided for in the sixth and eighth clauses of his will are valid and enforceable, and that it was the intention of the testator, Daniel P. Hussey, that these defendants or their children, should any of them die leaving children before the date of distribution, should, under section eight of his will, receive the principal as well as the accumulated income provided for in that section. He also alleges that his infant wards were intended by testator to be the residuary legatees of any portion of the estate not otherwise disposed of in his will, and makes his answer a counterclaim against the plaintiff for the purpose of having the rights of the infants ascertained, and requiring the plaintiff as executor and trustee to account for their shares when so ascertained. The court below held that the provisions of sections six and eight of the will providing for the accumulation and distribution of the income of Frederick D. Hussey's children at the end of thirty-three years, at which time Emily would become thirty-five years old, if living, were valid and enforceable, as was also the bequest of the principal, and adjudged that the plaintiff, Frederick D. Hussey, as trustee and executor, should file a full and complete account, showing the annual income from the trust estate from the death of Daniel P. Hussey, and the sums paid by them to Jane M. Littlefield, prior to her death, under the provisions of the sixth clause of the will. To which the plaintiff excepted. The lower court declined to make any adjudication on the question as to whether or not the

children of Frederick D. Hussey were entitled to take as residuary legatees that portion of the estate of Daniel P. Hussey not specifically devised by his will. To which the guardian ad litem excepted, and both the plaintiff and the guardian ad litem have appealed. It is contended in behalf of Frederick D. Hussey, first, that the provisions contained in sections six and eight of the will for the accumulation of specific portions of the income for the benefit of his children to be paid to them when his daughter, Emily P. Hussey, Jr., reaches the age of thirty-five, or if she should not live that long, at such date had she lived, are void because in contravention of the law against perpetuities, and that being void he, as heir at law, inherits the fund; second, that the testator has failed to dispose of the principal from which this income is derived, and that, therefore, as heir at law, he is entitled to it as intestate property. On behalf of the children it is contended by their guardian ad litem that appellant is wrong on both propositions.

In the first, second, third, fourth and fifth clauses of the will testator makes certain special bequests, about which there is no controversy. We copy the remaining clauses of the will, although only the sixth and eighth are directly involved in this litigation. They are as follows:

"Sixth. After deducting any payment of the legacies before named, I give and bequeath to my beloved wife two-fifths of the income of the remainder during her natural life, and to my said son, Frederick D., I give and bequeath a like sum, to wit: Two-fifths of the income of said remainder; and from the remaining one-fifth of said income I direct my executors to pay to my sister, Jane M. Littlefield, an annual sum of \$500, to commence at my decease and payable semi-annually, and to be continued and payable during her natural life; the balance of said one-fifth of said income shall be allowed to accumulate for the benefit of the children of my said son or their heirs, such accumulation and such income to be equally divided and paid to and distributed among said children when Emily P. Hussey, daughter of Frederick D. Hussey, arrives at the age of thirty-five years, if then living, or at that date when she would have been thirty-five years of age had she lived, being then deceased.

"Seventh. (He gives at the death of his wife \$50,000 to the city of Nashua, to establish a public library.)

"Eighth. If my said son shall survive my wife, he shall receive at her decease the sum of \$100,000 from my estate, and shall continue to receive two-fifths of the income of the remainder, and any remainder income heretofore received by my said wife shall, after deducting such sums as to my said executors may seem reasonable and fitting for the support of the children of my said son, be allowed to accumulate for the benefit of said children, conditioned as payments and distribution as in the sixth clause of the will.

"Ninth. Should my said son die before my said wife leaving no more than two children, I give and bequeath to my sister, Jane M. Littlefield, my brother's widow, Sarah S. Hussey, and to my said half brothers, Ezekiel H. and George W. Sargent, if living, the further sum of \$1,500, to each and all of such one surviving.

"Tenth. In case of the death of my said son before the death of my wife, leaving no children, I give and bequeath to my wife and her heirs one-half part of the whole of the remainder of my estate; and the rest and remainder

of said estate shall be divided into equal shares between those surviving of the following, to wit, the widow of my son, my said sister, Jane M. Littlefield, my brother's widow, Sarah S. Hussey and said half brothers, Ezekiel H. and George W. Sargent.

"Eleventh. If from any cause my wife should be dissatisfied with the foregoing provisions of this will relative to her share, and should elect to receive such share or distributive part as the statutes provide, waiving the provisions herein set forth, and in lieu of the same, then I order and direct that my said son shall receive one-half of the income of the remainder of said estate, instead of two fifths as set forth in section sixth. And I further order and direct that my said son shall receive on his arriving at the age of forty years the principal sum of which he shall have received the income as provided in the preceding sections.

"Twelfth. I hereby constitute and appoint Webster P. Hussey, of said Nashua, and my said son, Frederick D. Hussey, executors of this my last will and testament, hereby revoking any and all former wills by me made, and I hereby authorize and empower my said executors to sell or exchange my estate when same shall be deemed best and advisable and for the interest and said estate by my said executors, but no such change shall be made in said estate except sanctioned by both of said executors, further directing that no bonds are or shall be required of them as such executors. I also direct that all necessary expenses shall be paid to said executors incurred in the execution of the provision of this will, but that said son shall receive no further compensation for his services in the same. But I direct that said Webster P. Hussey shall receive in addition to such necessary expenses a sum not exceeding at any time (besides expenses) the sum of \$500 per annum, and at no time shall said sum so received exceed 2 per cent. of the income of said property then in care and trust of said executors; and when such percentage on the income as aforesaid would be less than \$500, then he shall receive and be allowed such sum as would be 2 per cent. on said income, and such sums so allowed to Webster P. Hussey shall be in full settlement and compensation for his services while acting and serving as such executor.

"In witness whereof I have hereto set my hand and seal this 21st day of June, 1883, and interlineations in sections seven and eight were made before signing.

"DANIEL P. HUSSEY.

"Signed, sealed, published and declared said Daniel Hussey as and for his. And testament in the presence of us, who at his request and in his presence and in the presence of each other have subscribed our names as witnesses thereto.

"CHAS. W. HOITT,

"IRA GUSTINE,

"MARK G. WILSON."

That wills must be sustained and the intention of the testator given effect by courts whenever it can be done without violating established rules of law, or some public policy, is a truism so often repeated that it has become trite. But it expresses a rule which is applicable to the construction of every will when its validity or that of any part of it may be called in ques-

tion. And when one undertakes to make a will it will be presumed that his purpose is to dispose of his entire estate, and does not intend to die intestate or become intestate after death. And courts are never disposed to put such construction upon a will as would be likely to lead to intestacy, and this inclination is most strong when it is a residue of personalty which is the subject of the bequest. (*Maberley v. Strode*, 3 Vesey, 456; *Whitcomb v. Redmond*, 8 L. R. A., 744, note.) "And if the reading of the whole will produces a conviction that testator must necessarily have intended and an interest to be given, and which is not bequeathed by express and formal words, the court must supply the defect by implication. (*Phelps v. Phelps*, 148 Mass., 570.)" So far as we are able to discover there is nothing in any clause of this will which indicates an intention on the part of the testator that any part of his estate should, under any circumstances, be treated as intestate. After providing for the payment of certain specific bequests, he divides the entire remainder of his estate into five equal parts, and specifically disposes of each of these parts. In the sixth clause of his will he gives the income on two-fifths of this remainder to his son, the appellant, without restriction. In the eleventh clause he provides that when he arrives at the age of forty years he shall receive the principal of this two fifths, and as appellant has passed the age of forty years, no question can arise as to this two-fifths remainder. He then gives the income on two of the other fifths of his estate to his wife for life, and in the eighth clause of his will provides that if his son should outlive his mother, that he shall receive therefrom \$100,000 in addition to the two-fifths already devised to him, and testator then provides, in clause eight, that his executors may deduct such sums as may seem reasonable to them, from the income of the remainder of this two-fifths of his estate, on which his wife during her life had drawn the income for the support of his grandchildren; and that any remainder of income from this two-fifths shall be allowed to accumulate for the benefit of the grandchildren, conditioned as to payment and distribution as in the sixth clause of his will. In the ninth clause he provides for an additional bequest to his brothers and sisters of \$1,500 in the event his son shall die before his wife, leaving only two children. In the tenth clause he provides for the distribution of his estate in case his son dies before his wife leaving no children, and in the eleventh clause he provides for the contingency of his wife renouncing the provision made for her in the will and claiming dower.

We will now consider the disposition made by testator in the sixth clause of the will, of the remaining one-fifth of his estate. Out of the income of this one-fifth testator directs that his executors shall pay his sister, Jane M. Littlefield, annually during her life, \$500, and that the balance of the income on this one-fifth shall be allowed to accumulate for the benefit of his grandchildren or their heirs; and that such accumulations and income should be paid to them when his granddaughter, Emily, was thirty-five years of age, or would have been had she lived. It must be conceded that in order to sustain the bequest of the principal of this one-fifth interest of the estate that we must believe that testator intended, and has attempted, to make such a bequest. It is clear from the entire will that testator intended that the bulk of the estate, after the death of his widow, should go for the

benefit of his son and his grandchildren, and that distrusting the improvidence of youth he postponed the time when both his son and his grandchildren could take possession of the principal of his estate devised to them until they had acquired the discretion which is the usual accompaniment of more mature years. The provisions in the will for the benefit of the wife and son of the testator are clear, definite and explicit. There is not the slightest intimation that testator intended that either of them should take by inheritance as well as by bequest, and we think it is equally clear that he intended that his grandchildren should take the entire accumulations of the one-fifth of his estate devised in the sixth clause of his will, subject, however, to the annuity in favor of his sister, Mrs. Jane M. Littlefield, during her life. It is contended for appellant that the words accumulations and income are synonymous, and both refer to the premium or interest which may be realized upon the principal of this one-fifth of testator's estate, and neither has any reference to the principal of the one-fifth. It must be conceded that in its ordinary use the word accumulations is used in this sense, but in law it has a more definite and technical meaning. Black in his law dictionary, defines its legal meaning as follows: "When an executor or other trustee masses the rents, dividends or other income which he receives, treats it as capital, invests it, makes a new capital of the income derived therefrom, invests that and so on, he is said to accumulate the fund. And the capital and accrued income thus procured constitute accumulations."

We are satisfied that the testator used the word accumulations in this sense. He plainly intended that this particular fund should grow; that the surplus income, after payment of the annuity of \$500 to his sister, should be added to the principal, and become a part of the capital from year to year; and that in this way a fund should be accumulated from the capital and accrued income for the benefit of his grandchildren.

There is another well-settled rule of construction that would give the principal of this one-fifth to the grandchildren. The testator nowhere provides that it shall go to any one else, or fall into the residue of his estate, and where the interest of a fund is bequeathed to a legatee or in trust to him without any limitation as to the continuance, the principal will be regarded as bequeathed also. (*Craft v. Snooks' Ex'or*, 2 Beasley, N. J., 121; *Guilicks' Ex'or v. Guilicks*, 10 C. C. Green, N. J., 324; *Wainright v. Wainright*, 3 Ves., Jr., 558; *Hale v. Beck*, 2 Eden, 229.) We are, therefore, of the opinion that testator's grandchildren took not only the income, but also the principal of the one-fifth of the estate.

We will now proceed to the consideration of appellant's second contention, that the provision directing the accumulation of income and its distribution to the grandchildren, when Emily should arrive at the age of thirty five years, or would have reached that age, if living, violates the rule against perpetuities. Mr. Perry, in his work on Trusts, 5th edition, volume 1, section 381, says that "in determining whether a particular devise is contrary to the rule against perpetuities, the inquiry is not whether the contingency upon which the estate is to vest actually occurred within the time limited by the rule, but whether it is possible that the event upon which the executory devise, or shifting, or springing use, is to vest in some person, may not

happen within the time, the executory estate is void, although in fact the event actually happens within the time."

Underhill on the Law of Wills, volume 2, section 888 and section 886, is to the same effect. And this view was adopted by this court in *Stephens v. Stephens*, 21 Ky. Law Rep., 1818; *Coleman v. Coleman*, 28 Ky. Law Rep., 1478. Undoubtedly this provision of the will under our statute against perpetuities would be held void, but this being the will of a testator who died domiciled in New Hampshire, which disposes alone of personalty, it must be construed according to the law of New Hampshire. On this point Judge Story, in his work on Conflict of Laws, section 465, says: "It is now a well-settled principle in the English law that a will of personal property, regularly made according to the law of the testator's domicile, is sufficient to pass such property in every other country in which it is situated."

Page on Wills, section 35, says: "Where a bequest of personalty creates a trust, its validity is primarily to be determined by the law of the domicile of the testator, not the law of the place where the property is situated."

On the same subject Mr. Wharton, in his Conflict of Laws, section 570, says: "By the English common law, as held both in England and the United States, testamentary capacity as to personalty is governed by the law of the domicile of the testator at the time of his death."

And this rule has been followed by this court in numerous decisions. (*Chapline v. Moore*, 23 Ky., 175; *Fletcher v. Sanders*, 37 Ky., 840; *Townes v. Durbin*, 60 Ky., 355; *Danelli v. Danelli*, 67 Ky., 67.) Indeed we do not understand that this proposition of law is controverted by appellant. It, therefore, remains to be determined whether the bequest at the time it took effect was in conflict with the law of New Hampshire, the domicile of testator.

It appears from the evidence that there is no statutory provision in New Hampshire against perpetuities; and that the common-law rule prevails there except in so far as it has been modified by the decisions of the supreme court of that State. The common-law rule required that every interest disposed of by will should vest within a life or lives in being at the creation of the estate and twenty-one years and ten months thereafter. (*Blackstone's Com.*, 174; *2d Minors' Institutes*, 376 and 377.) And it is clear that, tested by the restrictions of the common law, the devise in this clause to testator's grandchildren is void because it postpones the enjoyment of the income for a period of thirty-three years, which is longer than the time allowed by the common law rule.

But the supreme court of New Hampshire, in 1891, in their decision in *Edgerly v. Barker*, 66 N. H., 434, which is also reported in 28 L. R. A., 323, modified that rule of the common law as to perpetuities in a very important particular. In that case the testator devised the remainder of his estate to trustees, who were to pay fixed sums to the testator's two children for life, with remainder of the estate over to testator's grandchildren, born and unborn, and to be paid to them when the youngest should arrive at forty years of age, and upon their giving bond to the children of the testator for the payment of the support provided for them in the will. At common law this restriction in the vesting of the estate would have rendered the devise void, but the court sustained it by modifying the provision so as to make the gift

take effect when the youngest child reached the age of twenty-one years, instead of forty, upon the theory that the controlling idea of the testator was that his grandchildren should have the remainder of his estate; and that the postponement of this devise until the youngest child was forty years old was secondary and subordinate, and that the court would not permit the plain intent of the testator that his grandchildren should have the estate to be defeated by the provision that it should not take effect until the youngest was forty years old. The edition of the *Lawyers' Reports Annotated*, in a note appended to this case, says: "The application of the *cy pres* doctrine to a gift which is not charitable, so as to save it substantially when the time of distribution fixed by the will is unlawfully remote, is somewhat unusual, but the opinion in the above case presents much authority for the essential principle involved."

And whether the decision in that case be sound or not, it is conceded to be the law of New Hampshire, under which the validity of the devise in this case must be determined. It is very earnestly insisted for the appellant that the difference between this case and the *Edgerly* case is so marked as to except it from the rule announced in the *Edgerly* case. The basis of this contention is that in the *Edgerly* case the beneficiaries were known and the limitation was only as to the time when the estate should pass, whilst in this case the persons who are to take can not be known until his grandchild, Emily, should arrive at the age of thirty-five, or would arrive at that age provided she is alive. And in support of this contention appellants have taken the deposition of a distinguished lawyer and citizen of New Hampshire, who, in answer to a request by appellant to point out the distinctions between this case and the *Edgerly* case, said: "In the *Barker* case, as the bequest would not take effect until all of the grandchildren were born and the youngest became twenty-one, the same persons would receive the property as would have taken it at the end of forty years. No change of the beneficiaries could have been made by the court's action, whilst in the *Hussey* case the vesting of the estate at the end of twenty-one years, instead of thirty-three years, would cut off any grandchildren born during the twelve-year period, a change of the beneficiaries would have been made by the court's action, and the testator's primary purpose altered."

Upon cross-examination the witness was asked this question: "Mr. Senator, I think it appears from the report of the *Barker* case that at the date that case was decided by the supreme court, or at least at the time when testator died, the testator's son was thirty-five years old and the son's wife was thirty-two years old, and they were approximately at these respective ages at the time the case was decided. Assuming that to be true, suppose that a child was born to that couple after the decision of the supreme court of New Hampshire in the *Barker* case. In your opinion would that child share with other grandchildren in testator's estate, or would he or she be cut off?"

Answer. "I think they should be cut off, because the estate could not vest until twenty-one years after his birth, and such a limitation after life not in being or gestation when testator died would be void. What the court meant as to unborn children not then in gestation, I can not discover. As a matter of fact I suppose there were none."

Question 17. "Then in the Barker case there was a possibility of a grandchild being born who could not share in the testator's estate; that is a fact, is it not?"

Answer: "Yes; if that was the purpose of the court in that case possibly the court intended that all of the unborn children should be reckoned and the property vested at the end of twenty-one years from the birth of the youngest child whenever born. If so, this would tend to impeach the soundness of the decision in *Edgerly v. Barker*, but would not alter the fact that there was no possibility of change in the beneficiaries by cutting the limitation from forty years to twenty-one years."

Question 18. "Has the decision in *Edgerly v. Barker* been overruled or modified?"

Answer. "Not that I am aware of."

It seems quite plain that in *Barker v. Edgerly* the court put the period of distribution at the time when the youngest child then living became twenty-one years of age, so that there was a possibility in that case that other children might be born after that time who would be excluded. So after all, it seems to us that it is impossible to distinguish on principle this case from that; and that, following the doctrine laid down in that case, the chancellor properly decided that the provision of the will directing the accumulation of the income was valid and enforceable for a period of twenty-one years after testator's death, and should be carried out by the trustee; and that two-fifths of the income to be accumulated under the eighth clause of the will after the death of testator's widow stands upon the same footing as the one-fifth directed to be accumulated under the sixth clause of the will, with the exception that the support for the children is to be deducted from the income derived from this interest, and that both funds go to the grandchildren in twenty-one years after the probaton of the will of Daniel P. Hussey.

The third ground relied on for a reversal is that the chancellor erred in requiring an accounting in this action by the executor and trustee, as he qualified as such in the State of New Hampshire and received the estate by virtue thereof, and appellant has cited numerous authorities to support his contention that an executor can not be sued out of the jurisdiction of his appointment for a failure to carry out the trust imposed upon him. But the law on this question has long been settled against his contention in this State by numerous adjudications of this court.

In the early case of *Dorsey's Ex'or v. Dorsey's Adm'r*, 28 Ky., 280. it was held that a distributee of a decedent might enforce distribution in the courts of this State of assets received by the administrator appointed in Maryland, if found in this State. This was followed by *Atchison's Heirs v. Lindsey*, 45 Ky., 86, in which the administrator and infant heirs of John Atchison sought to recover of James Lindsey, who administered upon the estate of decedent in South Carolina, certain assets received by him in that State. The contention was made in that case that as Lindsey was appointed administrator in South Carolina and received the assets sued for there, he could not be held responsible in the tribunals of this State for the surplus remaining in his hands at the suit of a local administrator and infant heirs of decedent. In response to this contention, after referring to *Dorsey's Ex'or v.*

Dorsey's Adm'r, the court said: "Upon express authority of this case and upon our own sense of what is required by convenience and justice, and of the comity due sovereignty and laws of South Carolina, we are of the opinion that the mere fact that Lindsey was appointed administrator in that State and received there the assets for which he is now charged, does exempt him from all liability to be sued in tribunals of this State for the claim growing out of his having thus received assets or the proceeds of which the complainants or some of them are entitled. Whether any decree should finally be rendered against him on this account may depend upon the facts disclosed in his answer and upon the proof, but we think he was bound to answer."

The question was again before this court in *Manion's Adm'r v. Titworth*, 57 Ky., 597, and in a well-considered opinion by Judge Simpson it was decided "that it was settled doctrine in this State that the administrator or executor who is appointed, or who qualified in another State, and there receives assets in his hands, may be sued in the tribunals of this State by persons entitled to such assets if he shall have removed to and settled in this State." The question was again before the court in *Keiningham v. Keiningham's Ex'or*, 24 Ky. Law Rep., 1880, and the doctrine was reaffirmed. Appellant avers that his domicile is in this State; that the property disposed of by the sixth and eighth clauses of the will of testator are in his possession and under his control; that no part of it is within the State of New Hampshire. It is manifest that as the New Hampshire courts could not enforce any decree for a settlement of appellant's accounts unless he voluntarily came within their jurisdiction; and that under the decisions quoted *supra* the courts of Kentucky have jurisdiction both of him and the property received by him under the will of testator for the purpose of requiring an accounting at his hands, we, therefore, conclude that the court did not err in so adjudging. In our opinion the trial court properly declined to pass upon the question raised by the guardian ad litem as to who were intended by testator to be the residuary legatees of any portion of his estate not otherwise disposed of by his will.

For reasons indicated the judgment upon the original appeal is affirmed and the cross appeal prayed by the guardian ad litem dismissed and the cause remanded for proceedings not inconsistent with this opinion.

Whole court sitting.

NEW YORK LIFE INSURANCE CO. v. WARREN DEPOSIT BANK.

(Filed June 16, 1908—Not to be reported.)

Insurance—Forfeiture of policy—Laches—Appellant issued a policy for \$5,000 insurance on the life of P., which was assigned to appellee as collateral to secure a debt. The premiums were promptly paid for several years and when the premium became due P. executed a note for a part of the premium which stipulated that if said note and all premiums were not paid at the maturity of the note the assured would forfeit all claims to further insurance and benefits. The note became due September 9, 1896, and this suit was brought on October 22, 1901, for a paid-up policy. Held—That the failure to demand a paid-up policy for more than five years was such laches as deprives the plaintiff to the relief sought.

Humphrey, Burnett & Humphrey and Mitchell & DuBose for appellant.

J. M. Galloway, John B. Rodes and W. B. Gaines for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Nunn.

On December 9, 1889, appellant issued to E. A. Porter a policy of insurance of \$5,000 on the ordinary life plan. Soon after the issual and delivery of the policy it was assigned and put in pledge to the Warren Deposit Bank as security for a debt owing by E. A. Porter to the bank. The premiums were paid annually until December 9, 1895. The total annual premium was \$382.50. On December 9, 1895, when the succeeding year's premium became due, by an agreement between the insured and appellant the former was permitted to pay \$58.38 in cash; to execute and deliver his promissory note for \$175.12, payable June 9, 1896. At the maturity of that note he was unable to pay all of it, and by an agreement with the company he was permitted to pay \$48.78, leaving a balance due of \$131.34, including interest to that date. Thereupon he executed and delivered to the company his note for that sum due September 9, 1896. No part of that note was ever paid. The note is as follows:

"Pol. 389,686.

New York, June 9, 1896.

"Three months after date I promise to pay to the order of the New York Life Insurance Co. \$131.34, at the office of the company, 346 Broadway, New York. Value received.

"This note is given in part payment of the premium due December 9, 1895, on the above policy, with the understanding that all claims to further insurance and all benefits whatever, which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Co. if this note is not paid at maturity, except as otherwise provided in the policy itself.

(Signed) "E. A. PORTER."

From September 9, 1896, to October 22, 1901, neither said Porter nor his assignee, the bank, nor any one for him, made any demand of appellant for a paid-up policy, which privilege was specially provided for in the policy.

This court, in the case of the Washington Life Ins. Co. v. Miles, 23 Ky. Law Rep., 1705, fixed five years as a reasonable time in which an action might be brought for a paid-up policy, and after that time such action could not be maintained. Also in the case of the Equitable Assurance Society of the United States v. Warren Deposit Bank, ante, —, decided by this court at the present term on the 10th of June, 1903, the court again sustained and approved the limit therein stated.

It is contended by appellees that the execution and delivery of the note, copied above, constituted satisfaction of the premium until the next regular premium was due December 9, 1896, and that the condition in the note, to wit: "The policy * * * shall become immediately void and be forfeited to the New York Life Insurance Co. if this note is not paid at maturity," can not avail appellant, for the reason that it did not return or offer to deliver or return the note at its maturity to the maker. There is no pretense that after the maturity of this last note, on September 9, 1896, appellant, through

any agent or representative, attempted to collect same, or that any demand for payment was made. It remained silent and inactive in the matter. By such conduct it did not waive its right to claim and demand forfeiture on September 9, 1896, as expressed in the note referred to. (*Union Central Life Ins. Co. v. Duvall*, 20 Ky. Law Rep., 442; *Moreland v. Duvall*, *ibid*, 435; *Manhattan Life Ins. Co. v. Savage*, 22 Ky. Law Rep., 875; *Manhattan Life Ins. Co. v. Myers*, 23 Ky. Law Rep., 488, and other cases recently decided by this court.)

It appearing that more than five years had elapsed from the maturity of this last premium note to the institution of this action, therefore, the special judge, in sustaining the demurrer to appellant's answer pleading laches, was error.

The judgment is reversed and cause remanded, with directions to overrule the demurrer and for further proceedings consistent herewith.

Whole court sitting, except Judge Settle.

PEOPLE'S ELECTRIC LIGHT AND POWER CO. v. CAPITAL GAS
AND ELECTRIC LIGHT CO.

(Filed June 16, 1903.)

1. Municipal government—Exclusive privilege for furnishing electric lights—Contracts—Injunction—This appeal involves the question as to whether appellant or appellee owns the exclusive right to furnish electric lights to the city of Frankfort and its citizens. Appellant claims said exclusive right under a purchase of said right at a sale of the franchise authorized by an ordinance of the city. Appellee claims said exclusive privilege under various contracts made with the city. Held—That appellant's franchise is not exclusive as the language of the ordinance granting it will show. Appellee avers in its answer that it and its assignor and predecessor, the Southern Gas Works Co., by purchase and deed from the city of Frankfort, acquired title to its gas works, mains and pipes and to the exclusive use of its streets and alleys for the purpose of furnishing gas and electricity for the lighting of its streets and the use of its inhabitants, which right has been confirmed by repeated subsequent contracts made between it and the city. In 1882 the city of Frankfort sold its gas works to the Southern Gas Works Co., and by the terms of the contract it granted, or attempted to grant, the "exclusive right to the use of the streets for the purpose of laying, repairing and properly operating all mains, pipes and other necessary machinery for the furnishing of all gas or other illuminating light in said city." Among the undertakings assumed by the grantee was to extend the gas mains and light a certain number of street lamps at the price named in the contract, and to furnish private consumers gas at a stated price, with the privilege of readjusting the price every five years. This contract was assigned by the grantee to appellee and the city executed a deed to appellee, conveying all the rights it had sold to the Southern Gas Works Co. Under this contract appellee, for several years, furnished only to the city and consumers gas light. Appellee made several subsequent contracts with the city relative to furnishing electric lights, but none of them contained any agreement requiring appellee to furnish electricity to private consumers or regulating the price thereof. Held—That appellee did not, by its several contracts with the city, obtain the exclusive franchise it claims even though it be conceded that the city

was authorized to grant it, which latter question is not decided. The charter of the Southern Gas Works Co. provided only for the furnishing of gas light. It conferred no authority to use any light other than gas light, and its contract with the city was to furnish only gas light. Therefore, the contract by which the city granted, or attempted to grant, to that company the exclusive right to the use of the streets of the city for the purpose of supplying "gas or other illuminating light" was void as to "other illuminating light." The appellee, as assignee of the Southern Gas Works Co., assumed by the deed only such obligations as rested on the latter, nothing more; therefore, it was under no duty to erect an electric plant, or to furnish electricity to the city or its inhabitants for lighting. The contract of 1893 with the city did not attempt to confer on appellee any new right. The grant of the franchise to appellant was not void as it did not impair the right of any contract made with appellee. Appellee contends that appellant can not maintain the action to quiet its title as it is not in the possession of the streets and alleys of the city, the use of which is necessary to the enjoyment of its franchise. The contention of appellant is that the cloud cast upon its title to the franchise is preventing it from selling, pledging or mortgaging its stock or selling its bonds, in consequence of which it has been unable to erect its electric plant or to enjoy the franchise granted it by the city of Frankfort. In such a state of case injunction is the only remedy if appellant in fact owned the exclusive privilege.

2. Champerty—The granting of the franchise to appellant was not champertous. If appellee was exercising a franchise that was not exclusive at the time of the grant, the city was not prevented from granting a like privilege to appellant. If, on the other hand, appellee's franchise was exclusive, the second grant was simply void.

Hazelrigg & Chenault and John W. Ray for appellant.

John W. Rodman and John B. Lindsey for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Settle.

This equitable action was instituted by the appellant, People's Electric Light and Power Co., to enjoin the appellee, Capital Gas and Electric Light Co., from interfering with its alleged exclusive right to supply the city of Frankfort, its inhabitants and consumers, with electricity for lighting and other purposes, as provided by its articles of incorporation, and authorized by an ordinance of the city. The answer and counterclaim filed by appellee contains six paragraphs, and denies that appellant has or owns the exclusive right, or any right, to supply the city of Frankfort or its inhabitants with electricity for lighting or any other purpose, or that the city council had the power, by ordinance or otherwise, to confer upon appellant any such right; and for further defense avers, in substance, that it and its assignor and predecessor, the Southern Gas Works Co., by purchase and deed from the city of Frankfort, acquired title to its gas works, mains and pipes and to the exclusive use of its streets and alleys for the purpose of furnishing gas and electricity for the lighting of its streets and the use of its inhabitants, which right has been confirmed by repeated subsequent contracts made between it and the city; that this right is about to be interfered with by appellant, for which reason the answer asks an injunction against it.

Appellant filed general demurrer to the answer and counterclaim, and

each paragraph thereof, which was sustained to the first, second, fourth and fifth and overruled as to the second and sixth paragraphs. Thereupon an amended answer and counterclaim was filed by appellee, to which, and to the several paragraphs of the original answer as amended, appellant again filed a general demurrer, and the case being submitted on that demurrer it was sustained as to the first, second, fourth and fifth paragraphs of the answer as amended, and also as to the new paragraph added by the amended answer, to all of which appellee excepted.

The cause was then submitted for trial and judgment upon the pleadings and an agreed writing containing all the evidence, documentary and otherwise, upon which the parties relied in support of their respective contentions. Whereupon the special judge, expressing his views in a well considered and ably written opinion, rendered judgment to the effect that neither appellant nor appellee has the exclusive right to use the streets of the city of Frankfort for the purpose of furnishing electricity to the city or its inhabitants for lighting purposes, and enjoining each of them from asserting any such exclusive right. Appellant and appellee each excepted to the judgment and prayed an appeal to this court, and the case is now before us upon both appeals for final adjudication.

The facts presented by the pleadings and evidence are as follows: The city of Frankfort by a written contract of May 30, 1882, made with the Southern Gas Works Co., the assignor of appellee, sold to it its gas works, which had theretofore been constructed and was then being operated under a charter from the legislature granted the city. By the terms of this contract it granted, or attempted to grant, to the Southern Gas Works Co. the exclusive right to the use of its streets "for the purpose of laying, repairing and properly operating all mains, pipes and other necessary machinery for the furnishing of all gas or other illuminating light in said city." The consideration of this sale, as recited in the contract, was the undertaking of the Southern Gas Works Co. to execute to the city forty interest-bearing bonds of \$1,000 each, payable forty years from July 1, 1882, with the privilege reserved of paying the bonds, or any one or more of them, before maturity. The company further undertook to improve the gas works, extend the mains, to light a certain number of street lamps at the price named in the contract and to furnish private consumers gas at not exceeding \$3 per 1,000 cubic feet, but this maximum price was to be adjusted every five years so as not to exceed the average price charged for gas in cities or towns of the same or a less population than Frankfort. The contract mentioned and all rights incident and appurtenant thereto were assigned by the Southern Gas Works Co. to the appellee, Capital Gas and Electric Light Co., which became incorporated by a legislative act approved April 24, 1882, and by deed of June 27, 1882, the city of Frankfort conveyed appellee, as assignee of the Southern Gas Works Co., all the property and rights which it had agreed theretofore to sell to the Southern Gas Works Co., it being recited in the deed that the appellee had already executed and delivered the forty bonds required of the Southern Gas Works Co. by its contract with the city. The appellee, by the terms of the deed, was to assume and carry out all the undertakings of its assignor with the city. By virtue of the rights thus acquired under the contract and deed mentioned appellee only manufactured and fur-

nished gas for several years for the use of the city and its inhabitants, but about January 1, 1890, it constructed an electric light plant, and began, for the first time, to furnish electric lights to the city and its inhabitants, though no contract was made by appellee with the city in reference to electric lighting until September 18, 1893, at which time a new or supplemental contract was made between appellee and the city under which the electric lights were to be furnished. This contract contained the statement that it was entered into at the request of the city and because it desired a modification of the former contract. It appears that since that time various supplemental agreements have been made between the parties from time to time for the continued lighting of the streets, but neither the contract of September 18, 1893, nor any of those of subsequent date contain any provision or agreement requiring appellee to furnish electricity to private consumers, or regulating the price thereof. Appellee's claim of the exclusive right to the use of the streets of the city for furnishing electricity to the city and its inhabitants for lighting purposes is based upon its various contracts with the city. Upon the other hand the appellant, People's Electric Light and Power Co., contends that it has the exclusive right to the use of the streets for the furnishing of electric lights to the city and its inhabitants by virtue of the ordinance of the general council passed July 23 and August 13, 1901, and that the franchise granted it by these ordinances was duly advertised for sale and bids therefor were received publicly, and that the franchise was thereby awarded to it as the highest bidder.

It is averred by appellants that appellee is wrongfully asserting an exclusive right or franchise to supply electricity to the city and its inhabitants for lighting purposes, and is thereby casting such a cloud upon its title that it is being prevented from selling, pledging or mortgaging its stock or selling its bonds, whereby to raise the money with which to erect its plant, and it, therefore, asks that appellee be enjoined from asserting the claim of exclusive right set up by it.

We think the special judge properly sustained the appellee's general demurrer to the extent indicated in the judgment.

The first paragraph of the answer interposes the defense that appellant can not maintain the action to quiet its title to a franchise to light the city of Frankfort with electricity as it is not in possession of the streets and alleys of the city, the use of which is necessary to the enjoyment of its franchise. The contention of appellant is that the cloud cast upon its title to the franchise is preventing it from selling, pledging or mortgaging its stock, or selling its bonds, in consequence of which it has been unable to erect its electric plant or to enjoy the franchise granted it by the city of Frankfort. In such a state of case injunction is the only remedy, if, as a matter of fact, appellant owns the exclusive franchise to which it lays claim. This point seems to have been well settled in *Citizens Gas Light Co. v. Louisville Gas Light Co.*, 81 Ky., 263.

The second paragraph contains a plea of the statute of champerty, which has no place in a case like this. Although it may have been true that at the time of the grant of the franchise from the city of Frankfort to appellant, appellee was exercising a like franchise under claim that it was exclusive, such a claim unless true in fact could not prevent the city from grant-

ing a similar franchise to appellant. Upon the other hand, if appellee's franchise was exclusive, the grant of the franchise by the city to appellant was simply void.

The third paragraph of the answer, by denying that the sale of the franchise to appellant was advertised, or that bids were publicly received therefor, or that the franchise was sold to appellant as the highest and best bidder, raised an issue of fact upon which proof was necessary, therefore, this paragraph was properly held to be good upon demurrer.

The fourth and fifth paragraphs set forth the various contracts between appellee and the city upon which its claim to the exclusive franchise is based, and they present the contention that the grant of the franchise to appellant is void because its effect is to impair the obligation of appellee's contract with the city. By legislative sanction the city of Frankfort was invested with the title to its streets and alleys, and all other property of the city, including its gas works, waterworks, all being under the exclusive control of the city council. By an act of March 28, 1872, it was provided "that the board of councilmen of the city of Frankfort be, and they are hereby, authorized to grant, bargain and sell, and convey, to rent or lease any and all property or any part thereof belonging to said city of Frankfort, be the same lands, tenements, goods, chattels, or franchises, or immunities, on such terms, and for such sums and at such times as said board of councilmen shall deem for the best interest of said city of Frankfort."

We find in appellee's charter the following provisions: "Said company shall furnish gas light, or electric light, to any person on such terms as the company and such person may agree upon, and any such contract shall be obligatory and enforceable in any proper court in this Commonwealth;" and further, that the appellee company shall have authority "to put up lamp posts and electric lights, and that said gas and electric lights shall be furnished to the city at a reasonable price per light per annum, as may be agreed on." It is contended for the appellee that these provisions of its charter, considered with those of the charter of the city, conferred upon the city ample power to grant appellee the exclusive franchise asserted by it, and it is conceded by the special judge that some of the authorities cited by counsel for appellee, tend strongly to support that contention, though he properly, as we think, declined to accept that view. We agree with him that the question of whether the city has the power to grant an exclusive franchise, such as is claimed by appellee in this case, is not before us for decision. In our opinion it did not, by its several contracts with the city, obtain the exclusive franchise claimed for it, even though it be conceded that the city was authorized to grant it.

The Southern Gas Works Co., appellee's assignor, made the original contract with the city under which appellee claims title to the franchise asserted by it. It is clear that the charter of the Southern Gas Works Co. provided only for the furnishing of gas light. It conferred no authority to use any light other than gas light, and its contract with the city was to furnish only gas light; indeed it was unprepared to furnish any other. We, therefore, further agree with the special judge that the contract which granted, or attempted to grant, to that company the exclusive right to the use of the streets of the city for the purpose of supplying "gas or other illuminating light" was void as to "other illuminating light."

An examination of the charter of appellee will show that it did confer power to make and supply electricity, and to accept from the city a grant of the use of its streets for that purpose, and the city having carried out its contract with the Southern Gas Works Co., by executing a deed to appellee, as its assignee, conveying to it the gas works, and the exclusive use of the streets of the city for supplying "gas or other illuminating light," it becomes important to determine the effect of that deed.

It will be borne in mind that the Southern Gas Works Co. did not in its contract with the city undertake to erect an electric plant, or to supply electric light to the city or its inhabitants. It did, however, undertake to issue \$40,000 worth of bonds, and to improve the gas works, extend the mains and supply gas to the city and other consumers at agreed prices specified in the contract. The appellee, as assignee of the Southern Gas Works Co., assumed by the deed only such obligations as rested upon the latter, nothing more; therefore, it was under no duty to erect an electric plant, or to furnish electricity to the city or its inhabitants for lighting.

We do not think it was the purpose of the city to confer an exclusive right upon appellee's assignor, or upon it, to furnish electricity for the city's use and that of its inhabitants without imposing an obligation to compel it to exercise that right. It is contended, however, by counsel for appellee that the incorporation of such an obligation in the contract was unnecessary, as it was required by its charter to furnish electricity for lighting purposes. We are of opinion that the provision of appellee's charter, that "said company shall furnish gas or electric light to any person on such terms as the company and such person may agree upon," only expressed the duty which rests upon every corporation enjoying a public franchise to serve all alike, and does not compel the exercise of the franchise.

We find that for seven years after its right to use the streets of the city for lighting purposes was secured appellee failed to use electricity for that purpose, and this failure to exercise its electric light franchise demonstrates that it was under no obligation to do so. Furthermore, there was no time during that seven years that it could have been compelled by the city to furnish electric lights to it, or its inhabitants, and yet appellee insists that it had the right to prevent any other person from doing so. We are unable to find anything in any of the contracts between the city and appellee that requires the latter to furnish electric lights for the use of the city or its inhabitants; upon the contrary, we find in all of them that appellee has been careful not to recognize any obligations on its part to supply electricity. There is no ground for appellee's contention that its alleged exclusive franchise was confirmed by its contract of 1893 made with the city of Frankfort. The language of that contract shows no purpose or attempt to confer upon appellee any new right; and in view of section 164 of the present Constitution it was without authority to enlarge appellee's rights under the first contract except by its becoming the highest and best bidder for the additional privilege; and, besides, it is by no means certain that the city had the power to grant an exclusive franchise.

In the case of the City of Newport, &c. v. Newport Light Co., 14 Ky. Law Rep., 845, this court held that an exclusive gas franchise, which had been conferred by the city upon the light company, did not confer the exclusive

right to supply electricity for lighting purposes, though the contract authorized the light company to substitute electricity for gas. We do not feel called upon to consider the contention of appellant that the grant from the city to appellee is in perpetuity, and, therefore, void. It was the opinion of the special judge that the grant is limited to forty years because the bonds issued by appellee to the city, which are secured by lien on its property and franchises, were made payable in forty years. We are not disposed to question the correctness of this view of the law, but as the pleadings make no issue on this question, its consideration is unnecessary. Nor is it necessary to decide that the failure of appellee to exercise its alleged exclusive franchise for several years prior to January 1, 1890, worked a forfeiture thereof, as such nonuser and consequent forfeiture are not pleaded by appellant. It is manifest that the appellant's franchise is not exclusive, as the language of the ordinance granting it will show. Upon the whole case we have found no difficulty in reaching the conclusion that neither appellant nor appellee is entitled to the exclusive franchise claimed. There are one or two other questions connected with the case that might be discussed, though not raised by the record, but as we are of the opinion that we have passed upon all that are material to a proper decision of the case, they have not been considered.

For the reasons herein indicated the judgment of the lower court is affirmed upon both the original and cross appeal.

SHEPHERD, &c. v. GAMBILL, &c.

(Filed June 16, 1903—Not to be reported.)

Schools—Vacancies in office of trustee—G. was elected teacher of a common school by Spicer, who was conceded to be a trustee, and T., who claimed to be a trustee. The term of T., as a trustee under an election, expired on June 30, 1902. The former superintendent, whose term expired on January 5, 1902, appointed T. on January 2, 1902, to fill the vacancy which would occur at the end of his term. On the 1st day of July, 1902, the superintendent appointed S. to fill the vacancy, and he qualified on July 2, 1902. T. qualified as trustee on July 1, 1902, and on that same day notice was given to the other two trustees, and T. and Spicer only attended the meeting, when G. was elected as teacher. In this action by G. to recover the money due said district for teacher, Held—That the appointment of T. to fill a vacancy on January 2, 1902, before the vacancy existed, was void. S. was entitled to a reasonable time after his appointment to qualify, which he did on July 2, 1902. Besides, the notice of the meeting of the trustees at which G. was elected teacher was too indefinite.

J. J. C. Bach, John E. Patrick and Kelley Kash for appellants.

Pollard & Redwine and G. W. Fleenor for appellees.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge O'Rear.

This litigation presents a deplorable state of affairs affecting the well being of common school district No. 13, in Breathitt county. The suit is brought by appellee, Charles Gambill, who claims to have been employed by the trus-

tees of the district to teach its school for the year ending June 30, 1902, against the appellant, Green Shepherd, who claimed to have been also employed by trustees to teach the school for the same year. The superintendent of schools for the county was joined as a defendant, and an injunction sought and obtained against appellants, Shepherd continuing to teach the school, and against the superintendent's paying him any of the public fund appropriated to pay the teacher in that district.

Appellee was employed by Asberry Spicer, who is conceded to be a trustee, and Lewis Turner, who claimed to be a trustee, while appellant was employed by Sam Callahan, also conceded to be a trustee, and Sam Spicer, who likewise claimed to be a trustee. Thus the right of the case is attempted to be made to turn upon, as well as to decide, which one of the two, Lewis Turner or Sam Spicer, was the legal incumbent of the office on July 1, 1902, when appellee's contract was made.

It is admitted that Lewis Turner had been elected trustee in 1898 for the three years' term, ending June 30, 1902. The records of the superintendent's office appear to be in some confusion. The former superintendent, whose term expired January 5, 1902, attempted on January 2, 1902, to appoint Lewis Turner to fill the vacancy in his office, which would occur on July 1, 1902, because the regular election had not been held in October previous, as required by statute.

After the induction of the present superintendent into the office Turner applied to him to have the oath of office administered. The superintendent, under a mistake as to the facts, administered the oath. On July 1 he learned that Turner's term really expired at midnight on June 30, the day before, and thereupon appointed Sam Spicer to fill the vacancy in the office. Spicer did not qualify, however, till the next day. About 6 o'clock in the morning on July 1, 1902 (the first day of the school year, under the statute, when a valid contract can be made with a person as teacher), Asberry Spicer and Lewis Turner met at the schoolhouse and sent word to Callahan to join them, to make a contract to employ the teacher for the year. Callahan failed to attend, and the other two and appellee signed the contract. A few days later Sam Spicer and Callahan, after having given notice to Asberry Spicer, the other trustee, met and employed appellant to teach the school. In the meantime, after the reputed employment of appellee, the schoolhouse was burned at night, said to be the work of an incendiary.

It is claimed by appellee that his contract was binding upon the district because Lewis Turner's reappointment January 2, 1902, and his subsequent qualification continued him in office for the full term after July 1, 1902, or in any event that he, under the statute, continued to hold his office until his successor was elected or appointed and qualified," and that as he did not qualify until July 2, Turner's incumbency of the office was legal, and his official acts binding upon the board of trustees and the public.

This suit was begun August 4, and the injunction procured from the circuit judge August 20, 1902. Then the county superintendent, at the instance of Sam Callahan, began proceedings to remove Turner from office because he had, in 1899, been guilty of flagrant violations of his duties by selling the contract to teach to the highest bidder. The superintendent testifies, as well as certifies, that he found Turner guilty under the evidence before him, and

removed him from office by an order dated August 21, 1902. The superintendent has recognized Sam Spicer as the trustee in lieu of Turner since July 2, 1902, except the trial above referred to showed that at that time he recognized Turner as being in office, though it seems that that action was taken to avoid the decision of the circuit court that Turner was the legal trustee.

Our conclusion is that the appointment of Turner in January, 1902, was void. There was no vacancy then to fill. An appointment can not be made to fill a vacancy till one occurs. For the same reason the subsequently attempted qualification of Turner was a nullity. His term of office expired June 30, 1902. The act of the superintendent in appointing his successor on July 1 suspended Turner's official term if Spicer accepted and qualified; and to do that he should have been allowed a reasonable time. One day for that purpose was not unreasonable. At any rate, Turner's term had expired. The act of the superintendent in appointing another to the vacancy was equivalent to removing Turner. The expression that the outgoing trustee should hold his office till his successor was appointed and qualified could not mean that one removed from office could nevertheless continue to exercise its functions until his successor qualified. (*Terry v. Hargis*, 24 Ky. Law Rep., 2498.)

The contract with appellee was invalid for another reason: The notice to Callahan does not purport to have been given till the morning of July 1. The paper is shown by appellee's witness to have been returned to the trustee who is friendly to his contest. It was not produced on the trial. The only witness who undertook to state its contents was Sam Callahan, who testifies that it stated that the meeting was to be the next morning—"6 o'clock in the morning;" at least he understood it to mean, and it was susceptible of the construction that it meant, the following morning; or, if not, then any morning. It was not sufficient notice for the meeting July 1. (*Scott v. Pendley*, 24 Ky. Law Rep., 1431.)

Appellee seeks to break the force of Callahan's testimony by showing that Callahan shot at him and attempted to assassinate him during this controversy. Callahan admits the shooting, but claims that appellee was trying to shoot him with a 32-calibre rifle. During this controversy appellee has attempted to teach the public school under the void contract with Turner and Asberry Spicer and the order of injunction in this case. Appellant has continued to teach a few children in the same neighborhood, but disclaims that he was attempting, after the order of injunction, to teach the common school in that district. The court is of opinion that the judgment requiring the county superintendent to pay the public fund appropriated to this district to appellee was error. Nor would it have been right to have adjudged it to appellant, because he did not teach the school. His remedy is upon the injunction bond, as is that of the county superintendent, if anything has been paid to appellee under his contract and the judgment of the court. In any event, the district which has suffered enough from this mismanaged affair, involving, if the evidence is to be believed, bribery, incompetency, attempted homicide, house burning, and all inanner of shameless wire pulling by ambitious partisans, should not lose the money allotted to it, no lawful common school having been taught within the district for the year.

The judgment is reversed and the cause remanded, with directions to dissolve the injunction and to dismiss the petition.

CITY OF CARLISLE v. SECREST.

(Filed June 17, 1903—Not to be reported.)

Municipal government—Negligence—Appellee, while walking along the sidewalk of a street in the city of Carlisle, after dark, slipped and fell over a gate into an alleyway several feet lower than the sidewalk, receiving severe injuries in his shoulder and arm, for which he recovered \$500 damages, from which the city prosecutes this appeal. The petition alleges that the sidewalk was in an unsafe condition, and had remained so for such a length of time that the city could have known of it by the exercise of reasonable diligence. The answer denied the negligence on the part of defendant, and relied as a defense on the contributory negligence of plaintiff. The evidence shows that appellee knew of the defective condition of the sidewalk in question, but momentarily forgot it. The fact that a pedestrian knows generally of the defect in a sidewalk does not make his use thereof negligence per se. It was the duty of appellant to keep its sidewalk reasonably free from defects endangering the traveling public while using it, and if it failed in the performance of this duty it is responsible for the damages caused by such failure. The instruction properly submitted to the jury the question of contributory negligence of appellant and the duty of the city to keep its sidewalk in proper condition, and their verdict will not be disturbed.

Wood & Ross and J. B. Ross for appellant.

John I. Williamson for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Barker.

On the 23d day of August, 1901, the appellee, A. G. Secrest, while walking along the sidewalk of Main street, in the city of Carlisle, slipped and fell over a gate, about two feet high, into an alleyway several feet lower than the surface of the sidewalk, receiving severe injuries in his shoulder and arm, to recover damages for which he instituted this action.

The petition charges substantially that the sidewalk, at the point where appellee slipped and fell, by reason of the negligence of the appellant, was in an unsafe and dangerous condition to pedestrians; that it was made of rough rock slabs, which had, by long usage, become very uneven, some of them slanting down towards the property line, and having holes several inches in depth between them; that this condition of things was known to the appellant, or could have been known to it by the exercise of reasonable diligence, as the defective condition of the sidewalk had existed for a sufficient length of time to place the municipality upon notice. The answer denies the negligence of appellant and pleads affirmatively the contributory negligence of appellee. A trial in the lower court resulted in a verdict in favor of the appellee, awarding him damages in the sum of \$500. From the judgment based upon this verdict this appeal is prosecuted.

It appears that on the evening of August 23, 1901, about 8 o'clock, appellee was going from his home to church, in order to get his children who were there; it was drizzling rain, and the sidewalk was wet; there were some trees along the street, which obscured the pavement at the point where the injury occurred from the public lights; the appellant was in somewhat of a hurry, because of the rain, and just as he reached a point opposite the alleyway spoken of his foot slipped on the uneven surface of the rocks, and he

fell against and over the gateway, which separated the sidewalk from the sunken alleyway, and was precipitated to the bottom of the alleyway, a distance of about four to four and a half feet. The evidence shows that appellee knew of the defective condition of the sidewalk in question, but momentarily forgot it. The fact that a pedestrian knows, generally, of the defect in a sidewalk does not make his use thereof negligence per se.

In the case of *City of Louisville v. Brewer's Adm'r*, 24 Ky. Law Rep., 1671, a pedestrian was injured while walking along a cinder path which formed the sidewalk of one of the streets of Louisville, by falling over a post which stood in the highway, receiving injuries from which he died the next day. The evidence shows that the decedent had known of the existence of the post prior to the accident, but had momentarily forgotten it. The court left the question of contributory negligence for the jury to determine.

In the case of the *City of Maysville v. Guilfoyle*, 23 Ky. Law Rep., 48, upon this subject, it was said: "It can not be fairly said, as a matter of law, that appellee was guilty of contributory negligence by forgetting for the time the existence of the defect."

In the *Modern Law on Municipal Corporations*, section 1292, the rule is thus stated: "The fact that plaintiff had knowledge of the dangerous condition of a street will not prevent his recovery if he used reasonable diligence to prevent injury, hence his traveling on a sidewalk known to be out of repair is not negligence of itself. It may be evidence of negligence to use a street in a dangerous condition, but it is not negligence as a matter of law. The use of a street with knowledge of its unsafe condition is not contributory negligence where care is used proportionate to the known danger." Again, in section 1294, it is said: "Although a person is perfectly familiar with the dangerous condition of a sidewalk by reason of its frequent use, yet if, through forgetfulness, he walks into a hole in such walk, and is thereby injured, it is not contributory negligence."

Dillon in his work on *Municipal Corporations*, section 1007, says: "A person may walk or drive carefully in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street or walk is in a safe condition. He walks, it has been said, by a faith justified by law, and if his faith is unfounded, and he suffers an injury, the party in default must respond in damages."

In the *Modern Law of Municipal Corporations*, section 1304, it is said: "Where there are excavations on private lots adjacent to a sidewalk the city must use reasonable care to protect pedestrians from falling therein."

In the case at bar appellee endeavored to show that the gate which separated the sidewalk from the sunken alleyway had been frequently left open prior to the time of the injury complained of. This evidence was properly excluded by the court, as it was not shown that the gate had been left open continuously for any specific length of time immediately prior to the accident, and, therefore, there was nothing to put the municipality upon notice.

We think that the gate in question had nothing to do with appellee's injury; the testimony shows that he slipped upon the sidewalk, and losing his equilibrium, fell over the gate into the hole beyond; the gate was simply too low to constitute an effective barrier between the falling man and the alleyway. It was the duty of the appellant to keep its sidewalk reasonably free

from defects endangering the traveling public while using it, and if it failed in the performance of this duty, it is responsible for the damages caused by such failure.

The question as to whether or not there was such failure upon the part of the municipality, or as to whether or not the appellee was guilty of contributory negligence in the premises, were peculiarly within the province of the jury to determine, and as these questions were properly submitted by the court to the jury in the instructions given, the judgment is affirmed.

DIETRICH v. ROTHENBERGER, &c.

(Filed June 17, 1903—Not to be reported.)

Bills and notes—Banks—Appellant deposited \$300 with G., a title company, for which it delivered to him a certificate of deposit by which it agreed to pay him twelve months after date said sum, with interest, on return of the certificate indorsed by appellant. The title company was a corporation not authorized to do a banking business. It became insolvent and appellant filed this suit against the directors, asking a personal judgment against them on the grounds that the corporation had exceeded its authority in doing a banking business. Held—That appellant can not recover unless the particular transaction had with him was one beyond the corporate powers. The transaction was merely a loan of money to the corporation, which it was authorized to execute its note for. Although transactions with others may have been prohibited by the charter, appellant can not recover on that ground.

Wallace & Miller for appellant.

W. Pratt Dale for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hobson.

The plaintiff, William Dietrich, deposited in the German-American Title Co. the sum of \$300, for which it delivered to him the following:

“No. 104. CERTIFICATE OF DEPOSIT. \$300.

“German-American Title Co.

“Louisville, Ky., December 9, 1895.

“This is to certify that William Dietrich has now to his credit at the office of this company the sum of \$300, which the German-American Title Co. agrees to pay to said William Dietrich in twelve months after this date, with interest at the rate of 6 per cent. from date until paid on return of this certificate endorsed by William Dietrich

“GUS F. ROTHENBERGER, Secretary,

“A. J. SPECKERT, President.”

The German-American Title Co. was a corporation organized under chapter 56 of the General Statutes of Kentucky, and was not authorized to do a banking business. It became insolvent; Dietrich then filed this suit against the directors of the corporation, charging that at the time he made the deposit, and long prior thereto, it was engaged in the banking business, and

while so engaged received his deposit, with the knowledge and authority of the defendants as its directors. Personal judgment was prayed against them on the ground that they were engaged in a business which the corporation was not authorized to follow. The court sustained a demurrer to his petition, and he appeals.

It is immaterial, so far as the plaintiff is concerned, what business the corporation engaged in with other persons. If the transaction with him was within its corporate powers, the directors are not personally liable to him, although at other times and with other persons, they may have done business not authorized by their charter. The plaintiff's cause of action rests on the transaction had with him. The fact that in other transactions other persons might not have reason to complain of the directors for exceeding the powers conferred upon them by law would subtract nothing from the plaintiff's right to complain, if in the transaction with him the legitimate powers of the corporation were exceeded; and if in his transaction these powers were not exceeded, he can not, to make out his cause of action, show that they were exceeded in other transactions with other persons. The question presented then simply is whether the transaction with the plaintiff was within the powers of the corporation. The corporation was authorized to borrow money and give notes therefor, or other evidences of indebtedness. Stripped of its form, the transaction with the plaintiff was in effect that he lent the corporation \$300, which it agreed to pay him in twelve months, with interest at the rate of 6 per cent. The paper not only contains a promise to pay, but sets out fully the consideration; and the fact that it is called a certificate of deposit, instead of a promissory note, does not affect its legal character. In the American & English Ency. of Law, volume 6, page 808, it is said: "A certificate of deposit drawn in the usual form seems to fulfill in every particular the definition of a promissory note, to wit: An unconditional promise in writing for the payment of a certain sum of money, absolutely and at all events. It is, therefore, held in all the States of the Union, except Pennsylvania, that the instrument is in substance and in legal effect a promissory note, and governed in most respects by the same general rules."

In *Citizens National Bank v. Brown*, 45 Ohio St., 29, where a similar paper was before the court, it was said: "The certificate was in effect a promissory note. It possessed all the requisites of a negotiable promissory note, and as such was governed by the rules and principles applicable to that class of paper. In *Howe v. Hartness*, 11 Ohio St., 449, it was held that a certificate of deposit substantially the same as that under consideration was a negotiable promissory note. And in *Miller v. Austen*, 15 Howard, U. S., 218, where the amount deposited with the bank was payable only to the order of the depositor, at a future day certain, upon the return of the certificate of deposit, it was recognized as the established doctrine that a promise to deliver, or to be accountable for so much money, is a good bill or note; that the sum named in the certificate issued being certain, and the promise direct, every reason existed why the endorser of the paper should be held responsible to his indorsee that could prevail in cases where the paper endorsed is in the ordinary form of a promissory note; and that as such note the State courts generally had treated certificates of deposit payable to order." (*Bank of Peru v. Farnsworth*, 18 Ill., 563; *Talledega Insurance*

Co. v. Woodward, 44 Ala., 487; Poorman v. Mills, 85 Cal., 118; Cregg v. Union County National Bank, 87 Ind., 238; Bean v. Briggs, 1 Iowa, 488; Hatch v. Dexter First National Bank, 94 Me., 348; Tripp v. Curtenius, 86 Mich., 494; Pardee v. Fish, 60 N. Y., 265; Bellows Falls Bank v. Rutland County Bank, 40 Vt., 277; Klauber v. Biggerstaff, 4 Wis., 555, and cases cited.)

The distinction between such a transaction and the business of banking is plain, for any one may borrow money, and may put in such form as he pleases the evidence of his indebtedness. An express company is not a bank, although it draws and sells bills of exchange. (Wells v. Northern Pacific R. R. Co., 28 Fed., 469.) Nor is a corporation a bank, which borrows money for its own use on bonds. (Barry v. Merchants Exchange Co., 1 Sandf. Ch., 280.) In 3 American & English Ency. of Law, 791, it is said: "The distinction between a bank and trust company is well defined. The powers of the trust company depend upon the terms of its charter, of course, but they are not banking powers. The trust company, like the savings bank, pays interest upon deposits; but its deposits are strictly loans not subject to check. It may not issue its own notes for circulation, nor does it buy or sell exchange in the ordinary course of its dealings. In directions that are not akin to banking, its powers are much broader and extend outside the monetary realm into real estate transactions, trusteeships, and the conduct of property interests of all kinds. The exercise by a trust company of some of the functions of a bank does not make the company a banking institution, nor lay its officers liable to prosecutions for violating the banking laws."

Banks receive deposits subject to check; they are public agencies created for the public service, and are required to serve the public. The money in this case was simply lent for twelve months. It was not subject to check. There was nothing in the transaction that might not have been done, and is not in fact done, by many individuals throughout the State. It was not the exercise by the corporation of any banking privilege, nor beyond the powers of the corporation under its charter. Dietrich stands simply as a creditor of the corporation, who lent it money, and has no other claim upon the directors than any other creditor who lent it money or bought its paper. The action is not based on the idea that the directors, by engaging in the banking business outside of the legitimate powers of the corporation, wasted or lost the corporate assets. If they had done this, to the extent that assets of the corporation were thus lost by them they would be liable personally. But it is not alleged that any of the assets of the corporation were lost in the banking business. The sum of the cause of action stated is that the plaintiff lent the corporation \$300, and that it was then engaged, without authority, in the banking business. If for this the directors are liable personally to him, they are equally liable for all other transactions of the corporation within the powers conferred on it, although no part of its assets were lost by the directors in the business done outside of its corporate powers and the creditors were in nowise prejudiced thereby.

Judgment affirmed.

Whole court sitting, except Judge Barker.

Judges O'Rear and Nunn dissenting.

BOARD OF TRUSTEES OF PUBLIC LIBRARY v. BOARD OF EDUCATION.

(Filed June 17, 1908—Not to be reported.)

Constitutional law—School fund—Under section 3210, Kentucky Statutes, as amended by act of March 12, 1898, public libraries were established in cities of the second class, and it was provided that the council should annually direct to be paid over to said library board 3 per centum of the net amount of taxes levied annually for school purposes and one-half of the net amount of all fines and costs collected in the police court. A public library was established in the city of Covington, and this court decided that said act was in violation of section 180 of the Constitution as a diversion of the school fund. Before this decision was rendered the treasurer had paid over to the library board for the year 1900 \$1,792.82, and for the year 1901 \$1,734.98. This agreed action was instituted by the school board to recover the amounts so paid. Held—That the treasurer was without authority to make the payment and the trustees of the library were without authority to receive it. The rule in this State is that where money is paid without consideration under a clear mistake of law or fact, which should not in good conscience be retained, it may be recovered.

H. C. Theissen for appellants.

W. A. Byrne for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

By section 3210, Kentucky Statutes, provision is made for a public library in cities of the second class, and by the act of March 15, 1898, the section was amended, and, among other things, the following provision was inserted: "In aid of the establishment and maintenance of such library there is hereby appropriated, and the general council shall annually direct to be paid over to said library board, 3 per centum of the net amount of taxes levied annually in the city for school purposes and one-half of the net amount of all fines and costs collected in the police court."

In *Board of Education of the City of Covington v. Board of Trustees of Public Library*, 24 Ky. Law Rep., 98, this provision of the act was held in violation of section 180 of the Constitution, providing that no tax levied and collected for one purpose shall ever be devoted to another purpose. Concluding its opinion, the court said: "It is not a case of using a part of the school tax for what is undoubtedly a school purpose and a part of the school system, as the kindergarten and the high school, but the appropriation of a part of the tax levied and collected for school purposes to an object which, however laudable it may be, is not of the school, and should be otherwise and specifically provided for."

Before that decision was rendered the city treasurer had paid over to the trustees of the library, out of the taxes levied for school purposes for the year 1900, \$1,792.82, and out of the taxes levied for the year 1901 \$1,734.98. Thereupon an agreed case was filed by the board of education against the board of trustees of the public library to determine whether the amount so paid should be repaid. The circuit court entered judgment in favor of the board of education, and the trustees of the library have appealed. It is argued for the appellant that the money was paid voluntarily, under a clear

provision of the statute, and having been used by the trustees of the library, they should not now be forced to pay back that which was received in good faith after expenditures have been made by them upon the faith of the payment.

The rule in this State is that where money is paid without consideration under a clear mistake of law or fact, which should not in good conscience be retained, it may be recovered. (*McMurtry v. Kentucky Central R. R. Co.*, 84 Ky., 462; *Bruner v. Stanton*, 102 Ky., 459, and cases cited.) The act under which the money was paid being unconstitutional, was void. The legal status of the parties is the same as if the act had not been passed, for, so far as it authorized a diversion of the taxes levied for school purposes to another purpose, it was a nullity. The situation, therefore, is that money collected for school purposes has been paid out of the public treasury without warrant of law and in violation of the provision of the Constitution. The treasurer was without authority to make the payment. The trustees of the library were without authority to receive it. While they acted in good faith, their legal situation is simply that they have in possession money levied for school purposes which can not be legally used for any other purpose. If they are allowed to keep the money, proper effect will not be given to the provision of the Constitution. The rule is fundamental that he who obtains public funds without right must return them.

Judgment affirmed.

DAVIS' ADM'R v. CHESAPEAKE & OHIO RY. CO., &c.

(Filed June 17, 1908.)

Railroads—Removal of actions by foreign corporations—This court heretofore decided that the appellee, the Chesapeake & Ohio Ry. Co., a corporation organized under the laws of Virginia, had, by complying with section 841, Kentucky Statutes, become a citizen of this State, and was not, therefore, entitled to remove this action to the Federal court under section 2, article 3, Constitution of the United States. The Supreme Court of the United States having adjudged the precise question involved herein adversely to the holding of this court, a rehearing is granted and the former opinion withdrawn, and the right of removal recognized in conformity to the rule laid down by the Supreme Court. Appellant insists that having amended his petition making the engineer, fireman and conductor joint defendants, that the right of removal does not exist. Held—That when the rule of construing pleadings most strongly against the pleader is applied to the petition and amended petition, no cause of action is stated against the engineer, fireman and conductor. If the plaintiff desires to join as defendants persons who are claimed to be jointly liable for the tort with the railroad company, which is a foreign corporation, and thus prevent a removal of the case to the Federal court, a cause of action must be stated against the parties so joined.

A. E. Cole & Son for appellant.

W. H. Wadsworth and E. L. Worthington for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Paynter.

This is an action to recover damages for the loss of the life of the intestate

by the alleged negligence of the Chesapeake & Ohio Ry. Co. It presented its petition and asked for the removal of the case to the Federal court, and the motion was sustained. Owing to our duplex system of government perplexing and delicate questions as to the respective jurisdictions of the Federal and State courts arise, and the judiciary should meet and dispose of them with fairness and in the orderly manner which should characterize the proceedings of courts of justice. It will not be our purpose to discuss the questions considered by the Supreme Court of the United States, but to state its conclusions and follow them, as that court has jurisdiction to adjudicate the question involved. Section 1, article 3 of the Constitution of the United States provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish."

Section 2 of the same article provides that "the judicial power shall extend to all cases in law and equity arising under this Constitution; * * * to controversies * * * between citizens of different States." * * *

When a case decided by a supreme court of a State involves the question of diverse citizenship, the Supreme Court of the United States has held in many cases that it will review the judgments of those courts on the question. That court having adjudged the precise question here involved, and adversely to the view of this court expressed in the former opinion delivered herein, we feel that the petition for a rehearing should be granted and the opinion withdrawn, which is done. The appellant is a citizen of Kentucky. It is substantially averred in the petition that the Chesapeake & Ohio Ry. Co. is a corporation organized under the laws of Virginia and become a corporation, citizen and resident of this State by filing in the office of the secretary of state and in the office of the railroad commission, pursuant to section 211 of the Constitution, and section 841 of Kentucky Statutes, copies of its articles of incorporation.

The Chesapeake & Ohio Ry. Co. is a Virginia corporation. It complied with section 841, Kentucky Statutes, which reads as follows: "No company, association or corporation created by, or organized under, the laws or authority by any State or country other than this State, shall possess, control, maintain or operate any railway, or part thereof, in this State until, by incorporation under the laws of this State, the same shall have become a corporation, citizen and resident of this State. Any such company, association or corporation may, for the purpose of possessing, controlling, maintaining or operating a railway, or part thereof, in this State, become a corporation, citizen and resident of this State by being incorporated in the manner following, namely: By filing in the office of the secretary of state, and in the office of the railroad commission, a copy of the charter or articles of incorporation of such company, association or corporation, authenticated by its seal and by the attestation of its president and secretary, and thereupon, and by virtue thereof, such company, association or corporation shall at once become and be a corporation, citizen and resident of this State. The secretary of state shall issue to such corporation a certificate of such incorporation."

This section of the statute was based upon section 211 of the Constitution of the State, which reads as follows: "No railroad corporation organized

under the laws of any other State, or of the United States, and doing business, or proposing to do business, in this State, shall be entitled to the benefit of the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body-corporate pursuant to, and in accordance with, the laws of this Commonwealth."

When the Chesapeake & Ohio Ry. Co. complied with the terms of this section of the statute it at once became "a corporation, citizen and resident of this State," for it is therein so provided. But the question then arises, whether it remained a citizen of the State where it was organized in the meaning of section 2, article 3 of the Constitution of the United States?

In *Bank V. Deveaux*, 5 Cranch, 86, Chief Justice Marshall said: "That invisible, intangible and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently can not sue or be sued in the courts of the United States unless the rights of 'members in this respect can be exercised in their corporate capacity.'"

In *Covington Drawbridge Co. v. Shepherd*, 20 Howard, 227, it was said: "No one, we presume, ever supposed that the artificial being, created by an act of incorporation, could be a citizen of a State in the sense in which that word is used in the Constitution of the United States."

In *Muller v. Dows*, 94 U. S., 444, the court said: "A corporation itself can be a citizen of no State in the sense in which the word 'citizen' is used in the Constitution of the United States. A suit may be brought in the Federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation, and for the purpose of jurisdiction it is conclusively presumed that all the stockholders are citizens of the State which by its laws created the corporation."

At first the Supreme Court held that in order to give Federal courts jurisdiction of an action by or against corporations, it was necessary to aver citizenship of the incorporators. Subsequently it held that the individuals composing a corporation were conclusively presumed to be citizens of the State creating the corporation. There is no averment in the petition that the individuals composing the Chesapeake & Ohio Ry. Co. were associated together for the purpose of organizing a corporation of the same name in this State. The corporation which they organized in another State is, by an act of the general assembly, declared to be a citizen and corporation of Kentucky by reason of its compliance with certain constitutional and statutory regulations.

In *St. Louis Ry. Co. v. James*, 161 U. S., 545, it appeared that the St. Louis R. R. Co. had been incorporated by the State of Missouri, and had subsequently filed its articles of incorporation with the secretary of state of the State of Arkansas, under a statute like the one under consideration. A citizen of Missouri sued it in Arkansas, alleging it was a citizen of Arkansas. The court held that it was not a citizen of Arkansas, and was entitled to have its case removed to the Federal court. The precise question involved in this case was decided in *Walters v. Chicago Ry. Co.*, 186 U. S., 479, the court holding that the case should be removed to the Federal court, and as authority for the decision cited *St. Louis R. R. Co. v. James*; *Louisville R. R. Co. v. Louisville Trust Co.*, 174 U. S., 552. On November 3, 1892, the same court, in *Calvert, Adm'r. v. Southern Ry. Co.*, decided the

same question here involved and in the Walters' case, and ruled the same way it did in the latter case. The Southern Ry. Co. v. Allison, decided May 18, 1903, by the Supreme Court, involved precisely the same question we have under consideration. The Southern Railway Co., a Virginia corporation accepted the provisions of the statute of North Carolina, which is similar to our statute. The question was, whether it was, by virtue thereof, a citizen of North Carolina, and thereby lost its citizenship of Virginia in the meaning of the Federal Constitution, and the court held that it had not, and that it was entitled to have the action removed to the Federal court. In that case the court reviewed the cases to which attention has been called, and held them to be authority for its conclusion. The court also said it had "read with respectful consideration" the case of Debnam v. Southern Bell Telephone Co., 126 N. C., 531, in which the supreme court of that State reached the same conclusion that this court reached in the opinion which has been withdrawn, but said it could not concur therewith. The Debnam case was cited in the withdrawn opinion as authority therefor.

After the petition for removal had been filed the appellant tendered an amended petition making the Maysville & Big Sandy Ry. Co., a domestic corporation and appellees' lessor, a defendant. It came too late to prevent a removal of the case, therefore, it was not within the rule of the McCabe case, 23 Ky. Law Rep., 2328; Parson v. Illinois Central Ry. Co., 118 Fed. R., 342.

Before the petition for removal was filed the plaintiff filed an amended petition, making Bracken, Lewis and Inskip defendants, who were the conductor, engineer and fireman, respectively, and who are alleged to have been in charge of the train when the accident happened. A recovery is sought against them as well as the Chesapeake & Ohio Ry. Co. It is alleged that the intestate was run over and killed "at or near" a private crossing over the railroad track between her house and garden; that it was "not far" from public crossings to the east and west of her. The alleged negligent acts are that the train ran over the crossing at the rate of fifty miles per hour, which was a dangerous speed; that they failed to keep a lookout for travelers upon or at the crossing; that they failed to give signals of the approach of the train to the crossings. These are the acts of negligence averred in the petition. The averment that she was killed "at or near" the private crossing should be construed that she was killed at a place on the track other than the crossing, because pleadings are to be construed most strongly against the pleader. A failure to slacken the speed of the train or to give signals at the approach to private crossings is not negligence. (Louisville & Nashville R. R. Co. v. Survant, 19 Ky. Law Rep., 1576; Johnson v. Louisville & Nashville R. R. Co., 91 Ky., 651.) It is only where the crossing is a public one that reckless speed or the failure to give signals amounts to negligence of the railroad company. (Louisville & Nashville R. R. Co. v. Survant, 96 Ky., 197.)

In Louisville & Nashville R. R. Co. v. Bodine, 23 Ky. Law Rep., 147, it appeared that the party had been injured at a private crossing, and in considering the question of negligence the court said: "In this case, in view of the dangerous character of the crossing; its long use, not only by Bodine, but by the public; the fact that signals were accustomed to be given by the trains as they approached it, the speed of this train, and the fact that it was

a special, imposed upon the appellant the obligation to give such warning of its approach to this crossing as exigencies of the situation demanded for the protection of human life. And as no warning at all was given, we think the jury were warranted in concluding that proper precaution was not exercised by appellant, and that by reason of this the accident occurred "

The rule there stated does not change the general rule announced in *Johnson v. Louisville & Nashville R. R. Co.*, but simply recognizes an exception to it. The facts averred do not bring the case within the rule of *Louisville & Nashville R. R. Co. v. Bodine*. Neither do they bring it within the rule of the *Cahill* case, 92 Ky., 345, if for no other reason, there is no averment that the signals usually given on the approach of trains to the public crossings referred to could have been heard at the private crossing. The distance between the public and private crossings not being given, so the court could infer that a signal given at the public crossing could have been heard at the private crossing. The averment that the public crossings were near the private one is not sufficient, because what in the estimate of the pleader was near, might be too far for the signal to be heard at the private crossing.

From the averments the court concludes that the intestate had the right to use the private crossing. But under the rule that a pleading must be construed most strongly against the pleader, the averment that she was killed "at or near" the crossing is equivalent to the averment that she was not killed on it, but near the crossing, hence she was a trespasser. This being true, under the well-settled rule of this court those in charge of the train owed her no duty, except to use reasonable care to save her after discovering her peril. As she was not on a crossing when killed, it can not be claimed that as to the intestate, it was negligence to fail to give signals on the approach to either the private or public crossing.

In *Shackelford's Adm'r v. Louisville & Nashville R. R. Co.*, 84 Ky., 43, the court said: "Railroad trains must give the customary signals at public places or public crossings. The failure to do so is negligence, but this is required for the safety of passengers, trainmen and the public using, and who have the right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere. The instances are numberless upon every railroad of persons living along it, and having to and being in the habit of crossing the track to pass from the dwelling to the outbuildings or vice versa. and to require the companies in all such cases to signal the approach of their trains, and to presume and guard against the presence of persons upon the track, would not only be unreasonable, but detrimental to public travel."

If the plaintiff desires to join as defendants persons who are claimed to be jointly liable for the tort with the railroad company, which is a foreign corporation, and thus prevent a removal of the case to the Federal court, a cause of action must be stated against the parties so joined. Our conclusion is that the amended petition did not state a cause of action against Bracken, Lewis and Inskip.

The judgment is affirmed.

Whole court sitting.

Judge Nunn dissents from so much of the opinion as recognizes that a foreign corporation is entitled to have its case removed to the Federal court, after complying with section 841 of the Kentucky Statutes.

CITY OF MADISONVILLE v. PEMBERTON'S ADM'R.

(Filed June 17, 1903—Not to be reported.)

1. Municipal government—Negligence—Appellee brought this action for damages against appellant, alleging that appellant suffered an excavation to remain in a sidewalk into which his intestate fell, inflicting injuries from which he died. A trial resulted in a verdict for \$3,000 damages. The answer put in issue the facts as to whether the street was a highway of the city; the negligence of the city in regard to the defect in the paving; that the injury complained of caused the death of decedent, and charged affirmatively that the accident was caused by the contributory negligence of the decedent. The evidence clearly established that the street was one of the highways of the city, which required the city to keep the sidewalk free from dangerous obstructions or excavations. It is not necessary to charge the corporation with negligence; that it should have actual knowledge of the defect causing the injury. If the defect in the highway has existed for such a length of time, as by the exercise of proper care and diligence the municipality ought to have obtained knowledge of it, notice will be presumed. The question of whether or not the obstruction or defect has remained in the highway sufficient time to place the municipality upon notice is a question of fact for the jury to determine. The evidence showed that appellee's decedent, in a general way, knew of the existence of the hole into which he fell, but this general knowledge of itself did not make him guilty of contributory negligence in using the sidewalk. It can not be said as a matter of law that he was guilty of contributory negligence by forgetting for the time the existence of the defect. The question of whether or not the use of the sidewalk by the decedent was or not contributory negligence, under the circumstances, was peculiarly within the province of the jury to determine, as was likewise the question of whether or not his death resulted from the injury complained of. These questions were presented to the jury under proper instructions, and their verdict will not be disturbed.

2. Pleading—The filing of the amended reply will not be questioned on this appeal, as the filing of amended pleadings rests in the sound discretion of the lower court.

Jerrold A. Jonson, Polk Laffoon, J. Fletcher Dempsey, E. D. Morrow and Wm. Worthington for appellant.

Gordon & Gordon & Cox and J. F. Gordon for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Barker.

On the 12th day of February, 1900, H. R. Pemberton, while walking along the sidewalk of Lawrence street in Madisonville, Ky., stepped into a hole and was thrown down, his side striking the edge of the curbing, inflicting an injury, from the effects of which, it is claimed, he died in the following August. W. J. Cox having been appointed administrator of his estate, instituted this action in the Hopkins Circuit Court to recover of the city of Madisonville damages for the injury inflicted upon his decedent.

It is alleged in the petition that Lawrence street is one of the public highways of the city of Madisonville; that the defect in the sidewalk, by means of which Pemberton was injured, was known to appellant, or could have been known to it by the exercise of ordinary diligence, it having existed a sufficient length of time to put the municipality on notice. The answer put

in issue the facts as to whether or not Lawrence street was a highway of the city; the negligence of the municipality in regard to the defect in the paving; that the injury complained of caused the death of appellee's decedent, and charged affirmatively that the accident was caused by the contributory negligence of appellee's decedent. The reply, as amended, controverted the affirmative allegations of the answer, and thus the issues were made up. The material facts, as shown by the evidence, are as follows:

On the evening of the 12th of February, 1900, at the hour of half-past seven o'clock, appellee's decedent, in company with his son, was walking along the sidewalk on Lawrence street, when he stepped into a hole about a foot and a half long, and from fifteen to eighteen inches in depth, which threw him down, striking his side against the edge of the curbing. He was extricated and helped to his feet by his son and went on his journey, evidently thinking that he was not seriously injured, although he complained at the time of being hurt. On the following morning a considerable swelling or knot appeared on his side where the injury was inflicted, and he seems never to have been able to work at his business, except in a most desultory manner, up to his death.

The sidewalk, in which the defect causing the injury existed, was not made by the city, but the carriage way of Lawrence street had been graded under an order of the municipality, and the curbing placed along its edge, thus separating the street proper from the sidewalk. The walkway was then made by the citizens filling in between the property line and the curbing with cinders or ashes. The hole, by means of which the decedent was injured, seems to have been caused by the cinders being washed out under the curbing into the street, owing, it is claimed, to the wrongful or negligent act of one of the city's employes, who, while engaged in some work for the city in the street, had undermined the curbing, thus taking away the support of the cinders which constituted the walkway, and, as a result of hard rain, the cinders had been washed under the curbing and out into the street, thus creating the hole, by means of which decedent was injured.

Upon a trial of the case, the jury returned a verdict in favor of appellee, awarding damages against the city in the sum of \$3,000. The motion for a new trial having been overruled, the appellant has brought the case here for review. The evidence clearly established that Lawrence street was one of the highways of the city of Madisonville, and while it had not, by official action, improved the sidewalk, it had graded the street, put in the curbing between the highway and the carriage way, and permitted the citizens to make a sidewalk of cinders, which was constantly used by them, and this, in our opinion, is a sufficient opening, or taking charge of, the highway in question to require the city to keep the sidewalk free from dangerous obstructions or excavations.

The case of *City of Louisville v. Brewer's Adm'r*, 24 Ky. Law Rep., 1671, involved a question similar in principle to that at bar. Rawlings street had been taken into the city of Louisville by a change of the boundary line of the municipality, under proceedings authorized by law. Prior to the annexation of the boundary in question Rawlings street was a county road. A number of houses had been built along and fronting this highway, and a cinder path had been placed along the edge of the road for the use of pedestrians,

and three or four posts, one of which was the cause of the accident complained of, had been erected along the outside edge of the cinder path for the purpose of preventing wagons or other vehicles from being driven on or over it. The path was about four or five feet wide, and the post which occasioned the injury stood nearly in the middle of it, about one and a half feet further than the others; it was about two and a half feet high, and six or eight inches square, and the top had been split to a sharp point. After this portion of the county road was taken into the city by annexation it was continued, and used as a public thoroughfare, and property fronting thereon assessed for taxation by the municipality. The plaintiff, in the case cited, while walking along the cinder path at night, stumbled over the post in the path, inflicting wounds of which he died the next day. In that case, as in this, it was insisted that in order to authorize a recovery it was necessary for the plaintiff to establish the fact that the street in question had been formally accepted and improved by the city. This court, in their opinion, reviewing the authorities at length, held that, under the facts as stated, the corporation was liable; that it was its duty to keep the cinder path reasonably free from obstructions endangering the safety of pedestrians while using it.

Undoubtedly the general rule is that a municipality, charged with the duty of maintaining highways, must keep its streets and sidewalks in a reasonably safe condition for the use of the traveling public. Nor is it necessary to charge the corporation with negligence, that it should have actual knowledge of the defect causing the injury; if the defect in the highway has existed for such a length of time as, by the exercise of proper care and diligence, the municipality ought to have obtained knowledge of it, notice will be presumed. The question of whether or not the obstruction or defect has remained in the highway sufficient time to place the municipality upon notice is a question of fact for the jury to determine. In the present instance the hole in the sidewalk had remained there for several months, having been caused, as before said, by the negligent act of one of the city's agents in undermining the curbing, thus permitting the hole to wash in the sidewalk.

The evidence showed that appellee's decedent, in a general way, knew of the existence of the hole into which he fell, but we do not think that this general knowledge, of itself, made him guilty of contributory negligence in using the sidewalk. This question also arose in the case above cited, and it was held, on authority of the case of *City of Maysville v. Guilfoyle*, 23 Ky. Law Rep., 48, that although the decedent knew of the existence of the obstruction which caused his death, yet inasmuch as he seemed momentarily to have forgotten it, the question as to whether or not he was guilty of contributory negligence was for the jury to determine. In the case of *city of*

Maysville v. Guilfoyle the plaintiff knew of the existence of the defect which caused the injury. The court held: "It can not fairly be said, as a matter of law, that appellee was guilty of contributory negligence by forgetting for the time the existence of the defect." In the *Modern Law of Municipal Corporations*, section 12-2, it is said: "The fact that plaintiff had knowledge of the dangerous condition of a street will not prevent his recovery if he used reasonable diligence to prevent injury, hence traveling on a sidewalk known to be out of repair is not negligence of itself. It may be evidence of negligence to use a street in a dangerous condition, but it is not

negligence as a matter of law. The use of a street with knowledge of its unsafe condition is not contributory negligence where care is used proportionate to the known danger."

Again, in section 1204, it is said: "Although a person is thoroughly familiar with the dangerous condition of a sidewalk by reason of its frequent use, yet, if through forgetfulness, he walks into a hole in such walk, and is thereby injured, it is not contributory negligence."

The question of whether or not the use of the sidewalk by appellee's decedent was, or not, contributory negligence, under the circumstances, was peculiarly within the province of the jury to determine, as was likewise the question of whether or not his death resulted from the injury complained of. There was a good deal of testimony tending to show that his death resulted from other causes than the injury received by his fall, but the determining of that question was for the jury. The trial court did not err in permitting the filing of the amended reply. It is true it came late, but the admission of amendments is a matter which addresses itself to the sound discretion of the court, and with the exercise of this discretion we will not interfere.

Appellant complains of the instructions given, and the refusal of the court to give instructions asked by it, but a careful consideration convinces us that the court fairly presented the legal questions growing out of the facts of this case to the jury.

Perceiving no error in the record, the judgment is affirmed.

FIGG v. LOUISVILLE & NASHVILLE R. R. CO.

CITY OF LOUISVILLE v. FIGG.

(Filed June 17, 1903.)

Street Improvements—Railroads—This is a proceeding to subject a triangular lot of ground used as a right of way for the L. & N. R. R. Co. to a lien for street improvements. It is insisted that said lot is only a right of way, and not subject to payment for street improvement, also that it receives no benefit from said improvement. Held—That said objections are not tenable. It is also contended that the right of way is not a lot in the meaning of the statute governing street improvements. Held—That under the statute governing street improvements a lot is any piece of land within the territory defined by the statute or the general council where the territory to be assessed is not bounded by principal streets. The use or the nonuse, or the character of the use to which the parcel of land is put, does not determine the question whether it is or is not a lot.

Wm. Furlong and B. F. Washer for appellant Figg.

H. L. Stone for city of Louisville.

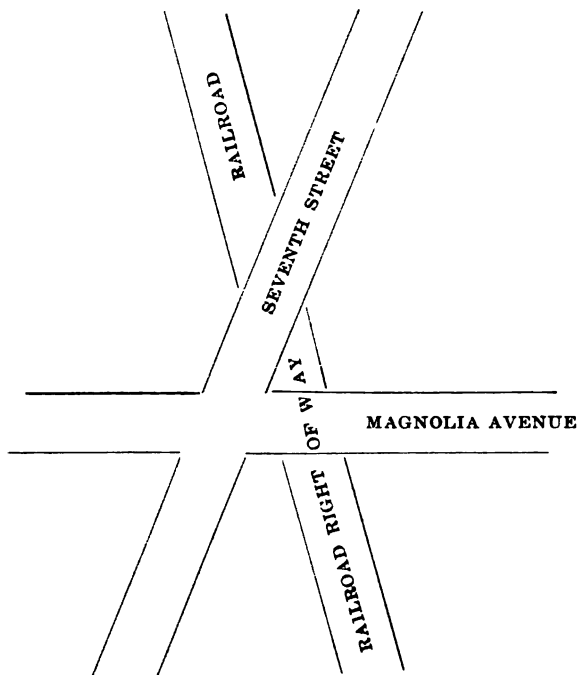
Helm, Bruce & Helm for L. & N. R. R. Co.

Appeals from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Judge Paynter.

The main line of the Louisville & Nashville R. R. Co. runs southwardly from near Tenth and Broadway streets, Louisville, Ky., to and beyond Nashville, Tenn. Its right of way is sixty feet in width. Under appro-

priate proceedings in the general council Magnolia avenue was improved by original construction, and the taxing district was properly designated. Within that district east of Seventh street and south of Magnolia avenue is a parcel of land sixty feet wide used by the appellee as a roadbed, or what is commonly called the right of way, and as a part of it a triangular parcel north of Magnolia avenue and east of Seventh street. The local situation is shown by the following plat:



It is insisted on behalf of the railroad company that, first, the property sought to be subjected to part of the cost of street improvement is only a right of way, and, therefore, can not be charged therewith; second, it receives no benefit from the improvement; third, the right of way is not a lot in the meaning of the statute governing street improvement.

It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use and upon which it builds its roadbed is its right of way. The railroad company has been in possession of the strip of land in question for fifty years. It is a part of a great railroad system. Its right of way is perpetual. In *Elizabethtown, Lexington & Big Sandy R. R. Co. v. Combs*, 10 Bush, 393, the court held the injury resulting from the location of a railroad in such proximity to adjacent property so that smoke, soot and fire from passing engines was thrown, blown into or upon it, entitled the owner to a single recovery, as the injury was permanent and enduring. In other words, the court regarded that the railroad had appropriated for all time to come and the injury would be permanent. It is

the very remotest possibility imaginable that the appellee would ever abandon its right of way. The court concludes that its use of its right of way will be perpetual. It is, therefore, practically the owner of the land. If this strip of land was not occupied by the railroad company as a right of way it would not be suggested that it was not subject to the special tax for street improvement. The purpose for which the lot is used can not affect the question of its liability for the cost of street improvement. Counsel for appellee calls attention to cases of other courts holding that rights of way can not be charged with the cost of street improvement; while, on the other hand, counsel for the appellant calls attention to cases of other courts holding that such rights of way are liable for such cost. It is not necessary to discuss this class of cases further because this court, in *Louisville, Cincinnati & Lexington R. R. Co., and Louisville R. R. Transfer Co. v. Obst & Stenge, MSS.* opinion February 28, 1875; *City of Ludlow v. Cincinnati Southern R. R. Co.*, 78 Ky., 357, held that such special taxation could be imposed.

On the second question we quote from *Preston v. Rudd, &c.*, 84 Ky., 156, which reads as follows: "Such assessments are made upon the assumption that a portion of the community are specially benefited by the improvement; the principle is that the territory is benefited; that it has a common interest; and that, governed by equitable rules, it must equally bear the burden. Necessarily individual cases of hardship will arise; but it approaches equality as nearly as it is practicable. It follows that a lot owner may be compelled to pay his proportion of the cost of an improvement, although in his particular case his property may not be benefited. This rule, however, can not be so extended as to entirely take from the citizen his property. This would work "a manifest injustice." It would be spoliation, and not taxation. Under the guise of benefit and taxation he can not be thus arbitrarily deprived of his property. It would be but an appropriation of it, by the exercise of arbitrary power, to public use without compensation." * * *

We do not understand that *Barfield, &c. v. Gleason, &c.*, 23 Ky. Law Rep., 128, changes the rule announced in *Preston v. Rudd, &c.*, and other cases of this court. Spoliation is not shown in this case. Under the statute governing street improvement a lot is any piece of land within the territory defined by the statute or the general council where the territory to be assessed is not bounded by principal streets. The use or nonuse, or the character of the use to which the parcel of land is put, does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot in the meaning of the statutes, and to thus appropriate it can not change its character.

The judgment is reversed for proceedings consistent with this opinion.

NELSON, MORRIS & CO. V. REHKOPF & SONS.

(Filed June 17, 1903—Not to be reported.)

Corporations — Jurisdiction — Process — Agents — Attachment — Appellees brought this action to recover on account \$213.28 for hides sold to appellants. It was alleged that appellants were a corporation and nonresident of Ken- .

tucky. Process was served on its agent and personal judgment was rendered by default. After a return of no property found was had, this suit was instituted and an attachment was levied on funds belonging to appellants. Appellants then answered, charging that the party served was not their agent, and that the judgment in the former action was void. The petition was then amended and the facts attending the transaction fully set out. Held—That the process was properly served under subsection 6, section 51, Civil Code of Practice, and while the law does not require the sheriff to fully set out all the facts in his return, the court, upon an examination of the entire record, is satisfied that the service was valid, and that appellants were engaged in business in this State through their agent.

W. M. Reed for appellants.

Bloomfield & Crice for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

On August 11, 1899, E. K. Rehkopf & Sons filed their petition ordinary in the McCracken Circuit Court against Nelson, Morris & Co., praying a personal judgment for \$318.28 on account of certain hides sold them by the defendants. It was alleged in the petition that the defendants were incorporated and nonresident of Kentucky, and that the transaction sued on was had through Bransford Clark, of Paducah, Ky., who was their agent. A summons was issued on the petition, which was returned as follows:

“Executed August 11, 1899, on Nelson, Morris & Co. by delivering to their agent, Bransford Clark, a copy of the within summons.

“A. H. ROGERS, S. M. C.,

“By GUS ROGERS, D. S.”

No defense having been made to the action, the court entered a personal judgment against the defendants on September 6, 1899. The plaintiffs, their execution having been returned no property found, instituted this action on October 4, 1901, and took out an attachment, which was levied on a fund belonging to the defendant, amounting to \$181. They then answered, and made their answer a cross petition, charging that Bransford Clark was not their agent, and that the judgment entered in the former action was void. The plaintiffs then amended their petition, and set out all the facts constituting their cause of action in the original suit. The defendants not having answered the amendment, but ignoring it, the case was submitted, and the court entered a judgment subjecting the fund to the payment of the debt, and refusing to set aside the former personal judgment. The original action was brought under subsection 6 of section 51 of the Civil Code of Practice: “In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred.”

In *Carpenter v. Laswell*, 23 Ky. Law Rep., 686, it was held that a personal judgment may properly be rendered on a service of process under this provision. Although the return of the sheriff alone did not show the facts

required by the statute, the return in connection with the petition seems sufficient. The sheriff is not required to know and to show by his return all the facts set out in the statute. If these facts are shown by the record it is sufficient. The suit was pending in a court of general jurisdiction. The only question being whether the summons was properly served on the defendant, the court may look to the whole record to ascertain that fact. This brings us to what seems to be the real question in the case. Were the defendants engaged in business in this State, and was Clark the manager or agent of, or person in charge of, such business in this State within the meaning of the statute? It is shown by the evidence heard on the trial that Nelson, Morris & Co. wired to Bransford Clark, who was a broker at Paducah, Ky., their prices on hides, and he, with these quotations of prices, sold the hides in controversy to appellees in Paducah, as the representative of appellants, forwarding appellees' order to appellants, who accepted it and filled it, the order being subject to their approval. The business was done in Kentucky. It was done by Bransford Clark as the agent of appellants. As to this transaction with appellees, Bransford Clark, by whatever name he may designate his business, was in fact the agent of appellants. The business was carried on in Paducah, and the cause of action sued on arose out of this transaction. As to this transaction, appellants were engaged in business in this State, and Bransford Clark was their agent in charge of the business within the meaning of the statute. The court, therefore, properly sustained the attachment, and subjected the fund in court to the debt.

Judgment affirmed.

NORTHINGTON v. REED.

(Filed June 17, 1903—Not to be reported.)

Res judicata—Infants—A. sold to B. two acres of ground, and the wife of A. owned 100 acres adjoining same, B. giving his note for \$115 as part purchase money. B. subsequently died, leaving his wife and two infant children surviving him. After his death his wife sold the 102 acres of land to appellant, who executed notes for the purchase money. In an action on one of these notes the infants, by their guardian, filed an answer, claiming the two acres of land, and pleading limitation to the \$115 note. It was adjudged that the infants recover the two acres of land. Afterwards a decree was rendered, ordering a sale of the land, when appellee became the purchaser. Appellant then instituted this action to recover the land; appellee pleaded the former actions in bar; this plea was sustained, and appellant has prosecuted this appeal, insisting that the judgment rendered in favor of the infants was void because the answer was filed by the guardian ad litem of the infants, who were under fourteen years of age, before summons was served on them, as provided by the Code. Held—That in this collateral proceeding these objections are unavailable as he failed to raise them in the action and joined issue on the merits, and is bound by said judgment.

W. H. Witty and Geo. W. Reeves for appellant.

B. S. Bailey for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Hobson.

J. S. Hudson purchased of Isham Reed two acres of ground and executed to Reed a note for \$115 as part of the price. His wife, Alice Hudson, owned a hundred acres of ground adjoining the two acres. He subsequently died, leaving his wife and two infant children surviving him. After his death the wife entered into a contract with N. C. Northington, by which she sold him the farm of 102 acres and he executed to her his notes for the price. She sold one of these notes to D. P. Newman, who brought suit on it against Northington. The widow and infant children of J. S. Hudson were also made parties to this suit, and Northington in the meantime had taken up the \$115-note executed by Hudson to Reed. In this suit the infants, by their guardian ad litem, filed an answer, claiming the two acres of ground as their property and pleading limitation to the \$115-note. Issues were made and the case progressed to a final hearing on August 24, 1896, and it was then adjudged by the court that the two infant children recover of the defendant, Northington, the two acres of land referred to, and a judgment was given them in addition for the sum of \$45 on account of rent while in his possession, over and above the amount of the note referred to. From this judgment an appeal was prosecuted, which was dismissed by this court. Thereafter the guardian of the infants filed a suit in the circuit court of the county, and on that petition the two acres of ground were sold and purchased by Guy Murphy, who transferred his bid to Isham Reed, who paid for the land. After all this Northington filed the suit before us against Reed to recover the land, alleging that he was the owner of it, and entitled to possession. Reed pleaded in bar of the action the proceedings in the former suit, and the court having sustained this plea and dismissed the petition, Northington appeals.

He insists that the judgment rendered against him in favor of the infants in the former action is void for the reason that the judgment was based on a cross petition filed by B. S. Bailey as guardian ad litem of the infants, who were under fourteen years of age, and it is insisted that the appointment of Bailey was void, no service of summons, as provided by the Code, having been made on the infants, and that the guardian ad litem had no authority to file the pleading.

The summons, as shown by the transcript, was returned executed on June 30, 1893, on A. E. Hudson, Carrie Hudson and Mary Hudson. Their father was dead, and the infants being under fourteen years of age, under section 52 of the Code, the summons should have been served on their guardian, if they had one; and if none, on their mother. They had, as is now shown, a statutory guardian, and, therefore, the summons should have been served on him. The guardian ad litem was appointed, and filed answer for the infants. The defendant, Northington, joined issue with him, and the case was tried out on the merits. He made his answer a cross petition against the infants, although, so far as appears, no summons was issued on it.

It is unnecessary for us to determine whether the judgment in contest could be held valid in a direct proceeding to set it aside, instituted in proper time by some person entitled to maintain it. It is attacked here collaterally. It was rendered in a court of general jurisdiction, and when a judgment of a court of general jurisdiction is attacked collaterally every presumption is made in favor of its integrity. If no summons or process appears it will

ordinarily be presumed that there was a proper service, and the fact that an insufficient service appears will not rebut the presumption. In Freeman on Judgments, section 124, it is said: "Nothing shall be intended to be out of the jurisdiction of a superior court but that which expressly appears to be so, hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, has acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appear." (Jones v. Edwards, 78 Ky., 6; Newcomb v. Newcomb, 18 Bush, 554.)

As shown by the transcript before us, appellant Northington made no objection in the suit in which the judgment was rendered, on the ground that the infants had not been properly served with process, or that the guardian ad litem was not properly appointed, or had no authority to plead the matters set up by him. There was no showing in that suit that the infants had a statutory guardian or were under fourteen years of age, so far as the record shows. Appellant waiving all of these matters, joined issue upon the pleading filed by the guardian ad litem, and a trial was had on the merits after full preparation. He thus undertook to win that case on the facts, and having elected to try on the merits, it must certainly be presumed, now in a collateral proceeding as against him, that the court had jurisdiction. Having undertaken to get a judgment in his favor on the case as then presented to the court, and having lost, he can not in a collateral proceeding be allowed to question that judgment on the alleged ground that the infants with whom he was litigating were not properly before the court.

Judgment affirmed.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO., &c. v.
COOK'S ADM'R.

(Filed June 17, 1908—Not to be reported.)

Gaither & Vanarsdall and John Galvin for appellants.

Robt. Harding, Thos. Shay and E. M. Hardin for appellee.

Appeal from Mercer Circuit Court.

Judge Barker delivered the following response to petition for rehearing:

We have re-examined the pleadings and evidence in this case, in response to the requirements of the petition for a rehearing, and are convinced that the statement of the evidence contained in the opinion is correct. Appellee is in error as to the facts admitted by the pleadings. On the subject as to where the intestate, Edward Cook, was, and what he was doing at the time of his death, the petition contains the following allegation: "Plaintiff avers that on the — day of —, 1901, his intestate, Edward Cook, as brakeman and switchman for the defendant company, was engaged in said yard in uncoupling and giving attention to the defendant's cars for said defendant, * * * and the defendant, Fred Milligan, caught and crushed said Cook's body between the cars of said train, by and through the gross negligence and carelessness of said Milligan, as engineer of said defendant company, in the management, movement and operation of its said engine and train, * * *

so injuring him that he died within a few minutes thereafter; and when so caught and crushed said Cook was engaged in discharging his duties as said brakeman to said company."

The third paragraph of the defendant company's answer contains the following denial: "It denies that it, or the defendant, Fred Milligan, caught or crushed said Cook's body in the cars of said train, * * * or that it thereby so injured him that he died in a few minutes thereafter, or when so caught or crushed said Cook was engaged in the discharge of his duties as said brakeman for said company."

This denial in the answer, so far as the question as to what Cook was doing at the time he was killed, is as broad as the allegation of the petition, and placed in issue the fact as to whether or not Cook was between the cars engaged in the company's business at the time he was killed. The testimony of the witnesses does not show that Cook was between the cars in the discharge of his duties as brakeman when he was crushed, or that the engineer, Milligan, knew he was between the cars at all.

The petition is overruled.

GREEN COUNTY V. SHORTELL.

(Filed June 17, 1903.)

Authority of county court to subscribe stock to railroad company—Bonds—Estoppel—Under an act of the legislature, approved February 24, 1869, a charter was granted the Cumberland & Ohio R. R. Co., with power to construct and operate a railroad from the Ohio river through Green and other counties to a point on the Tennessee line. Any city or town on the line of said road was authorized to subscribe for stock in said company and to issue bonds therefor, on a submission to a vote of the people and a majority voting in favor thereof. The county had previously voted a subscription to the stock of the Elizabethtown & Tennessee R. R. Co. The commissioners of the Cumberland & Ohio R. R. Co. submitted a written request to the Green County Court for a submission to the people of a proposition to subscribe for \$250,000 of stock in said road upon the conditions that said company should locate and construct said railroad through Green county, and within one mile of the town of Greensburg, and should expend the amount so subscribed within the limits of Green county; and also upon the further condition that said bonds should not issue nor the county pay any part thereof until the county of Green should be fully and completely exonerated from the payment of the capital stock subscribed to the Elizabethtown & Tennessee R. R. Co. The county court made an order submitting the proposition to a vote of the people, which resulted in favor of the subscription. The subscription was made and the bonds issued in the form of promises to pay principal and interest on presentation of proper coupons at the Bank of America in the city of New York. But the bonds did not recite any of the conditions of said subscription. Appellee, as a holder of some of said bonds, brought this suit to compel their payment. In its answer the county set up the defense of the failure of the railroad company to comply with any of the conditions of the subscription. It is urged that the county is estopped by its act in issuing said bonds from relying on the failure of the conditions. Held—That as the bonds contained no recitals as to the authority of the officers issuing them, or as to the performance of the preliminaries requisite to their issuance, there is no estoppel on the county to

plead the truth of these matters. The officers of a municipality have only such powers as are conferred upon them by law, and all persons dealing with them are required to take notice of the extent of their authority, because all persons are required to take notice of the laws of the land. The orders of the county court were the authority under which the bonds were issued, and the only authority which the officers issuing them had. If the county officials had followed the order of the county court and issued bonds conditioned as specified in the order submitting the vote the bonds on their face would have informed every purchaser of the conditions on which they were voted. But when the county officials neglected to do this and issued instead a naked promise to pay, without any recital of the authority under which it was issued, the purchaser was put upon inquiry as to their authority, and their want of authority is as available against him as the facts pleaded would have been had they followed their authority and conditioned the bonds as specified in the order submitting the vote. The meaning of the proposition submitted was that the bonds were not to be issued until the release from the subscription to the Elizabethtown & Nashville R. R. was made, and after the release was made the bonds might be issued subject to the condition that the company should locate and construct its road through Green county, within one mile of Greensburg, and expend the amount subscribed in Green county. These conditions were not complied with, and the county is not liable for said bonds. It is insisted that the order authorizing the subscription to the Elizabethtown & Tennessee R. R. Co. was void because it authorized the clerk to make said subscription. Held—That the order authorizing the clerk to make said subscription was valid.

Ernest McPherson, John W. Lewis and D. T. Towles for appellant.

George W. Jolly for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Judge Hobson.

The Cumberland & Ohio R. R. Co. was incorporated by an act approved February 24, 1869. (Session Acts, 1869, volume 1, page 468.) It was vested with power to construct and operate a railroad from the Ohio river through the counties of Henry, Shelby, Washington, Nelson, Marlon, Taylor, Green, Barren and Allen to a point on the boundary line between the States of Kentucky and Tennessee, "to be selected by the president and directors, about due north from the town of Murfreesboro, Tenn., with a view of connecting with the southern systems of railways converging at Nashville, Tenn." (Charter, section 12.) Any city, town or county through which the proposed road should pass was authorized to subscribe stock in the railroad company in any amount it desired, and to issue bonds therefor payable to bearer, with coupons attached, bearing interest not exceeding 6 per cent., payable in the city of New York at not more than thirty years from date; but before any such subscription should be valid the question of making it should be submitted to the qualified voters of the municipality, and a majority of the qualified voters voting at the election should be in favor of the subscription. (Section 15.) The charter authorized subscriptions to be made upon such conditions as might be deemed fit. In construing it in Shelby County Court v. Cumberland & Ohio R. R. Co., 71 Ky., 209, this court said: "The president and directors of the railroad company are not only expressly vested by the 12th section of the act of 1869, supra, 'with all the powers and

rights necessary to the construction' of the road, but the 18th section provides that the company 'shall have all the powers and privileges conferred' on the 'Louisville & Nashville R. R. Co., by the laws of Kentucky for constructing and operating their said road not herein specified and granted, and not in conflict with the terms of this charter;' and by section 23 of the charter of the Louisville & Nashville R. R. Co. the county courts of counties through which that road passes are expressly authorized to submit to the voters of their counties propositions for subscribing for stock in that corporation, 'if by them deemed expedient, in such manner as they may direct and prescribe.' And by the 6th section of an act to amend the same charter, approved January 17, 1856, counties, towns, cities, and other corporations are authorized, in express terms, to subscribe for stock in that road, 'with such terms and time of payment, conditions annexed, and kind of payment that may be set forth in the subscription.' "

At its June term, 1869, the following request was filed in the Green County Court: "We, the undersigned commissioners of the Cumberland & Ohio R. R. Co., hereby request that the county court of Green county submit to a vote of the qualified voters of said county the question whether said county shall subscribe for and on behalf of said county, and in pursuance of the provision of the charter of said railroad company, \$250,000 to the capital stock of said company, payable in the bonds of said county, having twenty years to run and bearing 6 per cent. interest from date, upon the conditions that said company shall locate and construct said railroad through Green county, and within one mile of the town of Greensburg in the said county, and shall expend the amount so subscribed within the limits of Green county; and also upon the further condition that said bonds shall not be issued or said county pay any part of either principal or interest on said amount subscribed as aforesaid until said county of Green shall be fully and completely exonerated from the payment of the capital stock subscribed by the county court of said county for and on behalf of said county to the Elizabethtown & Tennessee R. R. Co."

The county court thereupon made the following order: "Whereas, the commissioners of the Cumberland & Ohio R. R. Co., by virtue of the authority delegated to them by the charter of said company, have requested the county court of Green county to order an election in said county of Green, and submit to the qualified voters of said county the question whether said county shall subscribe for and on behalf of said county \$250,000 to the capital stock of the Cumberland & Ohio R. R. Co., having twenty years to run and bearing 6 per cent. interest from date, and payable in the bonds of said county, upon conditions that said company shall locate and construct said railroad through the county of Green and within one mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green county; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio R. R. Co. until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green County Court to the Elizabethtown & Tennessee R. R., or any part of the interest thereon. It is, therefore, ordered by the court

that an election by the qualified voters of Green county, at the several voting places in said county, be held and conducted by the several officers as prescribed by law for holding elections, on the 3d day of July, 1869, to vote on the question as to whether or not the said county court of Green county shall, for and on behalf of said county subscribe \$250,000 to the capital stock of the said Cumberland & Ohio R. R., conditioned, and to be paid, as above stated."

The election was held, resulting in a vote in favor of the subscription, and at its June term, 1870, the county court entered the following order: "Whereas, in pursuance of an order of this court made on the 17th day of June, 1869, an election was held in said county of Green, on the 3d day of July, 1869, at the several precincts in said county, and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for \$250,000 of the capital stock of the Cumberland & Ohio R. R. Co.; now it further appearing that said election was held in conformity with the law and in accordance with the provisions of the charter of the company, now, therefore, I, Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for \$250,000 of the capital stock of the Cumberland & Ohio R. R. Co., for and on behalf of the said county of Green, which subscription is to be paid in the bonds of said county as prescribed in said order of submission, and this subscription is made with the conditions set out in the order of this court ordering said election and now on record in the office of this county."

At its October term, 1871, this further order was made: "On motion of E. H. Hobson, director of the Cumberland & Ohio R. R., it is ordered that Z. F. Smith, president of the Cumberland & Ohio R. R., be, and he is hereby, authorized to have printed for the county of Green the bonds to the amount of \$250,000, the amount of subscription of Green county to said railroad, in the following denominations, to wit, the same to be conditioned as specified in the order submitting the vote of the said county: 125 bonds at \$1,000, \$125,000; 200 bonds at \$500, \$100,000; 250 bonds at \$100, \$25,000."

At the January term, 1872, bonds to the amount of \$1,300 were ordered to be issued, and at the February term, \$5,000 more. At the April term, 1872, the following order was entered: "Application was this day made to the presiding judge of the county court of Green county by the president and board of directors of the Cumberland & Ohio R. R. Co. to issue the balance of the bonds of said county to the amount of the subscription of said county of Green to the said Cumberland & Ohio R. R. Co., and the court being sufficiently advised, it is ordered by the court that the balance of the said bonds be, and they are hereby, ordered to be issued, to be signed by the judge of said county court of Green county and countersigned by the clerk of said court as required by the charter of said company."

Under this order the bonds here in controversy were issued. They read as follows:

"UNITED STATES OF AMERICA.

"County of Green, State of Kentucky.

"FOR THE CUMBERLAND & OHIO RAILROAD.

"Twenty years after date the county of Green, in the State of Kentucky,

will pay to the holder of this bond the sum of ———, with interest thereon at the rate of 6 per cent. per annum, payable semiannually upon presentation of the proper coupons hereto attached, principal and interest being payable at the Bank of America, in the city of New York.

"In testimony whereof the judge of the said county of Green has hereunto set his hand and affixed the seal of said county, on the 1st day of April, A. D., 1871, and caused the same to be attested by the county clerk, who has also signed the coupons hereto attached."

Appellee, James D. Shortell, is the holder of six of these bonds, each for the sum of \$1,000, and of one bond for \$500. He filed this suit against the county of Green to recover on the past due coupons. The county pleaded in defense of the suit the conditions above set out. On the former appeal a demurrer was sustained to the answer on the ground that it did not state the facts relied on sufficiently to raise the question aimed to be presented. (*Shortell v. Green County*, 22 Ky. Law Rep., 1010; 23 Ky. Law Rep., 144.) On the return of the case to the circuit court the answer was amended so as to set out all the facts above stated, and it was pleaded that the conditions upon which the subscription was made had not been complied with; that the Cumberland & Ohio R. R. failed to erect or construct a line of railroad through Green county or within one mile of the town of Greensburg; that there is no railroad now and never was any railroad running through Green county; that no part of the amount subscribed was ever spent in Green county in the construction of any railroad therein, and that the county was not exonerated from the payment of the capital stock voted by it to the Elizabethtown & Tennessee R. R.; that the conditions prescribed in the subscription were all disregarded and never fulfilled, and that the bonds were issued without authority of law, in violation of the rights of the taxpayers of Green county. The court sustained a demurrer to the answer, and the defendant appeals.

It is conceded that the appellee is a bona fide purchaser of the bonds without notice of the defense now set up by the county, and the question to be determined is whether, notwithstanding this, the defense relied on is good against him? In determining this question an important distinction is made by the authorities between those bonds which contain recitals certifying that the preliminary requisites for the issue of municipal bonds have all been complied with, and bonds containing no such recitals. Thus in *Citizens Savings Association v. Perry County*, 156 U. S., 701, the United States Supreme Court said: "But it is urged that the bonds having been executed and issued by those whose duty it was to execute and issue them whenever that could be rightfully done, the county is estopped to plead their invalidity as between it and the bona fide purchaser for value. This argument would have force if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrine of this court, the county would be estopped to deny the truth of the recital as against bona fide holders for value. But this court in *Buchanan v. Lichfield*, 102 U. S., 202, upon full consideration, held that the mere fact that the bonds were issued, without any recital of the circumstances bringing them within the power granted, was not of itself conclusive proof in favor of a bona fide holder that the circumstances existed

which authorized them to be issued." *Town of Coloma v. Eaves*, 92 U. S., 481; *School District v. Stone*, 106 U. S., 183; *Carroll County v. Smith*, 111 U. S., 556; *Hopper v. Town of Covington*, 118 U. S., 148.

This doctrine was recently reaffirmed in the case of *Provident and Life Trust Co. v. Mercer County*, 170 U. S., 598. The bonds in question containing no recitals as to the authority of the officers issuing them or as to the performance of the preliminaries requisite to their issuance, there is no estoppel on the county to plead the truth of these matters. Municipal corporations are simply agents of the State for local purposes, and possess merely such powers as are expressly given or may be properly implied because essential to effectuate what is expressly granted. (1 *Dillon on Municipal Corporations*, section 189; *Ottawa v. Carey*, 108 U. S., 110.) The officers of a municipality have only such powers as are conferred upon them by law, and all persons dealing with them are required to take notice of the extent of their authority, because all persons are required to take notice of the laws of the land. (*Mayor of Baltimore v. Reynolds*, 83 Am. Dec., 535; *Marsh v. Fulton County*, 10 Wal., 683.) When the bonds of Green county were offered upon the market every person buying them was put upon notice that the counties of this State had no authority to issue bonds of this character by the general laws of the State, and that the bonds in question were not binding on the county unless issued by special legislative authority. It was, therefore, incumbent upon all before buying these bonds to learn by what authority they were issued. It was shown by the bonds that they were issued "for the Cumberland & Ohio R. R." They were made payable to the holder. When the purchaser looked to the charter of the Cumberland & Ohio R. R. he was informed by it that the county court could only issue the bonds of the county after the question of making the subscription had been submitted to the qualified voters and a majority of them had voted in favor of the subscription. He was also informed that the county might make a subscription on such conditions as it saw fit. There being nothing on the face of the bonds to advise him on these matters, it was incumbent on him before buying paper, which was invalid in the absence of express authority in the officials, to look to the record and see under what circumstances these bonds had come into existence. When he looked to the record of the Green County Court, which under the act he was bound to know would set forth the facts, he was apprised that the subscription was made upon the conditions that the company would locate and construct its railroad through Green county, and within one mile of the town of Greensburg, and would expend the amount so subscribed within the limits of Green county; and also upon the further condition that the bonds should not be issued or the county pay any part of either principal or interest until it was fully exonerated from the subscription to the *Elizabethtown & Tennessee R. R. Co.* He was also notified that in the order of the court under which the vote was taken it was expressly submitted whether the county would subscribe \$250,000 to the capital stock of the *Cumberland & Ohio R. R.* "conditioned and to be paid as above stated;" and that in the order making the subscription it was stipulated: "This subscription is made with the condition set out in the order of this court ordering said election, and now on record in the office of this county." He was further

notified that in the order directing the bonds to be printed it was provided "the same to be conditioned as specified in the order submitting the vote of the said county." These orders of the county court were the authority under which the bonds were issued, and the only authority which the officers issuing them had. They plainly disclosed the fact not only that the subscription was conditional, but that it was "to be paid as above stated," and that the bonds were "to be conditioned as specified in the order submitting the vote." The county officials had no authority to issue a bond not conditioned as specified in the order submitting the vote, for the subscription was expressly conditioned and only to be paid on condition. If the county officials had followed the order of the county court and issued bonds conditioned as specified in the order submitting the vote, the bonds on their face would have informed every purchaser of the conditions on which they were voted. But when the county officials neglected to do this and issued instead a naked promise to pay, without any recital of the authority under which it was issued, the purchaser was put upon inquiry as to their authority, and their want of authority is as available against him as the facts pleaded would have been had they followed their authority and conditioned the bonds as specified in the order submitting the vote. In executing the bonds in their present form the county officials may have supposed that the rights of the county were sufficiently protected by the orders entered in the county court. The rule on the subject is thus stated in *Hainer on Municipal Securities*, section 418: "Where bonds purporting to have been issued by a municipality contain no recitals of an election, or of proceedings and orders of the municipality, but are mere naked promises to pay, every purchaser and holder of the securities is chargeable with notice of whatever appears upon the face of the records. If in such case it appears upon the face of the records that the commissioners had no authority to issue the bonds, the municipality could avail itself of that want of authority as a defense to an action even by a bona fide holder. When the laws or constitutional provisions relating to the issuance of county bonds point to the county records as evidence of facts required to authorize their issuance, such records, and not the recitals in the bonds, must be looked to by all persons proposing to deal in them."

In *Lewis v. Bourbon County*, 12 Kan., 216, the court, by Brewer, J., said: "Every one dealing with the commissioners or purchasing such securities must take notice of the law under which they act. * * * That these bonds are negotiable paper does not alter the case. The law merchant does not make the act of an agent proof of his authority."

In *Veda v. Town of Lima*, 19 Wis., 305, the court, by Chief Justice Dixon, said, after referring to similar statutory provisions as in the act referred to: "These provisions mark very clearly to my mind the intention of the legislature, that all persons negotiating for the bonds, whether directly with the supervisor or with third parties must look to the records and govern themselves accordingly. They are public records, open at all times to inspection; or if in any cases it is inconvenient or impracticable, transcripts can be had at a trifling expense."

In *Cooley on Constitutional Limitations*, in a note to side page 217, after collecting many authorities as to the effect of recitals in such bonds, and quoting at length from *Gould v. Town of Sterling*, 23 N. Y., 464, which is

to the effect that the municipality is not bound by recitals in bonds if unauthorized, the distinguished author says: "It is of course impossible to reconcile these authorities, but the doctrine in the case of *Gould v. Town of Sterling* appears to us to be sound, and that wherever a want of power exists a purchaser of the security is chargeable with notice of it, if the defect is disclosed by the corporate records, or, as in that case, by other records where the power is required to be shown."

It is insisted, however, for appellee that by the terms of the subscription it was made upon the condition that the bonds should not be issued or the county pay any part of either the principal or interest of the amount subscribed until the county was exonerated from the payment of its subscription to the Elizabethtown & Tennessee R. R. It is urged that this part of the condition was made precedent to the issuing of the bonds, but that the rest of the condition, to the effect that the company should locate and construct its road through Green county, or within one mile of Greensburg, and expend the amount subscribed in Green county, was not made a condition precedent to the issue of the bonds; but, therefore, only an obligation was imposed upon the railroad company for the performance of which the county only looked to it. It is also insisted that it is shown by the record that the subscription to the Elizabethtown & Tennessee R. R. was void. We can not concur in either of these conclusions. The meaning of the contract, taken as a whole, is that the subscription is upon the condition that the company shall locate and construct its railroad through Green county and within one mile of Greensburg, and expend the amount subscribed in the limits of Green county; and the further condition is added that the bonds are not to be issued or anything paid on account of the subscription until the county is exonerated from its former subscription to the Elizabethtown & Tennessee R. R. In other words, the bonds are not to be issued until this release is made, and after the release is made the bonds may be issued; but they are to be subject to the condition that the company should locate and construct its road as above set out. The railroad authorities, in applying to the county court for a vote on this subject, intended by their petition for the people of the county to understand that before any liability was created the old subscription to the Elizabethtown and Tennessee R. R. was to be out of the way entirely, and that after this was done the promise of the county to pay was to be conditioned on the location and construction of the road through Green county and within one mile of the town of Greensburg. In construing the contract the court must bear in mind that it was a proposition submitted by the railroad company to be voted on by the people of Green county; and that construction must be adopted which was clearly contemplated by the parties at the time. The railroad company intended the people to understand, and the people understood, from the paper, when they voted on the subscription, that they were to get a railroad through the county, and that if they did not get it, their subscriptions, being "conditioned and to be paid as above stated," would not be binding upon the county. That this was the understanding of the parties is conclusively shown by the order of the county court, made on the motion of the railroad company, directing the bonds to be printed, "the same to be conditioned as specified in the order submitting the vote of the said county."

As to the matter of the subscription to the Elizabethtown & Tennessee R. R. the record shows the following order of the county court made on May 20, 1868:

"This day T. R. Barnett, presiding judge, and D. T. Towles, clerk of the Green County Court, produced their certificate, in words and figures as follows, viz.:

"We, T. R. Barnett, presiding judge, and D. T. Towles, clerk of the Green County Court, duly authorized to compare the poll books of Green county, certify that an election held in said county, at the various voting places in said county, on the 16th day of May, 1868, on the question whether the county court of Green county shall, for and on behalf of said county, subscribe for 3,000 shares of the capital stock of the Elizabethtown & Tennessee R. R. Co., to be paid for in the bonds of said county, payable in twenty years and bearing 6 per cent. interest, payable semiannually in the city of New York, with interest coupons attached thereto, and that 586 votes were cast for said subscription and 204 against said subscription. May 20, 1868.

"T. R. BARNETT,

"D. T. TOWLES.

"It is, therefore, ordered by the court that the said vote be, and is now, entered of record, as follows, to wit, 586 votes were cast for said subscription and 204 votes were cast against said subscription, showing that there is a majority for said subscription of 382 votes.

"It is now, therefore, ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote as aforesaid."

It is insisted that the order is void because the county court, instead of making the subscription, delegated this duty to its clerk, and Mercer County Court v. Kentucky River Navigation Co., 71 Ky., 300, is relied on. But in that case the order of the county court appointing the commissioner to make the subscription contained these words: "But said commissioner is directed not to subscribe said stock, or any part thereof, until said company shall, by proper orders entered on the books, agree that no part of their subscription shall be mortgaged under the provisions of the 10th section of the act of the Kentucky Legislature incorporating said company, nor shall the county of Mercer be in any manner bound for the subscription herein decreed to be made until said company has accepted it upon the conditions herein set forth."

It was held that the power of the county court to make the subscription being conferred by law, must be exercised by it, and that it could not confer upon a commissioner the power to determine important questions submitted for its determination. The ground of the decision was that there was no subscription unless certain things were done, and the commissioner was to determine whether these things were done, and thus, by the exercise of his discretion, determine whether the subscription should be made, whereas the law had vested this discretion alone in the county court. But the case before us is wholly different. No discretion is conferred upon the county clerk. He is simply directed absolutely to do a clerical act. County courts can not conveniently sign subscription papers or documents of this kind, and for convenience such bodies usually act by a commissioner or agent in the discharge

of the mere clerical duty of signing the papers. Such a course of doing their business has been often sustained. (23 Am. & Eng. Ency. of Law, 2d edition, 365, 366; *Miller v. New York*, 109 U. S., 385; *Birdsall v. Clark*, 29 Am. Rep., 105; *Burrell v. Nahant Bank*, 35 Am. Dec., 305; *Dillon on Municipal Corporations*, section 60.) As the case is here only on demurrer, the question is not presented whether the subscription was in fact made.

Again, it is urged that four and a half miles of railroad have been built in Green county by a successor of the Cumberland & Ohio R. R. Co., and this is relied on as a compliance with the condition of the contract under the case of *Providence Trust Co. v. Mercer County*, 170 U. S., 602; but that case rests on the peculiar facts there shown, it being held in effect that the contract was substantially complied with. That is not the case here. There has been no substantial compliance with the contract. The road was to be built from the Ohio river to the Tennessee line, and the subscription was made on the condition that it was to be paid when the road was constructed through Green county. It has never been constructed through Green county, nor does its construction in any manner approximate a fulfillment of the conditions. To hold that there has been a compliance with the terms of the contract would be to give no effect to the natural meaning of the language used. (*People's Ferry Co. v. Balch*, 74 Mass., 303; *Memphis, &c., Ry. v. Thompson*, 24 Kan., 170.)

The fact that the county paid the interest on the bonds for a few years does not estop it to show their invalidity. (*Martin v. Fulton County*, 10 Wall., 676; *Norton v. Shelby County*, 118 U. S., 425; *District of Doon v. Cummins*, 142 U. S., 1044; *Mercer County v. Providence Life and Trust Co.*, 19 C. C. A., 58; *Graves v. Saline Co.*, 161 U. S., 373.)

We, therefore, conclude that upon the facts shown the county of Green is not liable upon the bonds sued on, and that the court should have overruled the demurrer to the answer. As the case was submitted both on a demurrer and a motion for judgment notwithstanding the answer, we will not now direct a judgment to be entered for the defendant. As the bonds in contest contain no recitals, no opinion is intimated on the conflict of authority referred to by Judge Cooley, as to whether municipal officers issuing bonds without authority can estop the municipality by reciting in the bonds that they have such authority.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

Whole court sitting except Judge Settle, who declined to sit in the case.

ISON, &c. v. CORNETT.

(Filed June 17, 1903.)

Infants—Ratification and disaffirmance of contracts—A. died leaving his widow and two infant children surviving him, B. and C. He owned four tracts of land. The widow married D., and B., one of the daughters, married E., and while B. was only seventeen years of age she and her husband swapped her interest in the four tracts, worth about \$1,300, to D., her step-father, for land worth about \$500, and \$50 in money. He knew that she was under age, and took her affidavit that she would make him a deed for same

after she became of age. Before deeds were made under this trade she and her husband swapped the tract received from D. to F. for a tract owned by him, and by agreement D. made a deed to F. for his tract and F. conveyed his tract to her, and she conveyed her interest in her father's estate to D. She and her husband settled on the tract conveyed to her by F., and subsequently, while she was still an infant, conveyed one-half of it to H., and made a deed to him for it. After this she became of age. The deed which she had made to D. had not been recorded, and appellee proposed to her husband to pay him \$1,100 for the land which had been conveyed to D. D. notified appellee that he owned the land, and for him not to complete the trade. Subsequently B. and her husband re-acknowledged the deed to H., and executed and acknowledged a deed to appellee, who paid \$1,100 for the land. D. was in possession of the land and had cut about \$200 worth of timber from it. Appellee filed this suit against D. to quiet his title to the land. Held—That the deed made by the infant married woman to D., her stepfather, was not void. She disaffirmed it by making a deed to appellee for the same land after she became of age. The fact that appellee had notice of the claim of D. did not render his purchase void. The deed she made to H. during her infancy was not void, and her re-acknowledgment of it deprived D. of no legal right. It is the policy of the law to discourage persons from buying the property of infants, and also its policy to encourage persons to buy their property at full value after they become of age. An infant may disaffirm his contract on becoming of age, and if during his infancy he has spent the consideration received, this is nothing more than the law expects of him; but if he still has the consideration, or its representative in money or property, he must, on disaffirming his contract, make restitution to the extent of the consideration still in his hands. Appellee paid the full value of the property, and a loss should not be thrown on him. She can not use her infancy as a sword, and the chancellor, on a proper application, can do justice between her and D. to the extent that she still retains the land that she got from him or its representative, charging him with what he has received for the timber cut off her land and the reasonable rent while it is in his possession.

N. B. Hays, J. G. & J. S. Forester and J. H. Hazelrigg for appellants.

T. L. Edelen and W. F. Hall for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Hobson.

John M. Creech died about twenty years ago, leaving a widow and two children, who were both then infants. He owned four tracts of land. Some time after his death the widow intermarried with William Ison, and after this the daughter, Pasha, married George Ison. In the year 1896, when she was seventeen years of age, she and her husband swapped her interest in the four tracts of land owned by her father to her stepfather, William Ison, for a tract of land in Letcher county owned by him, he paying her \$50 in addition in the trade. This trade was proposed by her and her husband, and seems to have been much canvassed before it was made. The tract of land which William Ison swapped to her was of value \$500, so that she got in the trade \$550 for her patrimony. He knew that she was only seventeen years of age, and took from her an affidavit that she would make him a deed after she became of age. Before deeds were made under this trade she and her husband swapped the William Ison tract to Elijah Ison for a tract owned by

him, and by agreement William Ison made a deed to Elijah Ison for his tract. Elijah Ison conveyed his tract to her and she conveyed her interest in her father's land to William Ison. She and her husband settled on the tract of land conveyed to her by Elijah Ison, and subsequently, while she was still an infant conveyed one-half of it to Joseph Holcomb, and made a deed to him for it. After all this, on July 1, 1891, she became of age. The deed which she had made to William Ison for her land had not been recorded, and R. N. Cornett proposed to her husband to pay him \$1,100 for it. William Ison heard of this, and on the day that she was of age went to see her, asking her to make him a deed the next day. The next morning he went to see Cornett, telling him of his purchase of the land and requesting him to drop the trade, and offered him \$100 to do this. Cornett said he did not want his money for nothing, and Ison told him if he bought the land he would buy a law suit. That day Cornett took to her house a deputy clerk, with a deed he had prepared for her to sign. Joseph Holcomb's wife was there with his deed for the purpose of getting that re-acknowledged. The proof is conflicting as to which deed was signed first, but from all the evidence we conclude that it was, in substance, one transaction, and that both deeds should be treated as executed at the same time. Both were on the table together, and the proof leaves the mind in doubt as to which was acknowledged and delivered first. Cornett got his deed and paid the money and Holcomb's wife got his. Both were properly acknowledged. William Ison was in possession of the land at the time. Cornett paid \$1,100 for the land, \$800 of it being paid in a stock of goods. Holcomb paid nothing for the acknowledgment of his deed. Pasha Ison and her husband were then living on the remainder of the tract conveyed to her by Elijah Ison outside of the part conveyed by them to Holcomb, and continued to reside there. Before she became of age William Ison had cut off the land she conveyed to him timber of the value of something over \$200, and received the money for it. What she had received for the land conveyed to Holcomb is not shown. Cornett then filed this suit against William Ison to quiet his title to the land. William Ison answered, making his answer a counterclaim, and praying that his title be quieted. The case was submitted to the chancellor, who entered judgment in favor of Cornett, and William Ison appeals.

The proof leaves no sort of doubt that Cornett bought with full knowledge of the previous sale to William Ison and of his claim to the land. It also leaves no sort of doubt that Cornett paid for the land \$1,100 in money and property. Each of them earnestly maintains that the other has no equity in his case. The stepfather evidently knowingly made a hard trade with his stepdaughter when an infant; but the husband urged the trade, and there was no fraud in it. Cornett bought with full notice of the prior claim of William Ison; also of the re-acknowledgment of the deed to Holcomb, and that he was buying a law suit.

The deed of an infant conveying real estate when any valuable consideration passes to him is not void, but voidable only, and may be confirmed after his arrival at the age by the re-acknowledgment of the deed or conduct showing an election to stand by it. (*Hoffert v. Miller*, 88 Ky., 572, and cases cited.) After arriving at age he may disaffirm a contract made during infancy for the sale of real property, either executed or executory, by merely

making another conveyance of the same property to a third person, and it is unnecessary for him to refund to the first person the consideration received in order to render the second conveyance valid. (*Vallandigham v. Johnson*, 85 Ky., 289.) The purchaser holding under a deed made by an infant can not rely upon the champerty statute as against the second purchaser, as his holding is not adverse to the infant. (*Moore v. Baker*, 93 Ky., 618; *Freeman's note to Craig v. Van Bibber*, 18 Am. St. Rep., 667, 703; 16 Am. & Eng. Ency. of Law, 288-298.)

The fact that Cornett had notice of the claim of Ison did not render his purchase void, for, as has been well said, the privilege of an infant to disaffirm his contract might be of little value to him if he were permitted to dispose of the property previously conveyed to such persons only as had no notice of the prior conveyance. (*Jackson v. Burchin*, 14 Johns., 124; *Morgan v. Lane*, 9 Mo., 442.) It has also been held that if an infant conveys his land, and on attaining his majority ratifies his conveyance and then conveys to another person for a valuable consideration, the first grantee not being in possession, the second grantee having notice of the deed made in infancy, but no notice of the ratification, is entitled to hold the land. (*Black v. Hill*, 36 Ill., 376, 87 Am. Dec., 224.) The rule is thus well stated in 16 Am. & Eng. Ency. of Law, page 287: "The right of an infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others; and though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former can not complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter, nor charge that the infant, in exercising the right, is guilty of fraud."

Here Cornett had notice of all the facts, and bought with full knowledge of the situation, Ison, the prior purchaser, being in actual possession. But the infant had sold the land to Holcomb before her majority, and, as appears from the proof, had nothing at that time except the little place on which she resided. She was under no obligation to disaffirm her deed made to Holcomb. That deed was not void. It was only voidable. If she did not disaffirm it, it stood good. Ison, when she disaffirmed the deed made to him, could not demand of her, as a condition of that disaffirmance, that she should also disaffirm the deed made to Holcomb. Her acknowledgment, therefore, of the deed made to Holcomb after she became of age deprived Ison of no legal right. She was under at least a moral obligation to Holcomb after she had disposed of the consideration received from him for the land conveyed to him. Her re-acknowledgment of the deed put it out of her power thereafter to disaffirm it; but the same effect would have followed if she had remained silent and taken no action for the statutory period. Ison was in no worse condition after she re-acknowledged that deed and disaffirmed his than he would have been if she had disaffirmed his without taking any action as to the Holcomb matter. He would have no claim on the Holcomb land if she had not re-acknowledged Holcomb's deed and simply allowed the matter to remain as it was.

If she had sold the land to Holcomb after becoming of age a different question would be presented; but when she re-acknowledged the deed to him she simply elected not to disaffirm it, as she had the legal right to do, and no right of Ison being prejudiced thereby, he can not complain. As it is the policy of the law to discourage persons from buying the property of infants, and also its policy to encourage persons to buy their property at full value after they become of age, without fear of losses by reasons of contracts made during infancy, the interests of this class of persons require that bona fide purchasers of their property for value after they have arrived at age should be upheld; for otherwise their property might be sacrificed, as in this case, by a sale at half its value during infancy, and after they arrived at age no one would be willing to buy from them and pay the value of the property.

Pasha Ison is not a party to this suit, and we can not, therefore, determine her rights. But on the facts as presented the real equity of the case is not difficult to see. The disability of infancy is allowed by law as a shield, not as a sword. The infant may disaffirm his contract on becoming of age, and if during his infancy he has spent the consideration received, this is nothing more than the law expects of him; but if he still has the consideration, or its representative in money or property, he must, on disaffirming his contract, make restitution to the extent of the consideration still in his hands. Thus, if he gives his note for the price of personal property and pleads infancy to the note, the title to the property reverts in the vendor, and he may recover it in an action in trover. The same principles apply in the case of real estate. (*Kitchen v. Lee*, 11 Page, 107; *Henry v. Root*, 33 N. Y., 526; *Carr v. Clough*, 59 Am. Dec., 345; 16 Am. & Eng. Ency. of Law, 293; *Manning v. Johnson*, 62 Am. Dec., 732; *Bradley v. Wolfe*, 60 Miss., 433.)

William Ison was the girl's stepfather; she was small when her own father died and had grown up in his home. He stood to her in loco parentis. In this situation, when she was seventeen years of age, he traded her out of her patrimony for \$550, and this land, after he had cut over \$200 worth of timber from it, sold for \$1,100, about four years later, thus showing that the land in its original condition would have been worth over \$1,300. The law will not enforce in his favor a contract made with her by him, by which more than half her property was taken from her. The rule is that ratification, to be binding on the infant, must be voluntary, the act of a free mind and not done under misapprehension. (Note to *Craig v. Van Bebber*, 18 Am. St. Rep., 705.) There was no intention on her part to ratify the deed to William Ison. Cornett paid the full value of the property, and a loss should not be thrown upon him. Still she can not use her infancy as a sword, and the chancellor, on a proper application, can do justice between her and William Ison to the extent that she still retains the land that she got from him, or its representative, charging him with what he has received from the timber cut off her land and the reasonable rent while in his possession.

Judgment affirmed.

THOMPSON'S EX'OR v. BROWN, &c.

(Filed June 17, 1903.)

Wills—Public charity—This action involves the construction of a clause of the testatrix's will directing that her executor sell her property, and after payment of certain bequests and funeral expenses shall distribute the balance to the poor in his discretion. Held—That the devise is sufficiently definite to establish a public charity.

Thompson & Spalding for appellant.

H. P. Cooper for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Burnam.

The eleventh clause of the will of Elizabeth Thompson, who died in September, 1897, reads as follow: "I will and direct that my house and lot in Raywick, Ky., be sold at such time and on such terms as my executor may deem best, and I will that the proceeds, together with whatever other estate I may have after the payment of the aforesaid bequest and funeral expenses, shall be collected by my executor, and by him distributed to the poor in his discretion."

The only question for decision upon this appeal is whether the gift in this clause is sufficiently definite to be enforceable under section 317 of the Kentucky Statutes, which require that such gifts shall point out with reasonable certainty the purpose of the charity and the beneficiaries thereof. Very different rules from those that are applied in establishing and administering private trusts will be applied in order to give effect to the intention of a donor to establish a public charity. In discussing this question Perry on Trusts, section 687, uses this language: "If in a gift for private benefit the cestui que trust are so uncertain that they can not be identified, or can not come into court and claim the benefit conferred upon them, the gift will fail. But if the gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed it is said that vagueness is in some respects essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins."

The general doctrine upon the question of charitable bequests is that the beneficiaries should be designated as a class only, leaving the number and individuals to be determined by the trustees who administer it. Devises for the poor have always been favorite modes of dispensing charity by benevolent persons, and trusts created for this purpose have been generally upheld by the court. In Moore's Heirs v. Moore's Devisees, 34 Ky., 354, it was decided: "When an ascertainable object is designated by the donor in general and collectible terms as the poor of a given county or parish, or when a person is appointed by him to select a described portion or kind or number from a designated class, the chancellor, sitting as judge in equity, will interpose on the ground of trusts."

In the case of Curling v. Curling, 8 Dana, 38, James Curling left the residue of his estate for the use and benefit of a public seminary, not designating where it was to be located. The circuit judge held the devise void for uncertainty, but upon appeal to this court Judge Robertson, delivering the

opinion of the court, said: "The testatrix by designating a general object of charity (a public seminary), must be understood as intending either a seminary, or the seminary of his county, or any seminary, which his executor or a court of equity, in the exercise of a sound discretion, should select as best adapted to effect the object of charity. Upon either of these hypotheses the testator's purpose, as declared and circumscribed by himself, may be fulfilled by applying the fund to a specific object without any hazard of perverting his bounty in a manner not contemplated by him, and authorized by his will. Therefore, according to principles established as perfectly judicial, we are of the opinion that the devise created a charitable trust, which may be executed according to law, and without violating the will of the testator or making a will for him, and, therefore, we conclude that the circuit court ought to have decreed the appropriation of the profits of the devise to the use of the Trigg Seminary, and appointed a trustee to execute the trust."

In the very recent case of *Spalding v. St. Joseph's Industrial School*, 21 Ky. Law Rep., 116, Judge DuRelle uses this language: "All the Kentucky cases have sustained the charitable uses therein considered because the court held that a charitable object was indicated, or a class of charitable objects designated, from which choice was authorized to be made. In some of them there is room for difference of opinion as to the certainty of the objects of the charitable uses sustained, but the courts have always held that they were certain, either by being designated by the donor or one of a class designated by him from which choice was authorized to be made."

In *Bedford v. Bedford*, 18 Ky. Law Rep., 193, the devise was to the State of Kentucky in trust for the benefit of the State, the profits therefrom to be appropriated annually forever towards the education of the children of the State, particularly the poor and most unintelligent. The devise in this case was sustained as sufficiently definite. The court said: "Trusts must be for the benefit of an indefinite number of persons, for if the beneficiaries are personally designated the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity, and which distinguishes it from a mere private trust."

There has been considerable diversity in the decisions of the courts of the various States of the Union as to the extent they will go in upholding an indefinite trust. In some States, particularly Maryland, Virginia, Michigan, New York and Wisconsin, it has been held that courts of equity have no greater jurisdiction to enforce public than private trusts. On the other hand, in Kentucky, Maine, Massachusetts, Missouri, Pennsylvania, and many other States, where the principles of 43 Elizabeth, chapter 4, are accepted, they have gone to the farthest limit in this regard. In this State sixteen decisions have been reported upon this question of charitable uses, beginning with the case of *Glass & Bonta v. Thomas*, 2 Dana, 170, in which charitable bequests have been uniformly upheld. But it is insisted that the amendment to section 317 of the Kentucky Statutes, passed by the general assembly in 1898, which is in these words: "If the grant, devise, gift, appointment or assignment shall have pointed out with reasonable certainty the purpose of the charity and the beneficiaries thereof, etc.," was intended by the law-making department of the government to change the rule which

has heretofore prevailed in this State. The words of the amendment are the same as those used in several opinions sustaining bequests to various charities, and it would be more consistent with reason and common sense to believe that the legislature simply intended to crystallize into the statute law the doctrine which has been so often announced by this court, and which has been accepted with approval by the profession, the general assembly, the public at large, and by most eminent text-writers.

The gift in this case is to the poor as a class, and the testatrix has appointed her executor to select from this class the persons who are to receive the benefit of the charity. In our opinion the judgment of the trial court is in conflict with what has become the settled legislative policy in this State with respect to public charities, and *Spalding v. St. Joseph's Industrial School*, 21 Ky. Law Rep., 116, relied on to support the judgment of the trial court, is not in conflict with the other case, and the devise in this case should be upheld.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

MILLER v. FARMERS BANK OF KY., USE OF SAM JETT.

(Filed June 17, 1903—Not to be reported.)

1. Champerty—Adverse possession—P. recovered judgment against E., enforcing a lien for purchase money, and M. became the purchaser at the sale and took possession, but failed to pay the purchase money. Afterwards P. took out an execution which was levied on the land, and he became the purchaser. He afterwards obtained a writ of possession for the land, but did not have it issued or executed. P. sold the land to M., and it was afterwards included in a large boundary conveyed by order of court to the Farmers Bank, who sold and conveyed it to J., and he failed to pay for this tract of land held by M., who was the nephew of P., who had permitted him to hold possession. The bank instituted this action in equity to dispossess M. of the land. It is insisted for M. that M.'s possession was adverse, and, therefore, the deed to the bank was champertous, and the judgment of P. against M. was void, as he was not before the court. Held—That the possession of M. was not adverse to P., and the deed was not champertous, and appellant can not in this collateral proceeding question the correctness of the judgment in favor of P. against M.

2. Parties to actions—The bank has a lien on the land for the purchase money, and, therefore, has an equitable interest in it. It was necessary for it to get M. out of possession to protect its interest, and although it had conveyed the land to J., it might maintain an action in equity for the protection of its rights.

J. B. Marcum for appellant.

J. J. C. Bach, John Patrick, Kelly Kash and John W. Rodman for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Hobson.

In the year 1876, M. W. Puckett recovered judgment in the Breathitt Circuit Court against Wesley Edwards, enforcing a lien for purchase money

on a tract of 100 acres of land. The land was sold on February 19, 1877, and M. W. Miller became the purchaser, executing bond with surety. He failed to pay the bond and Puckett took out an execution on it, which was levied on the land by the sheriff. After proper proceedings the land was sold and Puckett became the purchaser. On July 8, 1878, Puckett filed suit against Miller to recover the land. This action was consolidated with the former action then pending of Puckett v. Edwards, and on July 5, 1889, a judgment was entered in the consolidated actions in favor of Puckett, and awarding him a writ of possession for the land, the court holding that no conveyance was necessary as the legal title was already in him. Puckett allowed Miller, who was his nephew, to remain on the land, and while he was thus in possession, the writ of possession in favor of Puckett not having been sued out or executed, Puckett sold to John Meagher, and on March 19, 1896, in a suit of M. W. Puckett against John Meagher, the land was included in a large boundary conveyed by order of the court by commissioner's deed to the Farmers Bank, who sold and conveyed it to Sam Jett.

Jett refused to pay the bank for the 100 acres held by Miller, and thereupon it filed this petition in equity, praying that Miller be dispossessed of the land, and for writ of possession therefor. The court on final hearing adjudged the bank the relief sought, and Miller appeals. It is insisted for appellant that Miller's possession was adverse, and, therefore, the deed to the bank was champertous; also that the judgment against Miller in favor of Puckett is void, as he was not before the court, and that the bank having sold to Jett, is not the real party in interest and can not maintain an action.

In *Swager v. Crutchfield*, 72 Ky., 411, it was held that the champerty act did not embrace a case where the vendor had already litigated the title with the occupant and had obtained a judgment in his favor, which was irreversible. Besides, the proof heard on the trial is not sufficient to establish an adverse holding by Miller after the judgment in favor of Puckett against him for the land. As that judgment is not directly attacked and is only assailed now collaterally, it is presumed that the court had jurisdiction, although no service of process is shown. (*Freeman on Judgments*, section 124; *Jones v. Edwards*, 78 Ky., 6.) The bank has a lien on the land for its purchase money, and, therefore, has an equitable interest in it. It was necessary for it to get Miller out of possession to protect its interest, and although it had conveyed the land to Jett, it might maintain an action in equity for the protection of its rights. On the whole case the judgment in favor of appellee seems clearly in accordance with justice and right.

It is, therefore, affirmed.

TAYLOR V. COMMONWEALTH.

(Filed June 18, 1903.)

Criminal law—Embezzlement by president and director of an investment company—Indictment—Appellant and four others organized an investment company of which appellant became president and director. He was indicted and convicted under section 1202, Kentucky Statutes, for embezzlement of the funds of the corporation, from which he prosecutes an appeal, and insists that the indictment is insufficient, and that a demurrer thereto should have

been sustained on the ground that it charged two offenses: One, in that appellant embezzled the money of the corporation; and the other that he embezzled the money of various persons other than the corporation. Held—That said indictment charges but one offense, the taking of a certain \$500, in one fund and at one time. Its ownership was not material further than that it must be charged and shown to have belonged either to the corporation of which appellant was an officer or agent, or to some person who had entrusted its possession to that corporation. Under said section of the statute the distinguishing features of the crime of embezzlement are that the official should have come into possession of the property converted by reason of the confidence and trust reposed in him by virtue of his position, and that he should have converted such property fraudulently; in other words, it is to punish fraudulent breaches of trust when committed by such persons. The indictment is sufficient.

2. Evidence—The proof shows that the object and purpose of the corporation was to issue certificates of membership, to be sold to the public, who should make weekly payments of coupons, and the corporation agreed to redeem same in a certain method. The incorporators insist that the certificate holders were in no sense members of the corporation, and were not entitled in any event to share in its profits. It is also insisted that they were not regarded as creditors either. Held—That their relation was that of creditors. It is apparent that the scheme attempted was impossible of execution, honestly, so as to perform all the contracts. The most charitable view to take of it is that it was a species of lottery. So far as the manifest purposes of the corporation are concerned they do not appear to have been illegal. The liability of the corporation is first to pay to its creditors their demands in full, or to provide therefor, before the stockholders are entitled to distribute anything among themselves as dividends, or otherwise, than in legitimate expenses actually incurred in the business. If the corporation is solvent when it pays dividends to stockholders, and their payment does not impair its capital and resources set apart to pay its debts, then the discretion of its directors in declaring and paying the dividends will not be questioned. The corporation in this case had not the right, if it was in fact insolvent, to distribute about 20 per cent. of its assets among its stockholders as dividends, when all of its assets would not pay its liabilities. The board of directors met on May 14, 1901, and declared a dividend of \$2,500 (\$500 to each stockholder), payable to themselves. Two other similar dividends were subsequently declared, and thereafter the affairs of the company were placed in the hands of a receiver as insolvent. Appellant was indicted for fraudulently converting and embezzling \$500, which was a part of the dividend declared on May 14, 1901. The inquiry in this case, therefore, should have been, first, to learn whether the corporation had assets on May 14, 1901, which might be lawfully used in paying dividends, that is, a surplus in fact, whether or not in name. If it had not, the question of motive of the directors becomes important and controlling. If the directors believed they had the right to pay the dividend, or if they paid it in utter ignorance of their legal right, but without any fraudulent motive against others interested in the assets of the corporation, they can not be guilty of the crime charged. On the other hand, if they at the time knew that there were not funds belonging to the corporation which could legally be used in paying the dividend, and passed the resolution declaring it, and paid it with the fraudulent purpose of converting to their own use the money of the corporation, using the form of declaring the dividend as a blind to cover their peculations, then they are guilty under the statute. To determine whether the company was solvent on May 14, 1901, proof of its resources and assets, their solvency and security, should have been allowed

as well as of the course and nature of its business and the extent of its liabilities. In this connection proof of the declaration and payment of other dividends and sums to the directors and stockholders about the same time, including the transfer to the Germania Co. when the Industrial Mutual Deposit Co. sold out to it and the actual condition of the company at these dates, should have been allowed as showing, or tending to show, the motive of the directors, including appellant, in declaring the dividend May 14, 1901. All the transactions of the stockholders to which appellant was a party, in the way of buying coupons in the names of various syndicates and borrowing money of the corporation for the purpose of the security of the coupons, should have been allowed for the same purpose. The jury should be charged though as to the evidence of other dividends declared and other transactions permitted to be proved which went solely to the question of motive, as appellant could not have alone voted and declared the dividends in question, and, therefore, could not have taken or converted the money charged. It is essential to constitute his guilt that all directors, or at least a majority of them voting in the affirmative, including appellant, if he voted or participated in the act, must have acted in declaring and paying the dividend, and appellant also in receiving it, with the knowledge that their act was illegal; that there were no such funds belonging to the corporation subject to that purpose, and that each acted with the fraudulent purpose of converting to their own use, and the use of each other respectively, the money of the corporation. For if the directors, other than the appellant, through an honest belief in their right to do so, voted the dividend, although it could not have legally been done, the act was merely maladministration; it was not criminal; and as the act of voting the dividend was the one by which that money was set apart to the stockholders, the knowledge or purpose of appellant in receiving it can not alone make him guilty. It is equally true that if the directors voting the dividend, other than appellant, did so with the guilty knowledge and purpose of committing a fraud upon the corporation, and of converting to themselves its assets, yet if appellant actually believed he had the right to receive it and appropriate it and acted without fraud, he would not be guilty. The lower court properly refused to permit officers of other investment companies doing business at Lexington to state that they had construed similar provisions in their charters as giving the "surplus" and "expense" funds absolutely to the stockholders. The belief or conduct of other people could not affect the matter. Appellant's belief, and that of his co-directors, in acting in this case were relevant, and were properly admitted. It was likewise proper that they should have been permitted to state the foundation of their belief, whether it was based upon advice of counsel or their experience in other similar concerns, or whatever it may have been.

3. Instructions—The court properly refused to give a peremptory instruction to find for appellant. The instructions to the jury did not submit the question of the fraudulent action of appellant's co-directors in declaring and paying the dividend. This was prejudicial error. The instructions permitted a conviction if appellant appropriated the money of the corporation "without right and fraudulently." The court failed to define to the jury what were the limitations of this "right," and the meaning of "fraudulent," thus making the jury judges of the law as well as of the facts. This was error. These limitations should have been defined as set forth in the opinion. The court should have defined fraudulent conversion and fraudulent intent as directed in the opinion.

4. Construction of statutes—Section 548, Kentucky Statutes, which provides a civil liability of directors of corporations, and section 550, Kentucky

Statutes, which provides a penalty for negligence or acts of omission of directors, does not fix the whole liability of directors, or reduce the felonious act of embezzlement by the officers of a corporation, to a misdemeanor.

Hobbs & Farmer, C. J. Bronston and Morton, Darnall & Wilson for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant prosecutes this appeal from a verdict and judgment convicting and sentencing him under a charge of embezzlement. He and four others, in May, 1900, organized, as corporators, the Industrial Mutual Investment Co. Its authorized capital stock was \$5,000, of which each one of the incorporators subscribed \$1,000. They then paid in on their several subscriptions the sum of \$50 each, executing their notes to the company for the balance. Whether they ever actually paid any of this balance is not perfectly clear, although they claim that they did. The object of the corporation, as stated in the articles, was as follows: "The nature of the business and the object and purposes proposed to be transacted, promoted and carried out by said corporation shall be the issuing and selling, with the right to redeem, certificates of membership in the corporation, subject to the terms, conditions, restrictions and limitations named in said certificates of said corporation. The conditions, terms, restrictions and limitations shall be named in each certificate of membership, and shall be constituted and become a part thereof; also the buying or selling of real estate and personal property, bonds, stocks and securities of all kinds, and the investment of accumulations and the surplus in real estate, stocks, bonds and other securities."

It may be here stated that the corporation never in fact did any other business, so far as the record shows, than issuing the membership certificates alluded to.

These certificates of membership were sold to the public. Exactly what relation the holders then bore to the corporation does not seem to have been clearly understood by the incorporators or the dealers. The incorporators insist most earnestly, and back their contention by the opinion of counsel procured before they embarked in the enterprise, that the certificate holders were in no sense members of the corporation, and were not entitled in any event to share in its profits or net accumulations. By a statement contained in the charter limiting the corporation's indebtedness to \$5,000, it is indicated that they were not regarded as creditors either. It may be as well to say now that their relation was that of creditors of the corporation. The contract represented by the "Membership Certificate" was as follows:

"CERTIFICATE OF MEMBERSHIP.

"The Industrial Mutual Deposit Co.

"Lexington, Kentucky.

"These Presents Witnesseth, That _____ of _____, State of _____, has filed an application, which is a part of this contract, and has paid the Industrial Mutual Deposit Co., of Lexington, Ky. (a corpora-

tion), the sum of ——— dollars, it being for one week's installments on ——— coupons, numbered serially from ———, which coupons are a part hereof.

"Now in consideration of said payment, and the further agreement of the holder thereof, on or before each Monday of each week, from the date of the issuance of these coupons, to pay at the office of the company, or to some duly authorized agent thereof, 5 cents upon each redeemed coupon, made a part hereof, as said before, and so on, continuing until all of said coupons shall be redeemed by said company.

"The said Industrial Mutual Deposit Co. promises and agrees to pay to said ———, or to his or her heirs, personal representatives or assigns, upon the redemption of each of said coupons, \$1.60 on every \$1 paid to keep same in force to the date of redemption, less 10 cents on each coupon when redeemed.

"The terms and conditions printed on the back hereof, and in the application for same, are made a part of this certificate as fully as if recited over the signatures hereto affixed.

(Seal.) In testimony whereof, The Industrial Mutual Deposit Co. has caused these presents to be executed by its president and secretary, and its corporate seal to be affixed, in the city of Lexington, Ky., this the 23d day of July, 1900.

"A. P. TAYLOR, President,
"FRANK GILMORE, Secretary."

(Conditions.)

"1st. If any installment of weekly dues be not paid on Monday of any week, then the coupon upon which default is made shall be marked void for that week, and shall not be entitled to participate in the redemption fund for said week; and if such default continues for four consecutive weeks, then this contract shall become void, and of no effect, and the holder thereof shall forfeit all money paid on same to the company.

"2d. The coupons hereto attached shall not be eligible for redemption until eight weekly installments of dues shall have been paid thereon.

"The company reserves the right to redeem said coupons, or any of them, at any time in the manner provided for by the by-laws of said company, and upon the payment of the amount hereinbefore promised, and binds itself to redeem all coupons within one hundred and four weeks, upon which one hundred and four weekly payments have been made.

"3d. The weekly collections on dues are divided into eight funds, namely:

"a. General redemption fund, which consists of 20 per cent. of weekly collections on dues, and is used to redeem coupons that are eight or more weeks old, and are in force by a fixed mathematical rule, numeral apart system, which is determined each week by the number and value of each eligible coupon in force, and by the amount of money in said fund.

"b. Mortuary fund, which consists of 10 per cent. of the weekly collections on dues, and is used to pay off death claims. If there are no death claims any week this fund is added to the general redemption fund and is used for the same purpose.

"c. Special redemption fund, which consists of 10 per cent. of collections

on weekly dues, and is used to redeem every tenth eligible coupon in force each weekly redemption.

"d. Grand special redemption fund, which consists of 15 per cent. of the collections on weekly dues, and shall be used to redeem the oldest coupon in force on the register consecutively.

"e. Cash surrender fund, which consists of 10 per cent. of the weekly collection on dues, and is used the 30th week, and each week thereafter, to pay cash surrender claims. If there are no such claims at the 30th week or thereafter, this fund shall be added to the grand special redemption fund, and shall be used for the same purpose. Up to thirty weeks this fund shall be added to the grand special redemption fund and every other week thereafter unless there be a cash surrender claim, thus increasing the grand special redemption fund to 25 per cent. of weekly collections on dues, said increased fund to be used as above set forth.

"f. Reserve fund, which shall consist of 20 per cent. of the weekly collections on dues, and income derived from the investment of said fund and such other sums as the board of directors may add, and shall be used to guarantee the payment of all matured obligations of the company by reason of the issuance of certificates.

"At no time shall the reserve exceed by 20 per cent. the entire amount paid in on unredeemed coupons.

"When amount at any time shall exceed said sum it shall be passed to the general redemption fund.

"g. Surplus fund, which shall consist of 5 per cent. of the weekly collections on dues, and shall be used or invested as the directors may elect for the best interest of said company.

"h. Expense fund shall consist of 10 per cent. of the weekly collections on dues and of the transfer fees, and shall be used for the current expenses of the company, and for such other purposes as the director may direct.

"4th. All coupons are numbered consecutively.

"5th. Death Options—In the event of the death of the holder of this certificate his or her heirs or personal representatives may accept the following options, to wit: 1st. Accept in cash all money paid in on unredeemed coupons, less 10 per cent. on each coupon. 2d. May continue this contract for the benefit of decedent's estate. The payment of death claims shall be from the mortuary fund and are to be paid in the order of their applications for same.

"6th. Borrowing Option—After twenty-four or more weekly dues have been paid the holder may borrow all the money in the reserve fund that has been placed there from the weekly dues by said holder. Said loan to be applied to the payment of dues on said coupons, and said coupons shall be assigned to the trustees of reserve fund as collateral for said loan. Said loan shall bear 6 per cent. interest per annum, and shall be paid out of the first maturing coupons.

"7th. Surrender Cash Options—After thirty or more weekly dues have been paid the holder may surrender this contract and receive in cash 90 per cent. of all money paid in on unredeemed coupons hereto attached. Cash surrender option to be paid out of cash surrender fund in the order of application for same.

"8th. Application for any option offered in this contract to be effective must be made in writing within two weeks after the last weekly dues were paid, otherwise the company will not be bound by them, nor will it be bound to extend any of these options until after two weeks from the date of application.

"9th. These coupons are only transferable on the books of the company, and for such transfer one-half cent will be charged on each coupon.

"10th. All remittances for credit on coupons are sent at the risk of the sender or holder thereof.

"No receipt for dues is official, nor will any be accepted, unless signed by an authorized agent.

"11th. The company will be bound by only such statements as are contained in this contract.

"No agent, general or special, of this company has any right to vary or change in any way any part of this contract.

"12th. The holder by acceptance hereof admits he has read and understands this contract.

"The above contract, with its conditions as recited above, is hereby made and becomes a part of the by-laws of this corporation.

(Form of Coupon.)

"Coupon No. _____

"The Industrial Mutual Deposit Co. agrees to redeem this coupon according to the conditions named in the contract of which this is a part.

"A. P. TAYLOR,

FRANK GILMORE,

"President.

Secretary."

The "numeral apart" system referred to in the contract was this: A certain per cent., say 1 per cent., of the coupons in force was taken as a basis of distribution. If 1 per cent. of the coupons in force when a distribution occurred was, for example, fifty, then every fiftieth coupon that was eight weeks old or older would be redeemed at the rate of \$1.50 net, without regard to what sum had been paid on it, except that at least eight payments must have been made. This redemption was made from the "reserve fund" provided in the contract so far as the money on hand to the credit of those funds would permit. These redemptions occurred weekly.

It is perfectly patent that the scheme attempted was impossible of execution, honestly, so as to perform all the contracts. The most charitable view to take of it is that it was a species of lottery. It took the money paid in by new "members" in one week to "redeem" the coupons sold to others more than eight weeks before. If the theory of appellant and his associates be adopted, that the 10 per cent. of each certificate sold should go into an "expense fund," and 5 per cent. into a "surplus fund," neither of which could in any event be enjoyed by or divided among the holders of the certificates, then it was mathematically certain that out of the remaining 85 per cent. of all the money paid in the corporation could not in two years pay back to those who paid it in one hundred and fifty per cent., as it had no other resources or income. If the articles of incorporation had contemplated only the character of business above alluded to we would have some doubt whether it would have become a corporation in fact, as we are not

prepared to say that persons may avail themselves of corporate powers to do an illegal business even to the extent of becoming a de facto corporation. So far as the manifest purposes of this corporation are concerned they do not appear to have been illegal; that the directors subsequently adopted a method that made their transactions violative of law can not affect the fact that the corporation's existence was lawful. If their contracts were void, because mutually engaged in by the parties with the understanding on both sides that the corporation was conducting a lottery scheme alone, then it may be doubtful if the policy holders would have any claim upon the courts to enforce their contracts against the corporation as liabilities. Such understanding, however, was not shown, nor attempted to be shown, in this case. So far as this record discloses the purchasers of the coupons were innocent of such knowledge or connivance. Many features of the contract may have been possible of performance, and without legal objection. It was the duty of the corporation to have employed and distributed the funds received by it for the sale of membership certificates so as not to have broken the law, and so as to have complied with the undertakings to holders as nearly as possible by honest and legal methods of dealing. If they could not do that, it was then their duty to refund the money received, with its interest.

As to how the "surplus" and "expense fund" provided for in these contracts were liable to distribution by the corporation becomes a material inquiry in this case.

The provisions of the contract, which are identical with the by-laws of the company on that subject, are repeated here for convenience:

"g. Surplus fund, which shall consist of 5 per cent. of the weekly collections on dues, and shall be used or invested as the directors may elect for the best interest of the company.

"h. Expense fund, shall consist of 10 per cent. of the weekly collections on dues and of the transfer fees, and shall be used for the current expenses of the company and for such other expenses as the directors may direct."

It is the argument on behalf of appellant that these two funds were by the express terms of the contract set apart to the uses of the corporation proper, as distinct from certificate holders, and that it was contemplated by the contracts that the corporation might do with these funds what it pleased; that in no event or contingency were the certificate holders entitled to share in their distribution.

In our opinion nothing in the language employed, when it is fairly interpreted by its commonly understood meaning, exempts this corporation from its statutory and common law liability as such to its creditors. That liability is first to pay to its creditors their demands in full or to provide therefor, before the stockholders are entitled to distribute anything among themselves as dividends, or otherwise, than in legitimate expenses actually incurred in the business. If the corporation is solvent when it pays dividends to stockholders, and their payment does not impair its capital and resources set apart to pay its debts, then the discretion of its directors in declaring and paying the dividends will not be questioned. The corporation in this case had not the right, if it was in fact insolvent, to distribute about 20 per cent. of its assets among its stockholders as dividends, when all of its assets would not pay its liabilities.

The board of directors of the corporation met on May 14, 1901, and declared a dividend of \$2,500 (\$500 to each stockholder), payable to themselves; they did the same on June 27, 1901, and repeated it August 5, 1901. On November 4, 1901, they, by resolution, appropriated to each of themselves \$500 "on account," and on December 30, 1901, appropriated \$500 more to each of themselves "on account." In March, 1902, the affairs of the company were placed in the hands of a receiver as an insolvent. The grand jury of Fayette county indicted appellant, who was president of the board of directors, on the count of fraudulently converting and embezzling \$500 of the funds of the corporation. This \$500 was the part of the dividend declared March 14, 1901, that was paid to appellant as one of the five stockholders.

The descriptive part of the indictment is in these words: "That the said A. P. Taylor, on the 3d day of May, 1902, in the county aforesaid, was the president and a director of a corporation known as the Industrial Mutual Deposit Co., a corporation duly incorporated under the laws of the State of Kentucky, and being such president and director of said corporation, did then and there, by virtue of his said office and employment, and while he was so employed and acting as such president and director aforesaid, receive and take into his possession United States bank notes, currency and silver coin, commonly known as money, of the value of \$500, the property of said company and of divers persons whose names are unknown to the grand jury, who had intrusted such money into the custody and keeping of said company, and to the said Taylor as an officer thereof, did then and there unlawfully and willfully and feloniously, and with intent to willfully injure and defraud the said company and the said persons, embezzle the said money and convert the same to his own use, and that, too, at a time different from that mentioned in indictments Nos. 1 and 2 and 4, against the peace, etc."

The indictment was under section 1202, Kentucky Statutes, as follows: "If any officer, agent, clerk or servant of any bank or corporation shall embezzle, or fraudulently convert to his own use or the use of another, bullion, money, bank notes, or any effects or property, belonging to such bank or corporation, or other corporation or any person, which shall have come to his possession or been placed in his care or under his management as such officer, agent, clerk or servant, he and the person to whose use the same was fraudulently converted, if he assented thereto, shall be confined in the penitentiary not less than one nor more than ten years."

A demurrer to the indictment was interposed because it is claimed it charges two offenses: One, in that appellant embezzled the money of the corporation; and the other, that he embezzled the money of various persons, other than the corporation, and unknown to the grand jury.

We are of opinion that but one offense was charged, that is, the taking of a certain \$500 in one fund and at one time. Its ownership was not material, further than that it must be charged and shown to have belonged either to the corporation of which appellant was an officer or agent, or to some person who had intrusted its possession to that corporation.

Section 128, Criminal Code, appears to us to control this question. It reads: "If an offense involves the commission of, or an attempt to commit an injury to person or property, or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous

allegation as to the person injured, or attempted to be injured, or as to the owner of the property taken or injured, or attempted to be injured, is not material."

This court has uniformly held that where the act within this section is particularly and sufficiently described, so that it may be identified as the one which the accused is called upon to answer, whether the owner of the property taken or injured is correctly named is immaterial. (*McBride v. Commonwealth*, 13 Bush, 337; *Johnson v. Commonwealth*, 87 Ky., 189; *Ollie v. Commonwealth*, 5 Bush, 376; *Hennessey v. Commonwealth*, 88 Ky., 301.)

Under the section of the statute quoted the distinguishing features of the crime of embezzlement are that the official should have come into possession of the property converted by reason of the confidence and trust reposed in him by virtue of his position, and that he should have converted such property fraudulently; in other words, it is to punish fraudulent breaches of trust when committed by such persons.

The indictment contains all necessary averments showing the commission of this offense, and the demurrer was properly overruled. The learned circuit judge, in the exercise of extreme caution, restricted the evidence to rather narrow bounds, as affecting both the prosecution and the defense. Without noticing each feature of it in detail, we will state the principles which, in our opinion, should control the investigation. The argument is presented for appellant that in view of the fact that all the stockholders and directors of the corporation (there being but five of them) concurred in the act of declaring the dividends, and in the wrongful appropriation of the money, if it was wrongfully done, a peremptory instruction in behalf of appellant should have been given to the jury. This argument is predicated upon the theory that the corporation is in fact, and after all, merely the aggregation of its stockholders; that the stockholders are the actual, or at least the beneficial, owners of its assets, and that it is impossible in law for one to steal his own property. The argument denies the existence of the corporation as a separate legal entity. In a somewhat different form, but no less persuasive in its logical application, this argument has been variously made before. For example, it was once held that a corporation, being an intangible, soulless, fictitious creation, a mere legal and commercial convenience, could not be guilty of negligence, or, indeed, of any tort. Especially was it held that it could not commit willful wrongs, involving moral turpitude, such as libel, and the like, because it could not have the malicious intent, the wicked mind, whose presence was an essential ingredient to the offense. (*Thompson Corp.*, sections 6275-6321, 6399, and cases there collated.)

It was once argued, and in conformity held, that neither could a corporation be guilty of infractions of the statutes and criminal laws for the same reasons. In all these cases it was argued that the wrongful act was ultra vires, and that only the agent or servant perpetrating it could be held responsible. (*Commonwealth v. Swift, &c.*, T. P. Co., 2 Va. Cas., 362; *Thompson Corp.*, 6418; *Lord Holt* in 12 Mod., 559; *Anon. Wharton's Crim. Law*, section 91.)

Except as to such crimes as treason, and others involving personal immorality, these theories have long been exploded. In recent times the use of corporate qualities has become so extensive that it would be impossible to

continue business under existing methods on any other basis than to treat the corporation, concerning the title of its property and its liabilities and its rights, as a person. Modern legislation, as well as almost universal usage, so regard it. In legal contemplation the title to the property of a corporation is in fact in it, without regard to who are its members, or how numerous or how few they may be. It can not divest itself of this title, except by its governing body, or authorized agents, acting officially, in some manner permitted by its organic law, or by such acts of theirs on its behalf as would constitute an estoppel as against a natural person.

Nor is it true, either in theory or in fact, that a corporation is composed solely of its stockholders. This creature of the law, endowed with the qualities in law of a natural person to a certain extent, is charged as such with the duty to hold, and ultimately to dispose of, the property which it may take, to certain ends only, viz., first, the payment of the debts and other obligations incurred by it; and, second, to the distribution of the balance among those who hold its stock, as a corporate liability, in the proportion fixed by law. The corporation, so long as it holds property, can not escape doing either of these things, except by the consent of all who are affected thereby. True, a great variety of acts and dealings, within the scope of its lawful powers, it may do which in fact may be inimical to the interests mentioned. These *intra vires* acts, matters of judgment and discretion of the governing body of the corporation, are generally beyond the concern of the courts.

Three persons may form a corporation, and may consequently own all the stock. Beyond a certain limit they are not liable for its debts, which may largely exceed that limit. The corporation alone then is liable. If it be true that the stockholders may, without criminality, convert all its assets to their own use, those dealing with it on the faith of its property might be irretrievably injured.

To prevent just this thing, in part, the legislature has enacted section 1302 of the statutes, against embezzlement by the officers and agents of corporations. It recognizes the title of the property to be in the corporation. It presupposes the power of the corporate officers to manage and control their property in any manner they see fit, except that they may not fraudulently convert it to their own use or the use of another. It was to preserve the property to the ends required by law that was in contemplation. If the corporation owed nothing, then a division of its assets among all its stockholders, by their action, would not, and could not, be fraudulent as to any person, for it would amount simply to a voluntary liquidation and dissolution of the corporation. That is one of the things it has the right to do after payment of its debts. We conclude that the motion for peremptory instruction was properly overruled.

The inquiry in this case, therefore, should have been first to learn whether the corporation had assets on May 14, 1901, which might be lawfully used in paying dividends—that is, a surplus in fact, whether or not in name. If it had, then the motive of the directors in this case in paying the dividend is immaterial. If it had not, the question of motive becomes important and controlling. If the directors believed they had the right to pay the dividend, or if they paid it in utter ignorance of their legal right, but without any

fraudulent motive against others interested in the assets of the corporation, they can not be guilty of the crime charged. On the other hand, if they at the time knew that there were not funds belonging to the corporation which could legally be used in paying the dividend, and passed the resolution declaring it and paid it with the fraudulent purpose of converting to their own use the money of the corporation, using the form of declaring the dividend as a blind to cover their speculations, then they are guilty under the statute. (McKnight v. U. S., 115 Fed., 972.)

We find a case very like the one at bar in principle in *Reeves v. State* (Ala.), 11 Sou., 158. There, as here, the official came into possession and control of the fund converted by virtue of his office, and the trust reposed in him by reason of it. Reeves and the other officers of the corporation, under the guise of a legal act, committed a fraud by which they misappropriated the funds of the corporation. We quote from that opinion: "But we do not question that the statute may be violated by fraudulent transactions under the guise of loans, made with full knowledge of the managing officers or agents of the bank. The distinction is between the making of mere irregular, unsafe, or reckless loans of the bank's money, which would amount to maladministration only, and pretended loans, made in bad faith, for personal advantage, and with fraudulent intent, the pretended borrower being an officer, agent, clerk, or servant, having control and custody of money of the bank by virtue of his office or employment, which control and custody is shared by those making the pretended fraudulent loan, and who participate in the fraudulent purpose of the pretended borrower; and in cases which assume this phase it may become essential that the evidence should be permitted to take such range as to show the relationship existing between such managing officers, their management of the funds of the bank with respect to each other, the transactions they had had or permitted with each other, involving the use of the bank's money outside of and beyond the usual course of dealing of the bank, similar to or connected with the loan which is brought in question by the indictment, and illustrative of the real purpose and interest with which the latter was made. A transaction, such as is herein above referred to, would not be a loan in any sense of the law; it would be a fraud, and such fraud may be accompanied by facts and circumstances which would constitute it embezzlement or a fraudulent conversion to the use of the accused within the meaning of this statute."

To determine whether the company was solvent on May 14, 1901, proof of its resources and assets, their solvency and security, should have been allowed, as well as of the course and nature of its business, and the extent of its liabilities. In this connection proof of the declaration and payment of the other dividends and sums to the directors and stockholders about the same time, including the transfer to the Germania Co., when the Industrial Mutual Deposit Co. sold out to it, and the actual condition of the company at these dates, should have been allowed, as showing, or tending to show, the motive of the directors, including appellant, in declaring the dividend May 14, 1901. All the transactions of the stockholders to which appellant was a party, in the way of buying coupons in the names of various syndicates, and borrowing the money of the corporation for that purpose on the security of the coupons, should have been allowed for the same purpose. The jury

should be charged, though, as to the purpose of the evidence of other dividends declared, and other transactions permitted to be proved which went solely to the question of motive. This is especially necessary in this case, lest the jury should be allowed to believe that they were trying the accused for engaging in a very questionable enterprise, in which he and his associates appear to have been treated with peculiar partiality, and for the result of its being wrecked to the damage of their patrons, a result that in all likelihood would have happened finally anyhow, if they had attempted to carry out the plan adopted, however fairly.

As appellant could not have alone voted and declared the dividends in question, and, therefore, could not by such vote or act have taken or converted the money charged, it is essential to constitute his guilt that all directors, or at least a majority of them voting in the affirmative, including appellant, if he voted or participated in the act, must have acted in declaring and paying the dividend, and appellant also in receiving it, with the knowledge that their act was illegal; that there were no such funds belonging to the corporation subject to that purpose, and that they each acted with the fraudulent purpose of converting to their own use, and to the use of each other respectively, the money of the corporation. For if the directors, other than the appellant, through an honest belief in their right to do so, voted the dividend, although it could not have legally been done, the act was merely maladministration—it was not criminal; and as the act of voting the dividend was the one by which that money was set apart to the stockholders, the knowledge or purpose of appellant in receiving it can not alone make him guilty. (*United States v. Britton*, 108 U. S., 193; *United States v. Britton*, 108 U. S., 109; *U. S. v. Harper*, 33 Fed., 477; *U. S. v. Youtsey*, 91 Fed., 870.) It is equally true that if the directors voting the dividend, other than appellant, did so with the guilty knowledge and purpose of committing a fraud upon the corporation, and of converting to themselves its assets, yet if appellant actually believed he had the right to receive it and appropriate it, and acted without fraud, he would not be guilty.

Appellant offered to prove by officers of other investment companies doing business at Lexington that they had construed similar provisions in their charters as giving the "surplus" and "expense" funds absolutely to the stockholders. This evidence was offered to prove a custom, it is said, as justifying appellant's like belief and construction. The trial judge, we think, properly refused to permit the testimony. As a matter of law we decide that the company had not the right to appropriate these funds to themselves if the company was insolvent, or if such appropriation made it so. The belief or conduct of other people could not affect the matter. Appellant's belief, and that of his co-directors, in acting in this case, were relevant and were properly admitted. It was likewise proper that they should have been permitted to state the foundation of their belief, whether it was based upon advice of counsel, or their experience in other similar concerns, or whatever it may have been.

It is insisted for appellant that the legislature has by statute, by sections 548 and 550, Kentucky Statutes, fixed the whole responsibility of directors for wrongfully declaring dividends, and that they can not be otherwise punished for that act.

Section 548, Kentucky Statutes, makes the directors of a corporation liable for all its debts if they should pay any dividend to stockholders while it is insolvent, or that would make it insolvent. This is a civil liability only, and does not affect their responsibility for criminal acts.

Section 550, Kentucky Statutes, provides a penalty by way of fine against directors who violate any of the provisions of the chapter on corporations. This section deals with those acts which are merely negligent, principally acts of omission, or nonfeasance. The failure to comply with certain features of the law, the observance of which it was believed tended to the surer protection of those interested in or dealing with the corporation whether stockholders or creditors. It was not intended by this section to reduce the felonious act of embezzlement by the officers of a corporation, to a mere misdemeanor. Besides, this prosecution is not for wrongfully declaring dividends when the condition of the company did not justify it; but it is for embezzlement committed under the guise of declaring a dividend.

The instructions to the jury did not submit the question of the fraudulent action of appellant's co-directors in declaring and paying the dividend. That was error, as is pointed out above. The instructions permitted a conviction if appellant appropriated the money of the corporation "without right and fraudulently." The court failed to define to the jury what were the limitations of this "right" and the meaning of "fraudulent," thus making the jury judges of the law as well as of the facts. This was error. The jury should have been instructed that the directors had the right to declare the dividend in the event that the assets of the company remaining were sufficient to pay its liabilities, including those to the holders of outstanding membership certificates; that the directors had the right to reimburse themselves from the "expense fund" any sums actually advanced or paid out of their own money by them on behalf of the company to procure or extend its business. But the declaration and payment of dividends, or the payment of alleged expenses otherwise, were without right in fact and in law.

In defining fraudulent conversion and fraudulent intent, as used in the instructions, the court should have told the jury that "in this case by fraudulent conversion is meant the deceitful, intentional appropriation of the property of the corporation, without right, or without a belief of right, as defined in these instructions; and a fraudulent intent is the intent to effect such appropriation."

The instructions, in all other particulars, in our opinion, fairly present the law of the case.

The judgment is reversed and cause remanded, with directions to set aside the judgment and verdict, and to award appellant a new trial under proceedings not inconsistent herewith.

LOUISVILLE TOBACCO WAREHOUSE CO. v. GIST, &c.

(Filed June 18, 1903—Not to be reported.)

Bills and notes—Damages—Parties to actions—Appellees executed a note to appellant for \$90, which was indorsed by J. W. Shouse & Bro., as guarantors. Suit was brought on this note in the name of appellant as plaintiff, and defendants made their answer a counterclaim. At the next term of

court, without filing a reply, affidavits were filed, stating that appellant was not the owner of the note at the institution of the suit; that N. C. Shouse, who was bound on said note, had paid plaintiff the balance due and he was the owner thereof, and the suit was brought by mistake in the name of appellant. The court, on motion of appellant, dismissed the petition, but made no defense to the counterclaim, and judgment was rendered on same for \$865.25 damages in favor of appellees. On appeal appellant insists that it was not a party to the counterclaim. Held—That on the return of this cause appellant will be a party and before the court on the counterclaim, and will be permitted to plead and litigate this claim with appellees.

Humphrey, Burnett & Humphrey for appellant.

W. B. Moody and W. O. Jackson for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Nunn.

On September 10, 1896, the appellees, G. W. Gist, Luther Corbin, E. C. Ferguson and Shelby Ferguson, executed their joint note to the Louisville Tobacco Warehouse Co. for \$90, due in one day. Said note is as follows:

\$90.00.

New Castle, Ky., September 10, 1896.

"One day after date we promise to pay to the order of the Louisville Tobacco Warehouse Co. \$90, with interest at 8 per cent. per annum from date until paid, negotiable and payable at the Citizens National Bank in Louisville, Ky.

"In consideration of said money, which is advanced to us on our present crop of tobacco, and in consideration of the Louisville Tobacco Warehouse Co. agreeing and undertaking to furnish warehouse facilities for selling said crop of tobacco, when ready for shipping, we agree and bind ourselves to ship to it at the Green River Warehouse, Louisville, Ky., all our crop of tobacco, and in the event we do not ship it said tobacco as herein agreed, we agree to pay it full warehouse fees, both buying and selling, same as it would have received had it sold it, and in order to secure the full payment of said note, with all interest thereon and the fees as herein provided, we have and do hereby convey and mortgage to the Louisville Tobacco Warehouse Co. all our crop of tobacco, about ten hogsheads, raised during the year 1896, which is now in barn on farm of about — acres of land owned by George W. Gist, and in the county of Henry and State of Kentucky.

"G. W. GIST,

"LUTHER CORBIN,

"E. C. FERGUSON,

"SHELBY FERGUSON.

"Witness: N. C. SHOUSE."

This note has endorsed upon it the following guarantee: "I hereby guarantee the payment of this note and waive demand, protest and notice. Signed, J. W. Shouse & Bro." And also endorsed upon it is the following credit: "\$34.72 paid April 7, 1897."

It appears from the affidavits of N. C. Shouse and attorneys John D. Carroll and J. R. Fears that said note was given to Mr. Carroll for collection; that he turned the note over to Mr. Fears, directing him to bring suit thereon; that on August 12, 1901, Fears, as attorney, brought suit thereon in the

name of the Louisville Tobacco Warehouse Co. against the payors of the note. The defendants answered, making their answer a counterclaim against the plaintiff. At the next term of the court, and without filing reply, the plaintiff filed the affidavit of its president and also the affidavit of N. C. Shouse, J. D. Carroll and J. R. Fears, in substance stating that the warehouse company was not the owner of the note sued on at the time of the institution of the action; that prior to that time N. C. Shouse, who was bound for the payment thereof, paid to the plaintiff the amount of the balance thereof, and at the institution of the action he was the sole owner of the note; that by mistake and oversight of counsel the action had been brought in the name of the appellant. The court sustained appellant's motion and dismissed the petition without prejudice. The appellant failing to plead to the counterclaim of appellees, a trial was had thereon before a jury, and it returned a verdict in favor of appellees for the sum of \$365.25.

The issue on this appeal is whether the Tobacco Warehouse Co. was before the court on the counterclaim of the appellees. The appellees contend, under the authority of *Gill v. Johnson*, 1 Met., 649, and *Perry v. Sietz*, 2 Duv., 122, that the payee of a note who has transferred it by parol is a necessary party to an action thereon. This is a correct principle, but this rule does not apply where the transferee is a surety or a guarantor. The proof is very vague upon this question, and it is not stated that N. C. Shouse was a member of the firm of J. W. Shouse & Bro., the guarantors of the note. The affidavits filed on the motion state that N. C. Shouse was the beneficial owner of the note, but do not state under what circumstances he became the owner thereof, nor how much he paid for it. This question being in doubt, and as the action on the note was dismissed by the lower court, it is immaterial now whether N. C. Shouse was a member of the firm of J. W. Shouse & Bro. or not, as on the return of this cause the appellant will be a party and before the court on the counterclaim of appellees, and will be permitted to plead and litigate this claim with appellees. (*Stovall v. Stovall's Adm'r*, 19 Ky. Law Rep., 918; *C. O. & S. W. R. R. Co. v. Heath's Adm'r*, 87 Ky., 680, and the cases therein cited. In 87 Ky., 680, the judgment was reversed and cause remanded, with directions to grant appellant a new trial, and the court said: "As the appellant is in court by the appeal, no other service is required, this court having repeatedly held that an appeal from a void judgment for the want of process placed the appellant in court on the return of the case for all the purposes of a trial.")

For these reasons the case is reversed and the cause remanded for further proceedings consistent with this opinion.

REED v. ILLINOIS CENTRAL R. R. CO.

(Filed June 18, 1903—Not to be reported.)

Contracts—Damages—Instructions—This action was instituted by appellant to recover damages of appellee for breach of contract to furnish piling within a fixed time at an agreed price. Held—That under the contract the appellee was bound to order not less than five hundred pieces of piling in time to have enabled the appellant to have delivered it on or before the 1st day of June, 1901, and the jury should have been instructed on this theory

instead of upon the one that the railroad company had the right to have ordered this piling at any time during the year 1901.

Molloy & Utley for appellant.

Pirtle & Trabue, J. M. Dickinson and Blue & Nunn for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant, J. P. Reed, brought this action against the appellee, the Illinois Central R. R. Co., for damages for an alleged violation of a contract for piling, dated February 26, 1901, the essential parts of which, in the determination of this controversy, read as follows: "You to furnish this company, and we to take from you during the year 1901, square hewed white oak piling according to our specifications. * * * The piling to be furnished and received under this contract is to be of such various lengths and such number of pieces of such respective lengths as we may require, and give you orders for from time to time; such piling to be not less than fifteen feet in length nor over seventy feet in length; the aggregate number of pieces of piling to be furnished and received under this contract to be not less than five hundred pieces nor to exceed one thousand pieces of piling; all of the piling to be subject to an inspection and rejection at the point at which delivery of same is to be made; all piling to be delivered on the right of way of this company between Princeton, Ky., and Henderson, Ky., at such points on said right of way and piled in such manner convenient for loading on cars as our inspector may direct; such delivery to be made from time to time to meet our requirements as will be specified on orders sent to you from time to time during the current year 1901, but it is understood and agreed that at least five hundred pieces of piling shall be ready for delivery to us on or before June 1, 1901, and the balance of the piling called for in this contract shall be ready for delivery to us on or before August 1, 1901."

The issue between the parties is as to the construction of the contract. Appellant claims that the railroad company was bound by the terms of the contract to order not less than five hundred sticks of piling in time for them to fill the order for delivery by the 1st day of June; and that if they elected to order the balance of the piling contracted for, that the contract required that the order should be made therefor by the railway company in time to have permitted the appellant to have gotten it out and ready for delivery before the 1st of August. Appellee, on the other hand, insists that whilst under the terms of the contract they had the right to require appellant to deliver five hundred pieces before the 1st day of June, 1901, and the balance of one thousand pieces on or before the 1st day of August, 1901; that, if they so elected, they could disregard these periods of delivery and order the piling at any time during the year 1901 when they saw fit, provided they did not order more than five hundred pieces before the 1st day of June, nor more than one thousand pieces before the 1st day of August.

It is conceded that appellee ordered and plaintiff delivered two hundred and eleven pieces of piling before the 1st day of June; and that on the 30th day of September, 1901, they made an order on the plaintiff for two hundred and eighty-nine pieces of piling, the balance of the five hundred pieces, and that this order called for piling running from thirty-five to sixty feet

long. The testimony conduces to show that immediately after the execution of the contract that the appellant (Reed) bought trees, collected teams, men and machinery with the view of complying with his contract with appellee; that after the 1st day of August, having despaired of receiving any additional orders, he discharged his men and disposed of the greater part of his teams, and that subsequently thereto, on the 30th day of September, the appellee mailed to him an order, which reached him in the early part of October, for two hundred and eighty-nine pieces of the very longest lengths provided for by the contract; that appellant made a profit of four and one-half cents per lineal foot upon the piling ordered and delivered, and testified that he could realize at least this profit upon the two hundred and eighty sticks which completed the minimum number under the contract, if the railroad company had furnished him the order and specifications at any time prior to the 1st day of June or the 1st day of August, but that it would have been impossible for him to comply with the orders for the remaining two hundred and eighty-nine pieces which reached him in October during the year 1901, even if he had held his men and teams together.

Upon the trial the special judge instructed the jury as follows:

"1st. The court says to the jury that by the terms of the contract filed with the plaintiff's petition it was the duty of the defendant to make requisition for a minimum of five hundred sticks of piling within the dimensions of fifteen to sixty feet in length and within the other dimensions stated in the contract for delivery along the right of way of its line of road from Princeton, Ky., to Henderson, Ky., during the year 1901, at such time as defendant might order same, and the plaintiff was required to make and deliver as many as five hundred pieces of said piling on or before June 1, 1901, if ordered, and not more than one thousand pieces on or before August 1, 1901, if ordered by the defendant; and if the jury believe from the evidence that the defendant did make requisition for the minimum number of five hundred pieces of piling during the current year 1901, then the law is for the defendant, and they will so find unless they further believe from the evidence as stated in instruction No. 2.

"2d. The court says to the jury that although they may find from the evidence that the defendant did make requisition of the plaintiff during the current year 1901 for the minimum number of five hundred sticks of piling of the dimensions named, still if they believe from the evidence that the requisition for any part of said five hundred sticks was made so late in the year as to render it physically impossible for the plaintiff to fulfill said requisition, then the law is for the plaintiff, and they will find for him the damages he may have sustained, fixing same according to instructions Nos. 3 and 4."

By the express terms of the contract the railroad company obligated themselves to order not less than five hundred pieces of piling, which should be ready for delivery to them by the appellant on or before the 1st day of June, 1901. It was impossible for the appellant to comply with this stipulation of the contract without a previous order from the railroad company specifying the length and size of this piling, and by necessary implication the contract imposed upon the railroad company the duty to order these pieces early enough to have enabled appellant to perform his part of the contract. To say that

appellant was bound to have five hundred pieces of piling ready for delivery on or before the 1st day of June, 1901, and at the same time to say that the railroad company was under no obligation to have given an order specifying the length and sizes of the piling as required by the contract, would be to render it impossible of execution by appellant. We think it was the plain purpose of the parties that the railroad company should make their order, specifying the length of at least five hundred pieces of piling, in time to have enabled the appellant to comply with his contract for delivery on or before the 1st day of June, 1901; and that this was the construction placed upon the contract by the parties previous to and at the date of its execution is clearly shown by appellee's letters, which are copied into the bill of evidence. In their first letter to appellant, dated December 19, inviting him to make a proposition for furnishing the piling, they notify him that they would want the greater portion of the piling delivered during the early part of the year, and only requested him to bid upon piling for the first six months of the year 1901. In their second letter, dated February 2, they tell him that he must cut the piling at once, while the sap is down. Of course it would have been impossible for appellant to do this without a previous order, as the length of the piling was to vary from fifteen to seventy feet. In our opinion the railroad company were bound under their contract to order not less than five hundred pieces of piling in time to have enabled the appellant to have delivered it on or before the 1st day of June, and the jury should have been instructed on this theory, instead of upon that that the railroad company had the right to have ordered this piling at any time during the year 1901.

The trial court properly defined the measure of appellant's damage as the difference between actual cost to him of delivering the piling contracted for on the right of way of the company and the contract price he was to receive therefor; but for the errors pointed out in instructions 1 and 2 the judgment is reversed and the cause remanded for proceedings consistent herewith.

LOWERY v. CITY OF LEXINGTON.

(Filed June 18, 1903.)

Municipal government—Ordinances—This appeal involves the validity of an ordinance to authorize and provide for the construction of a system of sewers in the city of Lexington, and to order an election to determine the question of issuing \$150,000 of bonds of the city for that purpose. Held—That said ordinance was void for two reasons: First, because it employed certain persons named therein to superintend said work and provided for their compensation, when the city had no power under the Constitution and charter to create any office or officers other than those provided for therein. If they are to be regarded as simply agents and not officers, then it is void because they supplant the city council in the matters provided for in the ordinance. The general assembly, by section 3058, Kentucky Statutes, delegated to the city council of the city of Lexington the power and authority by ordinance to establish, erect and maintain sewers, and it had no power by ordinance to delegate this power to others and relieve itself of responsibility.

Breckinridge & Shelby for appellant.

W. S. Bronston for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Nunn.

This action was instituted by C. B. Lowery (appellant) to test the validity of an ordinance, No. 1872, passed by the city council of Lexington, Ky. The ordinance was to authorize and provide for the construction of a system of sewers in the city of Lexington, and to order an election to determine the question of issuing \$150,000 of bonds of the city for that purpose. The city demurred to the petition of appellant, the court sustained the demurrer, and adjudged that the ordinance was invalid and void. To test that question is the object of this appeal.

The first section of the ordinance authorizes sewers to be constructed in accordance with plans drawn by Col. George E. Waring, with such changes, alterations, extensions and additions as might be determined upon in the mode and manner thereafter set out and provided. The second section provided the manner of issuing the bonds and the terms thereof. The other sections, down to the seventh, provided the manner of holding the election and determining the result thereof. The seventh section is as follows: "George S. Shanklin, L. G. Cox, R. P. Stoll, J. R. Barr, Judge Matt Walton and Gus Straus are hereby employed by the city of Lexington to superintend and supervise the construction of the sanitary sewer system of said city, as provided for in this ordinance. And the general council is hereby authorized to pay to said named persons as wages a sum not to exceed \$300 each."

Section 8 authorized the employment of a capable, competent sanitary engineer, who was authorized, under the superintendence of the persons named in section 7, to superintend all work, examine all materials, contracts and purchases made under this ordinance, and under the direction of the persons named should superintend the construction of the sewer, disposal field, tanks, buildings, machinery or appliances to be constructed under the ordinance.

Section nine authorized the persons named in section 7 to advertise for bids for the construction of the system, and to fix such restrictions and limitations therein as they might determine, and receive the bids, and to open and compare same, and to report to the general council the names of the lowest and best bidders, and to prepare all necessary contracts, specifications and plans. If in the judgment of the persons named in section 7 the bids received by them were too high, or for any reason were not such bids as the city should accept, they were authorized to reject all bids, and advertise for new bids without reporting to the general council their action. Section 9 closes as follows: "It being distinctly understood and provided in this ordinance that said persons are not required to report to the general council any bids which, in the judgment of said persons, the general council ought not to accept, or any contracts which the said persons do not believe the city ought to enter into."

Section 10 provided that no money should be paid to any contractor under any contract entered into by virtue of this ordinance until the work had been examined and approved by the engineer employed under this ordinance, and a certificate issued to such contractor by the engineer, and the same was approved by the persons named in section 7, and when the certificate was thus

issued and approved the same should become binding upon the city and should be paid out of the proceeds of the sale of the bonds.

Section 11 of the ordinance closes as follows: "If any part of this ordinance is declared illegal by any court of competent jurisdiction, then no bonds are to be issued under this ordinance, and this ordinance is to be considered as invalid and void."

Appellant's counsel contends that the ordinance is void because it creates new offices and officers, and names the persons to fill them, which he claims is in violation of the Constitution and the city charter. Appellee's counsel, on the other hand, contend that the ordinance does not create any office or officer, and that the persons named in the ordinance were not appointed as officers, but only as agents of the city to superintend the construction of the sewerage system provided for therein. We are of the opinion that the ordinance is void in either event. If they are to be regarded as officers, then it is void because the city had no power under the Constitution and charter to create any office or officers other than those provided for therein. (*Lowery v. The City of Lexington*, 24 Ky. Law Rep., part I, 517.)

If it was intended by the ordinance to make them simply agents, then it is void because they supplant the city council in the matters provided for in the ordinance. The general assembly, by section 3068 of the Kentucky Statutes, delegated to the city council of the city of Lexington the power and authority by ordinance to establish, erect and maintain sewers, and it had no power by ordinance to delegate this power to others and relieve itself of responsibility. We do not mean to be understood to say that the city council should perform the manual labor, or be present in a body, or individually, to superintend the construction of the sewer, but it should retain the power and control and remain supreme in the matter of the approval of the plans and specifications, material to be used, prices to be paid for same, the acceptance or rejection of bids for the work, and the approval or rejection of the work when completed, the issuance of the bonds, the payment of the money on contracts and other like duties and powers. The council had no right or power to delegate such duties and powers to others and relieve itself from the labor and responsibility thereof.

Dillon in his work on Municipal Corporations, volume 1, 3d edition, section 96, uses this language: "The principle is a plain one that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, can not be delegated to others."

In same work, volume 2, section 779, this language is found: "We have already had occasion to refer to the principle that public powers conferred upon a municipality, to be exercised by its council when and in such manner as it shall judge best, are incapable of delegation. The principle extends to the authority conferred upon a municipal corporation to levy and collect taxes, or to determine upon the necessity and character of local improvements." (*Hydes v. Joyes*, 4 Bush, 464.)

We are clearly of the opinion that the ordinance is void.

Wherefore, the judgment of the lower court is affirmed.

HART COUNTY, &c. v. LOUISVILLE & NASHVILLE R. R. CO.

LOUISVILLE & NASHVILLE R. R. CO. v. HART COUNTY.

(Filed June 19, 1903.)

1. Railroads—Subscription by counties—Interest—Evidence—Hart county subscribed for \$100,000 of stock in appellant company, but did not pay for same when subscribed. Bonds in payment for same were delivered to said company at different times. This action was brought in equity by the county for the purpose of compelling the railroad company to issue to her certificates of stock for interest which matured on her subscription to the capital stock during certain periods; for certificates of stock for taxes paid by the taxpayers of the county to meet the interest which matured on the bonds which had been issued to pay for her subscription, and also to recover certain alleged cash dividends which she claimed she was entitled to receive. One of the questions involved on this appeal is when interest accrued on the subscription. Held—That interest accrued thereon from the dates of delivery of the bonds in payment of same; and the books of said company furnish better evidence of the dates of their delivery than the evidence produced by the county. The county was not entitled to have issued to it stock for taxes paid by taxpayers as this stock had already been issued to the taxpayers.

2. Estoppel—Hart county is estopped from claiming the right to have issued stock for interest which accrued on her subscription between April 1, 1862, and June 30, 1864, as the first date when a dividend was declared on said stock, as Hart county was represented at said meeting by two of its three commissioners, and this action was acquiesced in until this suit was brought. As the county was not entitled to the bonds she is not entitled to dividends thereon. Another reason why the county is not entitled to recover interest stock is because she had transferred her principal stock, and the interest stock passed as an incident to it.

McCandless & James for appellant county.

Helm, Bruce & Helm and H. W. Bruce for appellee, Louisville & Nashville R. R. Co.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

The charter of the Louisville & Nashville R. R. Co. was granted on March 5, 1850. Several amendments to it were passed by subsequent legislatures. The company was organized by the election of directors in September, 1851. Under the charter the counties through which the proposed line of railroad was to be constructed were authorized to subscribe to the capital stock of the company. The city of Louisville was also authorized to subscribe therefor. The counties and municipalities seem to have subscribed for \$3,200,000, of it. In January, 1853, Hart county subscribed for \$100,000 of the stock, but did not pay for same when subscribed. To pay the subscription the county issued bonds aggregating \$100,000. The appellee claims that the bonds were delivered to it as follows: August 14, 1853, \$33,000; August 6, 1856, \$33,000; and September 30, 1857, \$34,000. The bonds bore dates as follows: April 1, 1853, \$33,000; April 1, 1854, \$33,000; and April 1, 1855, \$34,000. To obviate the necessity of an elaborate statement of the facts as to the differences out of which this suit grew they will be made to appear as far as necessary in our discussion of the questions involved. This action was filed on March 23, 1870, and

the answer was not filed for many years thereafter. The action was brought in equity and for the purpose of compelling the appellee to issue to her certificates of stock for interest which matured on her subscription to the capital stock during certain periods; for certificates of stock for taxes paid by the taxpayers of the county to meet the interest which matured on the bonds which had been issued to pay for her subscription; and also to recover certain alleged cash dividends which she claimed she was entitled to receive. For convenience we will designate Hart county appellant and Louisville & Nashville R. R. Co. as appellee.

The first question that will be considered is, did interest accrue on the subscription from dates on which the appellee claims the bonds were actually delivered to it in payment of the subscription?

Section 5 of the act of March 20, 1851, reads as follows: "Said company shall allow to all subscribers and holders of stock under the company interest on the same from the time of paying for said stock up to the time of making the first dividend, and issue to the holder stock therefor; and when stock shall be subscribed for a branch they may provide that said stock shall not be entitled to draw dividends until said branch is completed, but may allow interest on the payments up to the completion thereof, and pay it in stock."

It will be observed that it is made the duty of the company to allow interest on the stock issued by it from the time of paying for the stock up to the time of making the first dividend, and issue to the holders of stock certificates therefor. The counties were authorized to issue bonds to pay their stock subscriptions. Although the bonds delivered to the appellee in payment of the stock subscription bore date anterior to the delivery of the same, and although the party who purchased them would be entitled to the interest thereon from their date, still the interest on the subscription for which stock was to be issued did not begin to run until the subscription was actually paid; in this case until the stock was actually delivered in payment of the subscription. The interest on the bonds and interest on the stock subscriptions are separate and distinct things provided for in the charter and amendments. As an inducement to the counties to subscribe for the capital stock of the appellee interest was to be paid on the subscription from the date of its payment. Besides, the charter provisions indicated a hope of the promoters that the dividends declared on the stock would pay the interest on the bonds. And it was, therefore, provided that if they did not do so that the taxpayers who were required to pay taxes for that purpose were entitled to certificates of stock in the company for the amount of taxes paid by each. The bonds having been delivered almost a half century ago, no one could possibly have any recollection as to the dates they were delivered in payment of the stock. It was the business of the company to keep a record of the transactions between the company and subscribers to the capital stock of the company. Their books should have shown who were subscribers, the amount of each subscription and the date the bonds were delivered in payment of the subscription. This is an action by one who at that time, and for many years thereafter, in part constituted the corporation. The county had the right at any time to examine the books of the company.

In *Turnbull v. Payson*, 95 U. S., 421, the court said: "Where the name of an individual appears on the stock book of a corporation as a stockholder,

the prima facie presumption is that he is the owner of the stock, in case where there is nothing to rebut that presumption; and in an action against him as a stockholder the burden of proving that he is not a stockholder, or of rebutting that presumption, is cast upon the defendant."

If the books of the appellee are prima facie evidence that one is a stockholder, they would be still stronger evidence when it is admitted a party is a stockholder, to show when he paid his subscription. There was no evidence offered to impeach the correctness of the record kept by the appellee as to the time the bonds were delivered, nor to overcome the presumption that the record was correctly kept. Counsel for the appellant contend that the presumption should be indulged that the bonds were delivered on day they bear date, but there is evidence in the record which shows that counties frequently delivered their bonds in payment of stock subscriptions after the time they bore date; and this fact tends to overcome the presumption claimed by counsel for the appellant to exist. Our opinion is, however, that the record kept by the company, showing date of delivery in this case, is the best evidence as to the date when the stock subscription was paid.

The county contends that the holders of tax receipts were only entitled to the dividends that were declared after the stock was delivered to them for same. The appellee claims that it issued to the holders of tax receipts when presented an amount of stock equal to the tax receipt, and also all cash and stock dividends which had been declared on the stock issued for the tax receipts. The claim is made that the county is entitled to the dividends as in the case where stock is sold after a dividend has been declared. There was no sale by the county of her stock to a taxpayer. The stock went to the taxpayer by virtue of the statute. At the time these taxes were paid, or at least part of them, the county did not hold certificates for her stock. Until the certificates for the stock were issued, the county's claim for stock was of the same equitable character as was that of the taxpayers to the stock which the law declared he was entitled to upon the payment of taxes. The law compelled the tax paying citizens of Hart county to pay for the stock for which she subscribed by paying taxes, to be used in the payment of interest and principal of her bonds.

Section 15 of the act of January 9, 1852, reads as follows: "That the said Louisville & Nashville R. R. shall, upon the date of the first dividend, and thereafter upon presentation and surrender at the office of the company of tax receipts for taxes paid to defray interest upon bonds given by any county under this act, issue to the holders thereof stock for the same; said tax receipt shall be negotiable by endorsement, and no stock shall be issued for a less amount than one share."

By section 4 of the act of January 17, 1856, it was provided that the county court shall appoint the clerk of the county or circuit court, or one of the commissioners of the sinking fund, to issue certificates to the taxpayers, etc., of taxes paid when the amount due the holder is \$100. This is to be done at the end of each month.

The concluding clause of section 4 is as follows: "The holders of such stock shall, to all intents and purposes, be entitled to all the rights and privileges of stockholders, but such stock shall not bear interest." The stock thus held by a taxpayer, or his assignee, was entitled to all rights and priv-

illeges of other stockholders, except such stock "shall not bear interest." The ownership of the stock by a taxpayer did not depend upon the fact that he held a certificate from the clerk or commissioner, but upon the fact that he had paid taxes. It is shown that the appellee delivered the stock to the taxpayers, or their assignees, as required by the act. After having fully and satisfactorily met the demands of the taxpayers, or their assignees, the county is here asking that she be adjudged certificates for part of the amounts for which the appellee has issued stock to the taxpayers, or their assignees. In other words, the county demands certificates of stock and dividends thereon, which by the express terms of the statute is declared to belong to others. There is absolutely no merit or justice in the claim, and would certainly be very inequitable to allow it.

There is another question in the case involving the right of the company to have issued to her stock for interest which accrued on her subscription between April 1, 1862, and June 30, 1864, the latter being the date on which the first cash dividend was made. In October, 1861, at a stockholders' meeting, a one-fourth of 1 per cent. stock dividend was declared, of date of April 1, 1862. Hardin county being one of the counties which had subscribed for stock, denied the right of appellee to stop the running of interest on stock subscriptions by declaring the stock dividend mentioned, her contention being that nothing but the declaring of a cash dividend would stop interest on the stock subscriptions. Although her representative was present at the meeting and made no objection to the proceedings declaring the dividend, yet the county repudiated it and continued to do so, and at subsequent meeting of stockholders protested against it, which culminated in a suit which finally reached this court, which held that the interest did not cease to run on the subscription until the cash dividend was declared in June, 1864. (*Hardin County v. Louisville & Nashville R. R. Co.*, 93 Ky., 412.) The conclusion of the court is now adhered to, therefore, the necessity is obviated to again discuss the question. The course Hart county pursued is entirely different from that of Hardin county. At the meeting declaring the one-fourth of 1 per cent. dividend Hart county was represented by one of her sinking fund commissioners. At the meeting of the stockholders in 1865 the question arose as to the claim and position of Hardin county, she claiming that she was entitled to stock for interest which accumulated between April 1, 1861, and June 30, 1864, and the dividends on that stock as well as other stock held by her. At this meeting Hart county was represented by two of her three commissioners, and Hardin county's claim was unanimously denied and proper record was made thereof. This action was acquiesced in until this suit was filed. In the meantime several cash dividends were declared upon the basis that none of the counties (and there were many of them) were entitled to stock for interest during the time mentioned, or dividends thereon. Hart county joined with all the other counties in thus construing their rights under the charter. All other counties, except Hardin, acquiesced in this interpretation of their rights under the charter as amended, and never did assert any claim against the company for interest stock covering the period in question. Thus Hart county voted that she and the other counties were not entitled to this stock and the other counties adhered to that conclusion, and never claimed or received such stock; Hart county now

attempts to repudiate the action taken with the approval of her representatives at the stockholders' meetings, and claiming that which she formerly said she did not own. After the proceedings at the stockholders' meetings she stood by and saw other counties who had subscribed for stock acquiesce in the action of the stockholders; saw the appellee declare and pay dividends upon the basis that the right to such stock did not exist in stock subscribing counties and municipalities. It is suggested that there is nothing to show that these commissioners were present at the meeting of the stockholders by authority of Hart county. The law authorized them to be present at such meetings to represent the county, and we must presume, after the lapse of so many years, that they were there acting with the consent and approval of the county, and we, therefore, say that Hart county acquiesced. The reason for refusing to grant relief on this claim of Hart county is as good as it was in the case of Simpson County v. Louisville & Nashville R. R. Co., 14 Ky. Law Rep., 674, wherein Judge Lewis, delivering the opinion of the court, said: "If the county court had authority to so order application of the stock dividends, the county and sinking fund commissioners as well are estopped to claim the stock from the company, for it was disposed of and applied precisely in accordance with the order and direction of that court. And if it be conceded, as is argued, that the sinking fund commissioners, and not the county court, had the right to control and dispose of the dividend stock, their conduct was not such as to entitle them to relief that involved injustice to the company, that is not shown to have acted in bad faith. For the evidence is entirely satisfactory that they knew of and consented to, if they did not directly advise, the action of the county court, and also were aware of the fact that the company was applying the stock as directed and authorized by the county court. Yet they made no objection then, nor thereafter, for more than five years. To suppose the commissioners were not aware of the disposition that was being made of the stock in question, that they now claim to have had the exclusive right to hold and control, is to assume they were utterly unmindful of their duties; and if they did know, it was their duty to then speak, and having acquiesced so long they can not now equitably ask the relief sought."

We are of the opinion that it would be inequitable to the other stockholders and to the appellee to grant this relief, and we, therefore, conclude that Hart county has been estopped by her action to demand it. From the conclusion we have reached, that Hart county was not entitled to the stock claimed, it necessarily follows that she is not entitled to any dividends thereon. In addition to the other reasons given for denying the county's right to recover interest stock, there is another which we deem conclusive. Hart county in 1879 sold her principal stock. By section 5 supra she was entitled to interest on her principal stock from the time she paid for it to the date of the first cash dividend, and for which she was entitled to have stock issued to her. This interest was like any other interest that might accumulate upon a debt, but instead of it being paid in cash, it was to be paid in stock. It was an incident to the principal stock, exactly the same as interest is an incident to a debt. If the debt is assigned and interest has matured thereon, the interest passes to the assignee as effectually as the debt. If the interest had been payable in cash instead of stock, the party to whom the county

transferred the principal stock would certainly at the same time have acquired the interest due thereon. This is because it would have been an incident to the stock. The mere fact that the appellee could pay it in stock did not make it different from what it would have been had it been payable in cash. We are of the opinion that when she sold and transferred her principal stock, if any interest had been due thereon (we have said none was) it would have passed to the purchaser. This view is supported by *Boardman v. Lake Shore R. R. Co.*, 84 N. Y., 167; *Jermain v. Lake Shore R. R. Co.*, 91 N. Y., 473, and *Manning v. Quicksilver Mining Co.*, 24 Hun., 361.

In view of the conclusions reached we have not thought it necessary to discuss the effect of the ten and one-half per cent. stock dividends declared, nor the question of limitation.

The judgment is affirmed on the appeal of Hart county and reversed on the appeal and cross appeal of the Louisville & Nashville R. R. Co. for proceedings consistent with this opinion.

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[Reported by Wm. Cromwell, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

WALKER v. COMMONWEALTH.

(Filed June 18, 1903—Not to be reported.)

Local option law—Evidence—Instructions—Appellant was an agent of a brewing company having license to sell beer by wholesale in Mayfield; made a sale of not less than five gallons of beer to S., the prosecuting witness, not to be drunk on the premises, and was indicted for a violation of the local option law. On the trial the court improperly admitted evidence showing that the witness was an inebriate and appellant knew this fact, and his intention to drink the beer, as it was not competent under this indictment to give evidence of the inebriety of the witness and the knowledge of appellant of that fact. The section of the statute regulating wholesale dealers does not limit the right to sell only to those who are licensed to engage in the retail trade. He might have been indicted and tried under another statute for making a sale to a known inebriate. A peremptory instruction should have been given to find for the defendant.

J. D. Atchison, B. C. Seay and Sam'l Crossland for appellant.

H. J. Moorman, C. J. Pratt and M. R. Todd for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Settle.

The appellant, West Walker, was indicted and tried in the Graves Circuit Court for the offense of selling, loaning and bartering spirituous, vinous and malt liquors, to wit, whisky, brandy, wine, gin, ale and beer, by retail without a license so to do, to J. F. Sanderson, within the corporate limits of the city of Mayfield, in which city local option was then in force. The trial resulted in his conviction, the jury finding him guilty of the charge, fixed his punishment at a fine of \$75, and a new trial having been refused him by the lower court he prosecutes this appeal.

But one witness was introduced by the Commonwealth, J. F. Sanderson, to whom the alleged sale was made, and the appellant testified in his own behalf. It was proved upon the trial that the F. W. Cook Brewing Co., a

corporation of Evansville, Ind., was engaged in wholesaling beer by the keg and case in the city of Mayfield, Ky., and that it had a license to so sell both from the city of Mayfield and the county court of Graves county. It was also in proof that the appellant, West Walker, was the duly appointed and acting agent of the F. W. Cook Brewing Co., in the city of Mayfield, at the time he made the sale for which he was indicted. It was conceded upon the trial that the local option law was in force in the city of Mayfield at the time of the sale, and the proof indisputably showed that the quantity sold to Sanderson by appellant was as much or more than five gallons; that it was delivered at one time, and that it was not sold to be drunk, nor was it drunk, upon the premises where sold, but was immediately sent to the residence of the purchaser.

The indictment against appellant was found under section 2557 of the Kentucky Statutes, as amended by act of March 11, 1902. (Acts 1902, page 41.) Section 2558, in so far as applicable to this case, is as follows: "The provisions of this act shall not apply to any manufacturer or wholesale dealer who in good faith and in the usual course of trade sells by the wholesale in quantities of not less than five gallons, delivered at one time, and not to be drunk on the premises."

The appellant concedes that the sale of the beer was made to Sanderson, but contends that it was a sale by wholesale, made in good faith and in the usual course of trade, and that it was not drunk upon the premises. Upon the other hand, it is contended for appellee that the sale was not made in good faith because the purchaser was a known inebriate, and that at the time of the purchase he communicated to the appellant his intention of drinking the beer at his residence, it being in proof that the purchaser so informed appellant at the time of his purchase of the beer.

We think it was improper for the court to have admitted the evidence of the inebriety of the witness and the knowledge of appellant of that fact. We infer that in permitting proof of this fact the court proceeded upon the idea that if the purchaser of the beer bought it for his own use, and he was an inebriate, that a sale under these circumstances amounted to an invasion of the law. If this view of the law were to obtain then a wholesale dealer of beer could only lawfully sell to one licensed to sell the same by retail. The section of the statute *supra* does not limit the right of the wholesale dealer to sell only to those who are licensed to engage in the retail trade. For selling to an inebriate spirituous, vinous or malt liquors whether by wholesale or retail, the appellant might have been indicted and punished under another statute, which declared such a sale to be an offense, and provides an adequate punishment therefor, but we do not think that because he might have been punished under the last statute for the sale made in this instance to Sanderson, that that fact made him guilty under the indictment in this case; and if not, it necessarily follows that the evidence admitted by the court as to the inebriety of Sanderson was incompetent. Under the evidence in this case it appeared that all the conditions required by section 2558 of a wholesale dealer existed: First, that the beer was sold by a wholesale dealer; second, that it was sold in good faith and in the usual course of trade; third, that the quantity was not less than five gallons; fourth, that it was delivered at one time; fifth, that it was not drunk, nor was it to be drunk, on the premises.

Upon the state of facts here presented we are of opinion that but one instruction was proper, namely, a peremptory instruction to the jury to find for the defendant, wherefore, the judgment is reversed and the cause remanded, with directions to the lower court to grant appellant a new trial and for further proceedings not inconsistent with this opinion.

Whole court sitting.

MAYSVILLE GAS CO. v. THOMAS' ADM'R.

(Filed June 19, 1903—Not to be reported.)

1. Negligence—Res judicata—Appellee's intestate, a boy about fifteen years of age, was killed by coming in contact with a live wire which had broken and fallen down over the sidewalk. An action to recover damages was instituted against the street car company and the gas company, who were charged with operating the street cars jointly, it being alleged that appellant furnished the current of electricity which constituted the motive power. On the trial a verdict was rendered in favor of appellant under a peremptory instruction. A judgment for damages was rendered against the street car company, and on appeal same was reversed and it was adjudged that said peremptory instruction for appellant was improperly given. On return of the case appellant amended its answer and denied that it furnished the electricity, but stated that it furnished the steam power which generated the electricity. Held—That the real issue was not changed, the allegations of the amended answer being substantially the same as the answer, and the reasons laid down on the first appeal as error in giving a peremptory instruction apply alike to the ruling of the court in refusing the peremptory instruction on the second trial.

2. Instructions—Gross negligence—The court did not err in giving an instruction based on gross negligence of appellant. It owed a duty to the public of seeing that the wires of the street car line were properly insulated before charging them with electricity, and having this duty they could as well be guilty of gross negligence with reference to it as of ordinary negligence.

W. H. Wadsworth, E. L. Worthington, Edward W. Hines, W. D. Cochran and L. W. Robertson for appellant.

A. E. Cole & Son and Thos. R. Phister for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Barker.

Isaac Thomas, about fifteen years of age, was killed on one of the streets of Maysville, Ky., by coming in contact with a wire charged with electricity, which had broken from its fastening and hung down over the sidewalk. This was a guy wire which connected with a trolley owned and used by the Maysville Street Railroad and Transfer Co., in carrying the current of electricity which propelled its cars. After the accident this action was instituted against the Maysville Street Railroad and Transfer Co. and the Maysville Gas Co. to recover damages for the death of appellee's decedent. The petition alleges, substantially, that appellant and the Maysville Street Railroad and Transfer Co. jointly operated the street car line, and that ap-

pellant furnished the current of electricity which constituted the motive power by which this was done; that the death of Isaac Thomas was caused by the negligence of the two corporations.

The answer of the defendant corporations controverted the material allegations of the petition, and pleaded, affirmatively, the contributory negligence of the decedent. Upon the trial of the case the court sustained a motion of the appellant for a peremptory instruction to the jury to find for it, which was done. The jury then returned a verdict against the Maysville Street Railroad and Transfer Co. for the sum of \$5,500. From the judgment awarding the peremptory instruction an appeal was prosecuted, and the case reversed, the opinion of the court being in 21 Ky. Law Rep., 1890.

Upon the return of the case the Maysville Gas Co. amended its answer, and pleaded affirmatively that it neither had the power, under its charter, nor did it, in fact, furnish the electric current to the Maysville Street Railroad and Transfer Co., by which its cars were operated; but that it, under contract, furnished the steam power by which the street railroad company generated its own electricity. The material allegations of this amended answer were controverted by reply. A second trial of the case resulted in a verdict against appellant, awarding damages in the sum of \$5,000. Appellant's motion for a new trial having been overruled, it has brought the case here for review. The main ground for a reversal of the case, insisted on by appellant, is the refusal of the court to sustain its motion for a peremptory instruction.

We do not think that appellant substantially changed the issue between it and appellee by filing the amended answer after the return of the case to the court below. This amended answer, after all, amounts to no more than placing in affirmative form the issue raised by its denial in the original answer to the allegation of the petition, that it furnished the electricity by which its co-defendant operated its street car line; and a careful comparison of the evidence on this issue adduced on the first trial with that on the same issue in the second trial shows it to be substantially the same. This court held that "the street railroad company owned and had charge of the wire, and the gas company generated and sent into the wire the electricity; the gas company received so much per month for supplying the wire of the street railroad company with electricity to operate its line of street cars, and had no interest in the car line, except that its income might enable it to pay the bill for the electricity. * * * Considering the dangerous character of the force produced by the gas company, there was a duty imposed on each to see that the wires into which it was sent were properly insulated. The danger was exactly the same, whether the wires were owned by one or both of the corporations. When one, through the instrumentality of machinery, can accumulate or produce such deadly force as electricity, he should be compelled to know that the means of its distribution are in such condition that those whose business or pleasure may bring them in contact with it may do so with safety. * * * If the wires were not properly insulated and the death resulted therefrom, then both companies are liable, as it was the duty of the street railway company to have its wires properly insulated, and there was a duty resting on the gas company to see it was done before charging them with electricity."

The evidence contained in the bill of exceptions, on this appeal on the question of appellant's position with reference to the furnishing of the electric current, is substantially the same as that adduced upon the same question in the first trial. All of the evidence upon this issue was obtained from the officers of appellant; it was shown on both trials that the street car company owned the dynamos and generators wherein the electric current was produced; that appellant only furnished the steam power by which the generator was operated; that this was done under a contract between the two corporations; that the engineers who operated the machinery were employees of the gas company, but that, in the matter of turning on or off the electric current by which the street car line was operated, they took their orders alone from the street car company; that the two corporations were distinct corporate entities, whose stockholders were not the same; that the gas company, as a corporation, had no interest in the street car company except to the extent of the contract for furnishing the power by which the electricity was generated. Appellant's motion for a peremptory instruction was properly overruled.

It is also urged that the trial court erred in giving an instruction on the subject of gross negligence, it being contended that appellant had a right to rely upon the diligence and care of those having control of the operation of the street car line, and as these were reliable and competent men, appellant can not be charged with gross negligence in depending upon their skillful management of the trust in their charge. The opinion on the former appeal permits of no such distinction; it holds that appellant owed a duty to the public, of seeing that the wires of the street car line were properly insulated before charging them with electricity, and having this duty, they could as well be guilty of gross negligence with reference to it as of ordinary negligence.

The opinion delivered on the former appeal contains the law of this case and as the trial court and the jury have carried into effect the principles therein announced the judgment is affirmed.

Whole court sitting.

Chief Justice Burnam dissenting.

LOUISVILLE BRIDGE CO. v. LOUISVILLE & NASHVILLE R. R. CO.
PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v.
SAME.

(Filed June 20, 1903.)

1. Railroads—Contracts—Res judicata—Appellant bridge company made a contact with appellee, L. & N. R. R. Co., and other companies, by which it permitted said company to transport freight over its bridge at certain tolls, which were equal to all the railroad companies. Appellee L. & N. R. R. Co. did not pay its tolls directly to the bridge company, but paid it to connecting lines north of the bridge, which lines settled with the bridge company. Appellee L. & N. R. R. Co. continued to pay full tolls for many years, but the bridge company rebated to the other railroad companies. In

1892 appellee L. & N. R. R. Co. filed a suit to recover excessive tolls charged for the years 1881 to 1891. At the same time it filed another suit to recover tolls for 1892, which was amended so as to embrace tolls for 1893, 1894 and 1895. Finally this case was tried, and resulted in a judgment for appellee. After this judgment had been rendered the defendants filed an amended answer in the other suit, involving the years 1881 to 1891, pleading that judgment in bar of the action. The court sustained a demurrer to the pleading; evidence was heard and the case submitted; the court gave judgment for plaintiff for the years 1888, 1889, 1890 and 1891, but dismissed its claim as to the years prior to 1888. From this judgment the defendants have appealed, and the plaintiff prosecutes a cross appeal. One of the matters relied on for reversal on the original appeal is the ruling of the court on the plea in bar. Appellant insists that plaintiff could not split its causes of action and prosecute each separately. Held—That appellant by demurring to the petitions waived the objection as to splitting actions. It was incumbent on defendants to make objection to the form of proceeding then or not at all. Their silence then was an acquiescence in the prosecution of the two actions.

2. Evidence—Prior to 1888 the L. & N. R. R. Co. kept no record as to the amount of tolls paid, but since that date it kept duplicate way bills which were admitted in evidence to sustain plaintiffs claim. The competency of this evidence is involved on this appeal. Held—That said evidence was competent as it was the best the case afforded, and the court properly found for appellee, based on said evidence, and refused to allow a recovery for the years for which no record was kept.

Dodd & Dodd, Gibson, Marshall & Gibson and Humphrey, Burnett & Humphrey for appellants.

Helm, Bruce & Helm for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hobson.

On June 5, 1872, a contract was made between the Louisville Bridge Co., the Louisville & Nashville R. R. Co., the Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. and certain other railroad companies, by which the railroad companies agreed to send their traffic over the bridge, and bound themselves to pay the bridge company such rates therefor as would pay certain fixed charges, create a sinking fund to meet an outstanding debt and pay the stockholders a given annual dividend. This contract is set out in the opinion of this court in the case of Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Dodd, 24 Ky. Law Rep., 2058. By the terms of the contract the railroad companies using the bridge were placed on terms of absolute equality, that is, each was to pay at the same rate for traffic it did over the bridge. For convenience the Louisville & Nashville R. R. Co. did not pay its tolls directly to the bridge company, but paid them to the connecting lines north of the river and they settled with the bridge company. After the rates had been fixed and things had gone on for a number of years an arrangement was made by which the bridge company did not require the roads north of the river to pay the full amount of their tolls, but at the end of each quarter the charges were rebated to them to the extent that there was a surplus over and above what was called for by the contract, and they were only required to pay to the bridge company the balance. This was without the knowledge or consent of the Louisville & Nashville R. R. Co., which continued to pay the

full tolls. The rebating of the tolls began about the year 1881, and was not discovered by the Louisville & Nashville R. R. Co. until some time in the year 1888, when some facts came to the knowledge of its president which led him to suspect what was going on. He wrote to the bridge company, complaining, but nothing was done, although various communications passed between the parties. Finally, in the year 1892, the Louisville & Nashville R. R. Co. filed this suit against the bridge company and the Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., seeking to recover of them on account of the excessive tolls charged for the years 1881 to 1891. About the same time it filed another suit to recover for the same matters for the year 1892. In the latter suit amended pleadings were filed setting up a like claim for the years 1893, 1894 and 1895. Finally this case was tried, and a judgment rendered in favor of the Louisville & Nashville R. R. Co. The defendants appealed to this court and the judgment was affirmed. (Louisville Bridge Co. v. Louisville & Nashville R. R. Co., 106 Ky., 674.) After that judgment had been rendered the defendants filed an amended answer in the other suit, involving the years from 1881 to 1891, pleading that judgment in bar of the action. The court sustained a demurrer to the pleading. Evidence was then heard, and the case being submitted, the court gave judgment in favor of the Louisville & Nashville R. R. Co. for the years 1888, 1889, 1890 and 1891, but dismissed its claim as to the years prior to 1888. From this judgment the defendants have appealed, and the plaintiff prosecutes a cross appeal. The matters mainly relied on for reversal on the original appeal are the ruling of the court on the plea in bar and its admission of the evidence offered by the plaintiff to make out its case.

As to the plea in bar it is earnestly maintained by the appellants that the whole claim for all the years from 1881 to 1895 was based on the same contract, and, being an entirety, the plaintiff could not split its cause of action and sue for part of it in one suit and for the remainder in another. Numerous authorities are cited by counsel in support of the proposition that where an entire cause of action is split a judgment in one case will bar a second action for the rest of the claim. The principle is sound, and has been applied very often by the courts. But it has no application where the defendant consents to the splitting of the cause of action. A party to an action is never allowed to take advantage of that which he consented to; and his consent may be shown expressly, or it may be implied from the circumstances, as in other cases. Both the actions referred to were brought in the same court and near the same time. The defendants appeared in both actions and without making any objection to the cause of action being split, or the bringing of two suits, filed a general demurrer to the petitions. These demurrers were heard by the court together, but one opinion being delivered, the court treating the two actions as one. The demurrer was sustained; amended pleadings were filed; the general demurrer was filed again, and again the two actions were heard together by the court and the demurrers were overruled, the court delivering, as before, but one opinion in the two actions. After this, without any objection to the bringing of two suits, the defendants filed answer in each, and the issues were made up, the two actions moving on together side by side; and no objection was made until the year 1897, or something like five years after the suit was brought, when

one of the actions having been tried, an amended answer was filed, pleading the judgment in that action in bar of the other. In the one action the plaintiff sought to recover for the time down to the year 1891, and in the other for the time after 1891. If objection had been made to the separation of the cause of action the plaintiff might have dismissed one suit without prejudice, and set up the entire cause of action in the other. This would have profited the defendants nothing. It was more convenient to the parties to practice the claim for the two periods separately, for the reason that the evidence was different and it would have been somewhat confusing to have prepared the whole matter in one suit. Besides, a very large sum of money was sued for, one-half a million of dollars, and the bridge company had nothing to gain by advertising the large claim against it in one suit. When a party is put to an election and elects what course he will follow, he can not thereafter abandon that election to the prejudice of the other party. When the two suits were filed and were heard together as one action on the demurrers, it was incumbent on the defendants to make objection to the form of proceeding then, or not at all. Their silence then was an acquiescence in the prosecution of the two actions. One of the objects of the Code is to expedite legal proceedings by requiring objections not going to the merits of the action to be made when the occasion for them arises; all such objections are waived if not made before issue is joined on the merits. (*Gunn v. Gudehus*, 15 B. M., 449.) All objections of mere form come within this rule, which is founded upon reasonable principles, for, otherwise, the rules of procedure, which are intended to facilitate the administration of justice, become in the hands of the skillful practitioner the instruments for defeating justice. (*Curd v. Lewis*, 1 Dana, 851; *Warren v. Glynn*, 33 N. H., 340.) Under the facts as shown by the record we conclude that the defendants acquiesced in the bringing of the two separate actions, and by their course led the plaintiff to understand that the prosecution of the two actions was consented to by them, or at least that the objection thereto was waived. After all this it was too late, after one action had proceeded to judgment, to object in the other action to that which for three years had at least impliedly been consented to.

The objection as to the admissibility of the evidence arises in this way: The bridge company kept no record of the business done by the Louisville & Nashville R. R. Co., as it paid its tolls to the connecting lines and they settled with the bridge company. When it became necessary to ascertain how much the tolls of the Louisville & Nashville R. R. Co. amounted to, a very difficult question was presented, as no record of the payments of the money had been kept. Previous to the year 1888 the Louisville & Nashville R. R. Co. had no records at all on the subject, but after the year 1888 it kept the way bills on the freight, or where the way bill followed the goods the transfer slip, from which the way bill was made out, was preserved. From these original papers kept by the railroad company, with much labor, it made out a detailed statement of the tolls paid by it subsequent to the year 1888. Objection is made as to the competency of these papers, on the idea that they were simply loose memoranda. This can not be maintained. They were the original and best evidence of the transaction, and were the record kept by the railroad company to show its transactions. In cases of

this sort the law does not demand impossibilities; it only demands the best evidence practicable, and no witness could carry in his mind these transactions. The only possible way to prove them is from the record kept at the time the transactions occurred. It is also objected that these original papers were not in fact produced before the commissioner to whom the case was referred to state the account, but he reports that he examined them, and that they were not filed for the reason that they would fill up the commissioner's office and were too numerous to be brought into court. This was all that the plaintiff could do. The defendants and their attorneys were also afforded opportunities to examine the papers. The defendants also complain that the statements of the account made out from these papers were allowed in evidence. Proof was taken by the officer of the railroad under whose supervision and oversight the work was done, and he testifies to its correctness, and that it was done under his eye, that is, that he superintended it, checked it up, and knew it to be correct. It was unnecessary to bring in all the clerks who had made out the original way bills or prepared the numerous statements. The way bills being the records of the company of its transactions made at the time, were original evidence and admissible without further proof because made and kept as a record in the usual course of business. The proof by the two witnesses who testify to the correctness of the statements made up from these way bills was sufficient to make out a prima facie case, which was supported by the commissioner's own investigation and his finding the statements correct in so far as he tested them, but of course he could not examine all the items. The papers would perhaps have filled the courtroom, and no good could have come from bringing them in before the judge, for no court could go through all these papers and make up a statement. If he did it, not being a practiced accountant, his work might have been worth intrinsically less than his commissioner's. Besides, the defendants took no proof. The roads north of the river had their records, and if the proof by the plaintiff was not correct, they had it in their power to show the truth. This they made no effort to do. For the years after 1892 there was little dispute about the amount of the tolls. The result reached by the commissioner for the years from 1888-1891 corresponds substantially with the amount fixed for the years after 1892. The cardinal feature of the common law is its want of specific rules. It rests on a few general principles. It requires the best evidence that the case is reasonably capable of, but it requires no more. The issue in this case depends upon a statement to be made up from thousands of way bills, which, if all brought in, would have filled up the commissioner's office. The only practical way of getting at the truth was to make out a statement from these way bills. If either party doubted the accuracy of the statement when prepared, the court could afford him access to the papers, and give him opportunities to manifest the truth to him. To demand of the plaintiff more than was shown here would be to deny a recovery in cases of this character. The rule of evidence is that no evidence shall be received where there is better evidence which may reasonably be had. It is intended to prevent fraud, but it is not intended to prevent the administration of justice, where all the evidence is produced by the party of which the case is reasonably susceptible. In *Northern Pacific Ry. Co. v. Keyes*, 91 Fed. Rep., 47, where similar tables were introduced in

evidence and objected to, the court said: "To have called each of the clerks would have added very little to the trustworthiness of the evidence. No clerk conducted any entire investigation, but various details were placed in the hands of forty or fifty different employes, and each contributed his computation to the general result. No clerk could have testified that the tables were correct, for the reason that they were not made by him; neither could any single clerk testify that the figures from which the tables were compiled were correct, for he only contributed a small fragment to the general result. The method adopted was the only practicable one for conducting the investigation. It would have been absolutely impossible for any one man to have compiled the general result without delaying the case for years. A reasonable safeguard against falsification in the preparation of such statement is furnished by placing the records from which they are compiled freely at the disposal of the adverse party. It was the duty of the companies to do this, and to give the attorney-general the fullest assistance in explaining such records, and to allow him to place the same in the hands of expert accountants, if he so desired, for the purpose of detecting error or falsification in the testimony as prepared by the companies. The record shows that this was done throughout the taking of the testimony in these cases. We must assume that the attorney-general was satisfied of the correctness of the testimony from the fact that he declined to investigate its trustworthiness."

This seems applicable to the case before us. The evidence in the case is the original record kept by the railroad company of the transactions as they occurred. The statements or tables prepared by the clerks are not, properly speaking, evidence at all; they are only exhibits of the facts shown by the evidence. If the court doubted their correctness, he should have had correct statements or tables prepared; but it was not necessary to do this when those offered were proved to be presumptively correct, and there was no showing made that they were incorrect. The court has a sound discretion in determining matters of this sort in the interest of substantial justice, and we see no error in the admission of the matters in question.

The defendants complain that interest was allowed on the amount found due the plaintiff. In the former case above referred to, of *Louisville Bridge Co. v. Louisville & Nashville R. R. Co.*, 106 Ky., 674, it was held not only that the defendant was liable, but that it was liable for interest from the date of the illegal exactions, at least from the time it had information of the amount due the plaintiff. The chancellor seems to have followed this ruling. As to the cross appeal of the appellee for the years previous to 1888, there being no record of the amount of tolls paid, we concur with the chancellor in refusing to give relief. The court will not guess at the amount of a judgment. The plaintiff must make out his case. If he can not do it, it is his misfortune that he has no evidence. It is true we might infer from the facts shown by the record that appellee is entitled to something for these years, yet after all it would be a bald guess to fix any amount. But while we are unwilling to disturb the judgment on the cross appeal, we have no doubt from the record that, at least, as much was due the appellee as the chancellor entered judgment in its favor for, and that on the whole case appellants have no substantial ground of complaint. As the bridge company and the Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. are not ad-

versary parties herein, their rights as between themselves are not determined.
Judgment affirmed.

COMMONWEALTH v. McGOVERN, &c.

(Filed June 20, 1903.)

Prize fights—Injunction—Jurisdiction—This action in equity was instituted by appellant on relation of the attorney-general against appellees to prevent the holding of a prize fight advertised to take place in the "Auditorium," a large theatre, situated in the city of Louisville. McGovern and Corbett were to be the combatants. The allegations of the petition were to the effect that the prize fight, if allowed to take place, would bring to the city a great number of sporting men, disorderly persons and criminals, and would produce a public nuisance, and that the remedy at law was inadequate to prevent the violation of the law. The answer denied that a prize fight was intended, but that same would be a glove contest, conducted under the "Marquis of Queensbury rules," and denied the jurisdiction of a court of equity to grant an injunction to prevent such contests. Held—That under the proof the contest proposed was brutal in its nature, and was a prize fight if conducted as advertised. The fact that the reward in this case was to be equally divided between the combatants can not legalize the transaction. The jurisdiction of courts of equity to prevent and suppress nuisances, especially such as affect the public health, morals or safety, is of ancient date. The question presented to the circuit court when the injunction was applied for was whether or not the powers that might be invoked under the criminal jurisdiction of the courts were adequate to the suppression of the prize fight about to come off, and if not, what further powers might be exercised by him. As the statute required of him the exercise of all the powers of which he was possessed, and the right to employ the writ of injunction being one of those powers, it was his duty to grant it to the extent of preventing the use of the Auditorium for the holding of the prize fight. While a court of equity may not grant an injunction against the principals who were expected to engage in the fight in question, nor those connected with them as managers, trainers, etc., because the processes of the criminal courts and the powers of conservators of the peace are, or ought to be, adequate to the prevention of the prize fight, by the arrest and prosecution of the parties concerned, yet it was proper for the lower court to enjoin the owner, proprietor and managers of the Auditorium Theater from permitting the holding of a prize fight therein, and from allowing therein any future exhibitions of the same character, upon the ground that such a use of the building would constitute a public nuisance, dangerous to the public morals and safety. In order to constitute a public nuisance, in the meaning of the law, it is not always necessary that the acts charged should have been habitual or periodical. Where a single act produces a continuing result, the offense may be complete without a recurrence of the act.

Clifton J. Pratt, Bennett H. Young, H. L. Stone, David W. Fairleigh and Helm Bruce for appellant.

Dodd & Dodd, Kohn, Baird & Spindle, O'Neal & O'Neal and Forcht & Field for appellees.

Appeal from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Judge Settle.

This equitable action was instituted in the Jefferson Circuit Court, Common Pleas division, by the appellant, the Commonwealth of Kentucky, on relation of the attorney-general, against the appellees, Terry McGovern and others, to prevent the holding of a prize fight advertised to take place on the 22d day of September, 1902, in the "Auditorium," a large theater situated in the city of Louisville. Terry McGovern and Young Corbett were to be the combatants, and their managers and the owner of the Auditorium were made parties to the action.

It is averred in the petition, in substance, that the prize fight was to be given under the auspices of the "Southern Athletic Club," of which the appellee, Robert Gray, is the sole stockholder and manager; that the Auditorium has a seating capacity of 4,000, and that the prices of tickets for admission into that building to witness the prize fight vary from \$5 to \$20 a seat; that the fight was to take place according to the Marquis of Queensbury rules, and the fighters were to receive \$10,000 between them.

It is further averred that the prize fight, if allowed to take place, would bring to the city of Louisville a great number of sporting men, disorderly persons and criminals, and that the persons so drawn to the city would constitute a lawless, turbulent and dangerous assembly of many thousands of people, and would produce breaches of the peace and other violations of the law, which would have a demoralizing effect upon the good order and well being of the community, and produce a public nuisance. It is also averred that a criminal prosecution of the principals and others connected with them would not prevent the great injury that would be done to the people of the State by holding the prize fight within its bounds; and finally, that the Commonwealth has no adequate remedy at law for the injury which would result to the public welfare if the prize fight were allowed to be held. Answer was filed by the appellees traversing the allegations of the petition.

Thereafter, upon the pleadings and proof, in the form of affidavits and depositions, the judge of the court in which the action was then pending issued a temporary restraining order against appellees, and upon the day following its issuance a motion was made by the appellees before one of the judges of this court to dissolve the restraining order, and that judge and five of his associates, members of this court, whom he called in consultation, rendered the following opinion: "This motion was made before the chief justice, who, by consent of the applicants, transferred the hearing of the motion to Judge White, who invited the whole court, except Judge Paynter (absent), to hear the application with him. The majority of the court who heard the application to dissolve the injunction of Judge Field are of the opinion that the contest which has been enjoined is a prize fight, and that it is not material whether the victor in the contest is to receive more of the reward offered than the vanquished. The court is divided equally upon the question of whether the chancellor has preventive power under the Kentucky Statutes to restrain the holding of such contest. Chief Justice Guffy and Judges White and Burnam holding in the negative, and Judges DuRelle, Hobson and O'Rear holding the affirmative. The motion to dissolve is, therefore, denied."

After the foregoing action by this court the case was submitted upon the pleadings and proof to the judge of the chancery division, No. 2, Jefferson Circuit Court, for trial, who rendered judgment dismissing the petition. Appellant complains of that judgment, and has brought the case by appeal to this court for review.

No one can doubt that the contest between appellees, McGovern and Corbett, if it had taken place as advertised, would have been a fight. Indeed it is clear from the evidence furnished by the record that the fight between these men was to be one of unusual endurance and extreme brutality, a very feast of blood, to be enjoyed to the full by the thousands who were expected to witness it. From the mass of testimony in regard to the bloody character of such contests found in the record we have but to mention the following: Lambertson, the sporting editor of a Cincinnati newspaper, in describing a fight of this kind, which he witnessed at the Auditorium, said it appeared to him the men were "hitting each other just as hard as they could." Harris, the manager of McGovern, in speaking of his manner of fighting, says: "There is 'no make-believe' about it; that when he goes into a contest of this kind, he 'goes in to win;' that he strikes 'just as hard as he can,' and that this is the way with every such contest, unless it is a fake."

Gearhart, a professor of boxing in the city of Louisville, testified that he had seen a great many contests under the Marquis of Queensbury rules, and that they are brutal, and upon being asked if it was customary for the contestants to try to knock each other out in such contests, he said: "The contestants do generally, if they are fighting under the Marquis of Queensbury rules, endeavor to knock each other out, because if they succeed in doing that, that is, in knocking their opponent down, so that he is unable to get on his feet in ten seconds, in that way they will get the decision, hence they always endeavor to do that if they are fighting on the square, in sporting parlance."

Upon being further asked if the sports would regard it a square contest if the opponents did not use their best endeavor to knock each other out, he answered: "No; that would be considered a fake." A physician, Dr. Gossett, testified to having professionally attended a man named Handler, after his fight with Bill Harrahan at the Auditorium in November, 1901, and of his condition, said: "His upper lip was cut in two places, one side clear through to the teeth, completely severed, and the other side was nearly through. His upper lip was swollen about three or four times its normal thickness, and one eye completely closed and swollen very much. Both lids were swollen about an inch in thickness, due to the extravasation of blood. He could not open one of his eyes; the other was very nearly as bad. He had a cut over one eye about an inch and a half in length, in which we had to take three or four sutures. We took six or eight sutures in his lip. His face was very much bruised; looked like a piece of raw beef; blood was oozing from different parts of it. * * * When I first saw him the feeling I had was of sickening disgust."

Another witness, Mr. Lewis Humphrey, testified that he saw the fight between Ryan and West for the championship of the middle weights of the United States, which occurred in the Auditorium, in the city of Louisville,

on March 4, 1901. They fought with five-ounce gloves and under the Marquis of Queensbury rules. The fight was under the auspices of the Southern Athletic Club, of which the appellee, Robert C. Gray, was then, as now, the manager, and some of the city police were present. The fight is thus graphically described by the witness: "I saw this fight from beginning to end, being very close up to the ring, where I could very distinctly see both contestants during the whole fight. They were dressed in the manner which is universally customary with prize fighters, being stripped to the waist. They started into the fight in the usual manner by shaking hands in the center of the ring, and then began to fight each other with their fists, using, and manifestly exerting, all of their physical strength in the blows delivered against each other. It was an extremely vicious fight, and the physical punishment of each of the contestants was very great. West was the greatest sufferer. His nose was split early in the fight, so it hung in two portions. Midway in the contest he was so covered with blood that above the waist it was difficult to see the white skin. The gloves on the hands of his opponent, Ryan, became fairly soggy with blood from striking the face of West. West showed the greatest endurance, and, although at least half a dozen times it appeared as if he would faint, he remained in the ring until the close of the seventeenth round. During this time he was several times knocked to the floor, and barely managed to rise before the count of ten. At the end of the seventeenth round he took a seat in the corner, and was in such a dazed and weakened condition that, after consultation with his seconds, the referee declared him unable to go further, and awarded the fight to Ryan. During the fight Ryan resorted to what is known as chopping tactics, and cut and bruised West in innumerable places about the entire face and head; also striking him in the body, raising very perceptible bruises. Ryan was himself badly cut about the face, and one of his eyebrows split. He bled very freely, and the attention of his seconds between the rounds was almost entirely taken up with removing the blood from his face and body. A large quantity of blood covered the floor on which they were fighting, making it at several places very slippery."

The combats described by the witnesses were conducted according to the Marquis of Queensbury rules. It is admitted that the prize fight, to prevent which the injunction in this case was sought, was to be fought under the same rules. A copy of these rules is made a part of the record in this case, and we here quote from that copy the following:

"6th. When the contestant has fallen to the ring floor through the medium of a blow or weakness, he must arise, unassisted, within a period of ten seconds. His opponent must meanwhile retire to his corner, and not resume fighting until the fallen man has regained his feet. Should the latter fail to recommence the battle within the specified ten seconds, the referee shall award the victory to the other contestant. When a contestant is on the floor, the count shall be made by the official timer of the club, either from an electric clock, or his watch. He shall call off each second by striking the gong.

"7th. A contestant, on one knee, or hanging on the ropes in a helpless condition with his toes off the floor, shall be considered down, and if struck while in that position must be awarded the decision by the referee."

The brutal frankness of the language contained in these rules manifests, without the aid of extrinsic evidence, the character of the fighting provided for therein, and the cruelty of the punishment that may be inflicted thereunder.

The fact that the reward in this case was to be equally divided between the combatants can not legalize the transaction. As well said by counsel for appellant, to hold that the statute against prize fighting covers only the case where the reward is unequally divided, would be to say that the statute does not prohibit the brutal and debauching public exhibition, but does prohibit a greater reward being given to one than to the other combatant. It would be absurd to place such a construction upon the purpose and object of the statute, and certainly there is nothing in its language that warrants the conclusion that it was enacted to prevent discrimination between the victor and the vanquished.

"The evil designed to be remedied by the statute is that class of brutal exhibitions for giving which considerable sums of money were paid, and we do not think the statute can be evaded by rewarding the unsuccessful as well as the successful party." (State v. Purtell, 56 Kansas, 488.)

Nor will the use of gloves by the combatants in a prize fight make such a combat any less an offense in the eyes of the law. The Supreme Court of Louisiana in the case of State v. Olympic Club, 47 La. Ann., 1095, said of such a contest as the one under consideration: "The glove contests permitted in defendants' club are advertised extensively and are generally known as prize fights. The fighters are under contract with each other, with the club, and under obligations to spectators and bettors to fight to a finish, that is, usually until there is what is called a knock out. There can be no reasonable objection to boxing as generally understood. It is a manly, healthful and vigorous training, and encouraged in some of our most respectable institutions, and interference with it by legislative power would be a great stretch of authority, bordering upon an infringement of personal liberty. And even boxing without gloves for a display of skill and for pastime, when there is no breach of the peace and no intentional injury to the person, can not be considered as embraced within the statute. But in a prize contest for a purse, with or without gloves, there is, despite the customary shaking of the hands and the preliminary courtesies between the combatants, an intention to do injury, and to break the public peace. The contest is directly within the spirit, if not the exact definition, of an assault. In such a contest there can be no absence of an intention to do an injury, for the purpose of the contest is to subdue an opponent by knocking him senseless, or so injuring him that he can not, within a given time, continue to fight."

A fight between McGovern and Corbett would necessarily be one of the bloodiest of its kind, for the large money reward, and the more highly-prized championship at stake, would furnish every incentive to fire the courage and enlist all the physical powers of the combatants. Blood would flow and flesh be bruised and mangled, to the delight of the multitude of spectators present, whose applause would doubtless equal that of the Roman populace for the victorious gladiator, as standing over his prostrate foe he awaited the turn of the Emperor's thumb that he might know whether to slay or spare his victim. But we will not consume further time upon this branch

of the case, for whatever else may be in doubt, we take it, there is no escape from the conclusion that the combat between McGovern and Corbett would have been a prize fight if conducted as advertised. It now remains to be seen whether a court of equity has jurisdiction to prevent by injunction a prize fight.

Kentucky Statutes, 1884 to 1888, inclusive, prohibit prize fighting; make it a felony to engage in prize fighting; a misdemeanor to aid or abet in bringing on a prize fight, or to bet on or voluntarily witness such a fight, and also a misdemeanor for any one to permit the use of his lands for a prize fight.

"Section 1289. It shall be the duty of all judges of courts, justices of the peace, mayors of cities, trustees of towns, and other conservators of the peace, all sheriffs, constables, marshals, and other public officers, on being informed or having reason of their own knowledge to believe that such a fight is about to take place, or that there is training or preparation in any place, within their jurisdiction, for such fight, to suppress and prevent the same, and for this purpose they shall arrest the offending parties, or have them arrested, or hold them to security for their good behavior, and also commit them to prison, if they do not give bail for their appearance at the next circuit court to answer the charge; and in order to suppress and prevent the same they shall exercise all the powers vested in them for the prevention of crimes and misdemeanors; and any officer having such knowledge or information, who shall willfully neglect or fail to execute the duties required of him in this section, shall be fined in the sum of \$500, and shall forfeit his office."

We are told by Judge Story, in his excellent work on Equity Jurisprudence, volume 2, section 921: "In regard to public nuisances, the jurisdiction of courts of equity seems to be of very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. This jurisdiction is applicable not only to public nuisances, strictly so called, but also purprestures upon public rights and property."

Again, in section 924, it is said by the same author: "The ground of this jurisdiction of courts of equity in cases of purpresture as well as of public nuisance, undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation."

Continuing the discussion, the learned writer announces further, that "the courts (of equity) can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest and abate those in progress, and by perpetual injunction protect the public against them in the future. Whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."

In Pomeroy's Equity, volume 3, section 1349, it is said: "A court of equity has jurisdiction to restrain existing or threatened nuisance by injunction at the suit of the attorney-general in England, and at the suit of the State or

the people, or municipality, or some proper officer representing the Commonwealth in this country."

In 21 Am. & Eng. Ency. of Law, 708, it is likewise said: "A court of equity has discretionary jurisdiction to enjoin the creation or erection of either a public or private nuisance or a purpresture. This jurisdiction is founded upon the ability of equity to prevent irreparable mischief and vexatious litigation, and to furnish a more complete remedy than can be had at law. The remedy by indictment for a public nuisance is not an adequate remedy at law, precluding the remedy by injunction, nor is the right of a private person to call upon the public authority to abate the public nuisance after its erection such a remedy."

In *Attorney-General v. Jamaica Pond Co.*, 135 Mass., 361, an injunction was granted to restrain the lowering of the waters of a pond, on the ground that it would be injurious to the public health. In concluding its opinion the court said: "Indeed it may be affirmed that in no well considered case has the power of a court of equity to interfere by injunction in cases of public nuisances been denied, the only denial being that of a necessity for exercise of that jurisdiction under the circumstances of the particular case."

In *Mugger v. Kansas*, 123 U. S., 672, suit was brought by the State to enjoin the operation of a distillery, which was forbidden by its laws, on the ground that it was a public nuisance, injurious to the morals of the community. The court, after referring to the rule herein quoted from *Story's Equity*, adopted it without reservation. The same doctrine is adhered to in *People v. City of St. Louis*, 48 Am. Dec., 339; *Atty-Gen. v. Railroad Cos.* 35 Wis., 356.

We find by the foregoing authorities that the jurisdiction of courts of equity to prevent and suppress nuisances, especially such as affect the public health, morals or safety, is of ancient date, though in Kentucky this power has been somewhat restricted in its application. While the writ of injunction may not be employed to prevent the commission of crime, as such, we see no reason why it may not be resorted to to prevent the use of real property for the holding of a prize fight. Indeed we think the use of the injunction for this purpose is not only permissible, but required by the statute *supra*, enacted to suppress that evil, if the means at the command of the criminal courts are inadequate to its suppression.

We are not inclined to believe that the language of the act *supra* "shall exercise all the powers vested in them for the prevention of crimes and misdemeanors," confers upon any of the officers named therein new powers of any kind, but it does require of all ministerial officers of the State peculiar and extraordinary alertness, activity and zeal in the exercise of all the powers with which they are vested in the matter of preventing and suppressing prize fights, and any willful failure of duty on their part will subject them to a fine of \$500 and the forfeiture of office. The same provision of the statute requires "all judges of courts" in the performances of the duties enumerated in the statute, "in order to suppress and prevent" prize fights, that they shall exercise all the powers vested in them for the prevention of crimes and misdemeanors. It will be observed that the language *supra* not only embraces judges of courts of purely criminal jurisdiction,

but also includes all judges of courts, therefore, the command reaches judges of common law and equity jurisdiction, and no such express command is laid by the Kentucky Statutes upon all judges with reference to any other crime or misdemeanor than prize fighting. Under the statute, then, it is the duty of all the officers, both judicial and ministerial, named therein, to act without delay in preventing and suppressing prize fights. They are not to wait for the fight to begin, nor for the principals and others who are to engage therein to reach the place determined upon for the fight, before taking the necessary steps to prevent the same, but should proceed at once before the fight, and upon receiving notice of the fact that it will be held, to issue proper process for the arrest of the guilty parties, put them under arrest, and require of them bonds to keep the peace, and to answer for the violation of law in the circuit court.

The question presented for the consideration of the judge of the Jefferson Circuit Court when the injunction was applied for in this case was whether or not the powers that might be invoked under the criminal jurisdiction of the courts were adequate to the suppression of the prize fight about to come off, and, if not, what further powers might be exercised by him? As the statute required of him the exercise of all the powers of which he was possessed, and the right to employ the writ of injunction being one of those powers, it was his duty to grant it to the extent of preventing the use of the Auditorium for the holding of the prize fight, if in the exercise of a sound discretion the facts before him justified such relief, in aid of the jurisdiction of the criminal courts in the matter of arrest and prosecution of the guilty participants in the prize fight.

In granting the injunction to the extent indicated, the chancellor would only exercise the jurisdiction that was exercised in draining the pond and in suppressing the distillery, in the Massachusetts and Kansas cases, respectively, above cited.

In none of the cases *supra* was there any question of property or pecuniary right involved, nor need there be any property right involved so far as the State is concerned in the maintenance of the public health, morals or safety. These are all valuable rights, though not susceptible of a pecuniary estimate, which it is the duty of the State to protect by every means at its command, and if a court of equity has the power to enjoin the use of private property as a nuisance, which is dangerous to the public health, why may it not in like manner enjoin it where it constitutes a nuisance dangerous to the public safety or morals?

Is the use of land or a building for the maintenance of prize fighting a public nuisance? In Wood on Nuisances, 3d edition, section 63, the author says: "A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order or welfare of society, is a public nuisance. Under this head are included all puppet shows, legerdemain, and obscene pictures, and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and dissolute members of society."

That a prize fight is an exhibition of the character here described, and consequently a public nuisance, there can be no doubt, and if so, the use of a theater for prize fighting is such a nuisance. Therefore, the legislatures of

many of the States have enacted laws for their suppression. realizing, no doubt, that the remedies afforded by the general laws were not adequate to that end, and the courts have been uniform in upholding the statutes thus enacted. Thus in *Sullivan v. State*, 67 Miss., 352, the Supreme Court of Mississippi said: "We think, however, that the evil sought to be protected against by the statute is the debasing practice of fighting in public places, or places to which the public, or some part of it, is admitted as spectators."

Such a meeting as would have been held in the Auditorium, in Louisville, to witness the prize fight between McGovern and Corbett, if that fight had occurred, would doubtless have attracted many of the better and law-abiding class of citizens, curious to see such a spectacle as a prize fight, but for every such reputable citizen thus attending there would have been present a dozen gamblers, confidence men, bunco steerers, or pickpockets, gathered from all parts of the United States, men of idle, vicious and criminal habits and practices, whose business is to prey upon the public in some form or other, and many of them would remain in the community after the combat to ply their nefarious callings. Such an assembly would easily be led into a riot, or other unlawful disturbance of the public peace.

In addition to the evils suggested, there would be the contaminating effect of such a meeting upon the youth of the city and State, which might prove of incalculable injury to their morals and future welfare. Such a gathering, too, would demand increased vigilance in the protection of the property of the city and its inhabitants, be a menace to good order, and disturb the peaceful pursuits and happiness of citizens who would be unwilling to patronize such an enterprise. We conclude, therefore, that while a court of equity may not grant an injunction against the principals who were expected to engage in the fight in question, nor those connected with them as managers, trainers, etc., because the processes of the criminal courts and the powers of conservators of the peace in the city of Louisville are, or ought to be, adequate to the prevention of the prize fight, by the arrest and prosecution of the parties concerned, yet it was proper for the lower court to enjoin the owner, proprietor and managers of the Auditorium Theater from permitting the holding of a prize fight therein, and from allowing therein any future exhibitions of the same character, upon the ground that such a use of the building would constitute a public nuisance, dangerous to the public morals and safety. We think this exercise of power by the court can not be questioned, not because any new powers were conferred upon it by the statute against prize fighting, but because such jurisdiction exists in courts of equity, and has practically always so existed; and further, because its exercise was required in this instance by the exigencies of the case and the express language of the statute, which commanded the court to use all the powers with which he was vested to the end that the nuisance might be suppressed.

As already suggested, not the least of the evils connected with the holding of the prize fight would be the presence of the immense crowds of lawless and turbulent men from all quarters. An injunction against the use of the building advertised as the place of the fight would go far toward preventing the assembling of this crowd, and thereby avert incalculable mischief, which could not well be averted by the criminal courts, or their ministerial

officers, after the assembling of the audience at the place of the combat, or in the act of assembling; for although every person who attends a prize fight by that act violates the law, it would be impossible for the officers of the law to arrest any considerable number of them under such circumstances.

We do not regard this case as analogous to that of *Neaf v. Palmer*, 108 Ky., 496. In the latter case the action was brought by several property owners to enjoin the maintenance of a bawdy house upon the property of another. In passing upon the questions involved this court said, in part: "It is not alleged that there are offensive sights, or sounds, about the obnoxious premises, but only that the property is made less valuable in the vicinity, and that the moral atmosphere is tainted and pestilential. The injury is wholly consequential; it seems to us, under these circumstances, criminal courts had best be left to enforce the criminal laws. They are confessedly adequate for the purpose of suppressing such evils."

There was nothing in the case *supra* to indicate that the bawdy house complained of could not be suppressed by the ordinary methods appertaining to the criminal court, and the damages resulting to the plaintiff's property from the existence of the bawdy house being wholly consequential and speculative, it would, of course, have been improper in that case to employ the writ of injunction in aid of the mere property rights of the individual. But in the case at bar the complainant is the State—the sovereign—which is seeking by a writ of injunction to prevent a great evil, affecting the people of the city of Louisville, and the entire State as well, and which threatens irreparable injury to the public morals because of its cruelty, inhumanity and debasing associations and danger to the public safety, because of its bringing together the lawless and turbulent elements of society from all quarters. Upon such a state of facts, and with the commands of the statute directing him to employ all his powers to avert the threatened evil, it was, in our opinion, no stretch of authority for the chancellor to employ the aid of the writ of injunction in such an emergency, to the extent, at least, of preventing the use of real property for the holding of the prize fight.

Nor do we think that the right of the chancellor to so employ the writ of injunction in this case is dependent upon the fact that a property right be involved. It may be justified upon the higher ground that the morals and safety of the public are involved, and that the public good is of the first consideration. If the element of continuity were needed in this case to authorize the injunction, it is shown by the record to exist, for several witnesses testify to having attended contests similar to this in the Auditorium, and the advertisement of the McGovern-Corbett fight showed that it would come off at the Auditorium, and that it was one of a series of fourteen of such contests, all given under the auspices of the Southern Athletic Club, and several of which had already been held, and perhaps some of them elsewhere than in the Auditorium. The evidence shows, therefore, that the use of the Auditorium had, to some extent at least, been devoted to the maintenance of prize fights, and that its use for that purpose is to be continued. We are of the opinion, however, that continuity is not a necessary element in this case. In the *Cincinnati R. R. Co. v. Commonwealth*, 80 Ky., 187, the railroad was indicted for a public nuisance in leaving a hand car on a public road, and though the proof showed that the car did not remain for more than

a day, this court held that the offense "was not to be determined by the length of time the thing that worketh hurt, inconvenience or damage to the public continues, or by the number of times it may be repeated, nor is it necessary, in order to constitute the offense, that actual injury be sustained by any person."

In order to constitute a public nuisance in the meaning of the law it is not always necessary that the acts charged should have been habitual or periodical; where a single act produces a continuing result, the offense may be complete without a recurrence of the act; thus one act upon the part of an individual in befouling a spring from which the public are accustomed to drink is a public nuisance, so is indecent exposure of one's person in a public place. (Sections 27 and 57 of Wood on Nuisances.)

To constitute the offense denounced by the statute as a prize fight, or prize fighting, it is not necessary that a number of such combats, or that more than one combat, should take place. We think one such offense at a given place would constitute a public nuisance, and it is the province of a court of equity to prevent nuisances that are threatened, and before irreparable mischief ensues, as well as to arrest or abate those in progress, and by perpetual injunction protect the public against them in the future.

Being of the opinion that the chancellor erred in dismissing the petition and in refusing to perpetuate the injunction in this case to the extent of restraining the owners and managers of the "Auditorium" from permitting the use of that building for the holding of the prize fight between appellees, McGovern and Corbett, the judgment is reversed and cause remanded, with directions to set aside the order dismissing the petition and to enter in lieu thereof the necessary decree perpetuating the injunction to the extent herein indicated.

Whole court sitting.

Judges Paynter, Barker and Nunn dissenting.

COUNTY OF HENDERSON v. HENDERSON BRIDGE CO.

(Filed June 19, 1903.)

Taxation—Res judicata—The county of Henderson instituted this action to recover of appellee taxes for the years 1893, 1894, 1895 and 1896. Appellee answered, pleading that the county was estopped by former adjudication, in which a judgment by default was rendered, enjoining the sheriff from collecting taxes for the same years. The county was not a party to this litigation. The lower court overruled the demurrer to this plea of *res judicata*, and this appeal is prosecuted. Held—That the rule is well settled, to the effect that a person or municipality is not bound by former litigation unless it was a party, either actually or by its representative. Under our statutes the fiscal court has control of the affairs of the county, and the sheriff is only a tax collector, in nowise a representative of the county in the management of its affairs, and the county is not, therefore, bound by any adjudication to which it was not a party.

Montgomery Merritt and N. Powell Taylor for appellant.

Helm, Bruce & Helm for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hobson.

The county of Henderson instituted suit against the Henderson Bridge Co. to recover certain taxes alleged to be due for the years 1893, 1894, 1895 and 1896. The bridge company resisted judgment on the ground that every item of the taxes sued for had been adjudged illegal in suits brought by it against the sheriff of Henderson county, final judgment having been entered in each of these suits perpetually enjoining the collection of the taxes. The plaintiff demurred to the plea of *res judicata*. The court overruled the demurrer, and the plaintiff declining to plead further, the action was dismissed. The only question to be determined on the appeal is whether the judgment rendered in the former actions by the bridge company against the sheriff bind the county, although it was not a party to those suits. In those cases the bridge company alleged that Henderson county had levied no tax for the years named; that its property had not been assessed for taxation, and that the sheriff had not been authorized to collect the tax. The sheriff did not answer the petition, and judgment by default was entered to the effect that the plaintiff did not owe the tax, perpetually enjoining the sheriff from collecting it. Appellee relies on the principle that a judgment against the legal representatives of a county is conclusive against it and all its citizens. The rule is thus stated in Freeman on Judgments, section 178: "The position of a county or municipal corporation towards its citizens and taxpayers is, upon principle, analogous to that of a trustee towards his cestui que trust, when they are numerous and the management and control of their interests are by the terms of the trust committed to his care. A judgment against a county or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties to the suit." To same effect is Black on Judgments, section 584.

The principle stated in these sections is that a judgment against a county or its legal representatives in a matter of general interest to all the people of the county is binding not only on the official representatives of the county, but on all its citizens, though not made party defendant by name. Otherwise, there would be no end to litigation. But no question arises in this case between any of the citizens of Henderson county and appellee. The only question is whether the county is bound by default judgments in favor of appellee in actions between it and the sheriff, to which the county was not a party. The question how far a municipality may be bound by a judgment against one of its subordinate officers is not touched upon in either of these sections. In the latter part of section 178 of Freeman on Judgments it is said: "Though its officer is a nominal party to a suit and the municipality is not joined with it, a judgment is conclusive for or against it, if it was the real party in interest, and as such prosecuted or defended the action."

The rule that one who prosecutes or defends an action in the name of another is bound by the judgment, though not nominally a party to it, is of general application, and has been recognized by this court. (*Schmidt v. L. & N. R. R. Co.* 99 Ky., 148.) But this rule does not apply here, as no defense was made to the action against the sheriff. The judgment against the

municipality binds its citizens because it is their legal representative; but can it be said that the county is bound by the default judgment against the sheriff for this reason? A judgment binds only parties and privies. The heir is bound by a judgment against his ancestor; the distributee by a judgment against the administrator; but unless there is some privity one person is never bound by a judgment against another. The ground upon which a municipality is held bound by a judgment against certain of its officers is that these are its legal representatives who are by law authorized to speak for it and control its affairs, but this can not apply to subordinate municipal agencies having no power to speak for the municipality or control its action. In none of the adjudged cases has the municipality been held bound by a default judgment against any of its officers, except those who had charge of its affairs as its chief managing agents. Thus in *Lyman v. Farris*, 53 Iowa, 498, the validity of a tax having been determined in an action against the board of supervisors who were the managing agents of the county, it was held that an action to enjoin the collection of the tax could not be maintained by a taxpayer, as the supervisors represented all the taxpayers of the county in the defense which they had made to the former action on the same ground. To the same effect are *Wilson v. Rainey*, 74 Mo., 229; *Harmon v. Auditor*, 123 Ill., 122. In *Gallagher v. Moundsville*, 34 W. Va., 730, certain taxpayers, suing for themselves and all other taxpayers of the county, sought an injunction against the delivery of certain bonds, which was refused; then other taxpayers who were not named as parties in the first suit brought a similar suit, suing for themselves and all other taxpayers. The first action was held a bar to the second. (*McCann v. Louisville*, 23 Ky. Law Rep., 558.) Were the rule otherwise, in this class of cases there could be no end to litigation until every taxpayer in the county had brought his individual suit.

In *Sauls v. Freeman*, 24 Fla., 209, the county commissioners were sought to be enjoined for moving the county records in a proceeding instituted by certain taxpayers. There had previously been a mandamus awarded against the commissioners to remove the records, and this judgment was held to bar the second suit; but the commissioners were empowered by law to remove the records and were, therefore, the representatives of the people of the county in this matter. *Brown v. C. & L. R. R. Co.*, 13 S. C., 290, rests on the same ground. None of these cases involved a judgment against an inferior ministerial officer who was not by law entrusted with the disposition of the matters in controversy. In no case cited or decided, so far as we can find, has an inferior officer been allowed to accomplish indirectly by means of a judgment against him what he could not do directly. In all the cases where the judgment against the officer was held a bar his official act without the judgment would have bound the municipality. The question, then, to be determined is, has the sheriff in the collection of taxes such power under our statute as to make him the legal representative of the county so that a judgment against him will bind the county?

By section 4120, Kentucky Statutes, "the sheriff, by virtue of his office, shall be collector of all State, county and district taxes unless the payment thereof is by law specially directed to be made to some other officer." This statute confers upon him only power to collect the taxes. The mode of collection is pointed out in sections 4148, 4151, 4184, Kentucky Statutes, by dis-

traint, levy on land or attachment. By section 4131, if the office of sheriff is vacant, the county court may appoint a collector of taxes. The powers of the sheriff are the same as those of the tax collector. By section 144 of the Constitution each county shall have a fiscal court, composed of the county judge and justices of the peace, or a county may have three commissioners, who, together with the county judge, shall constitute the fiscal court. Pursuant to this provision of the Constitution is section 1384, Kentucky Statutes: "Unless otherwise provided by law, the corporate powers of the several counties of this State shall be exercised by the fiscal courts thereof respectively."

Also section 1840: "The fiscal court shall have jurisdiction * * * to regulate and control the fiscal affairs and property of the county. * * * And to execute all of its orders consistent with the law and within its jurisdiction, and shall have jurisdiction of all such other matters relating to the levying of taxes as is by any special act now conferred on the county court or court of levy and claims."

By section 1883 the officer who may collect the State revenue in each county shall also collect the county levy. It will thus be seen that the entire control of the fiscal affairs of the county is vested in the fiscal court, of which the sheriff is not a member, and that his sole power in the matter of taxes is limited to that of a tax collector. The powers of a tax collector and the limitations upon his authority are thus well stated in Cooley on Taxation: "The authority of a collector of taxes to collect is his warrant. The duplicate is but a memorandum of the amount he is to collect from the parties therein named respectively. Without a warrant the collector becomes a trespasser as soon as he intermeddles with the property of the taxpayer." (Page 202.)

"It is not the business of the collector to question the fairness or propriety of any tax which has been committed to him for collection. If the assessment is excessive, the party assessed must make the objection and not the collector. His duty is to collect the list committed to him, and he can not excuse himself for any failure to exhaust his authority in collecting on the pretense that the person taxed should have been assessed otherwise than he was." (Page 500.)

"In general, any mere ministerial officer to whom process is issued, which proceeds from an officer, or board, or other body having authority to issue process of that nature, which process is legal in form and contains nothing on its face to notify or apprise him that it is issued without authority, will be protected in serving it even though in fact it was issued without authority of law. This is a rule not only essential to the protection of such officers, but absolutely required also for the due dispatch of public business." (Page 569.)

The tax collector, therefore, in the collection of his tax warrants stands substantially as the sheriff in executing a fl. fa. or other final process which is delivered to him. In acting under such a writ the officer is protected if the writ is valid on its face; he is not the agent of the plaintiff; the sale made by him is the act of the law and the plaintiff in the writ is in no way bound by the acts of the officer if he leaves the law to take its course without directing the officer in the discharge of his duties. (Freeman on Execu-

tions, section 278; Rhorer on Judicial Sales, section 46.) The sheriff in the collection of his revenue is a ministerial officer charged with a specific duty, which is to collect the money on the tax bills and pay it over to the person entitled to receive it. He is without power to dispose of the fund, or to release the taxpayer from liability, or to reduce the amount to be paid by him, or to do anything involving the fiscal interests of the county. He has no authority to represent the county in any litigation; he can not employ counsel for it or subpoena witnesses on its behalf, or do any act at its expense, however necessary, in the litigation for the protection of its rights. In the collection of the public dues he is simply the agent of the law, performing duties imposed on him by the law. The county is not responsible for his acts out of court unless it directs or controls them; and the same rule must apply to his acts in court, for he can not accomplish by nonaction in court what he could not accomplish by direct action out of court. The law does not impose on the sheriff the burden of defending suits against the county. The expense of such litigation might be far beyond his means. When the rights of the county are to be determined, it should be sued, so that it may control the defense, pay the expenses, and take such steps as its interests may require.

There are other officers charged with certain duties, ministerial in character, in connection with the collection of taxes that must be regarded as the representatives of the county if the sheriff can be so regarded. Thus it is the duty of the assessor to assess the taxpayers. But it would not be maintained that a default judgment suffered by an assessor, enjoining him from assessing the property of a taxpayer, would bar the State or the municipality from proceeding under section 4241, Kentucky Statutes, to have the omitted property assessed. It is the duty of the county clerk to copy the tax list and deliver the copy to the sheriff for him to collect on. If a taxpayer were to enjoin the county clerk by a default judgment from copying his list and delivering it to the assessor, this judgment would not conclude the Commonwealth or the county, or prevent it from collecting its taxes.

No. of the tax cases decided by this court touch the question. It is true suits to test the validity of taxes have been brought in the name of the sheriff, and where the litigation has been conducted by the State or municipality the name of the officer it is bound by the judgment; but the interests of the municipalities of the State, as well as sound legal principles, require that they should be made parties defendant to actions against the tax collectors, where the purpose of the action is to prevent them from collecting air revenues. For the power to tax involves the power to exist; and the usefulness might be crippled or destroyed if the collection of taxes levied for their support could be defeated by judgments in actions over which they had no control. A county may be sued; section 51 of the Code of Ethics provides: "In an action against a county the summons must be served on the presiding judge of the county court, or, if he be absent from the county, upon its attorney."

In *People v. Squire*, 110 N. Y., 666, the plaintiff had obtained a mandamus against the Commissioner of public works, and relied on that judgment as res judicata between him and the city. The court deeming the matter free of doubt, simply said: "The city of New York is not a party to the litigation."

gation, and is not bound by any judgment heretofore entered in this proceeding."

In the subsequent case of *Peck v. State*, 187 N. Y., 372, the court approving this case, said: "In *People v. Squire*, 110 N. Y., 686, we held that a judgment in a mandamus proceeding against the commissioner of public works for the city of New York did not bind the city for the reason that it was not a party to the litigation."

In *Gilmore v. Fox*, 10 Kan., 509, a suit was brought against the county clerk and county treasurer to enjoin the collection of certain assessments made by the city of Emporia, without making it a party. It was held that the city was the real party in interest, and was a necessary party to the action. The court said: "If the city can not collect these special assessments, it must resort to general taxation to raise the amount. But before it can be properly determined that the city can not collect these special assessments, the city must have its day in court."

The same principle was followed in *Vass v. Union School District*, 15 Kan., 467, where a suit to enjoin a collection of taxes was brought against the treasurer and sheriff. The court said: "Said treasurer and sheriff were merely nominal parties, and the school district was the real party in interest."

To the same effect are *Knopf v. Chicago Real Estate Board*, 173 Ill., 16; *Heinroth v. Rochersperger*, 173 Ill., 206, and *Bradley v. Gilbert*, 165 Ill., 54. In the last case an effort was made to enjoin the action of the county board as to dieting prisoners without making the county of Cook defendant. The court said: "Whatever may be said as to the right or policy of county boards to adopt the method of fixing the amount to be paid for dieting prisoners shown by this bill to have been pursued in Cook county, before that method can be judicially pronounced contrary to law and void the alleged order must be given its day in court." (*Beach on Injunction*, 373; *Carpenter v. Grisham*, 59 Mo., 251; *Laners v. King*, 40 Conn., 312; *Leferts v. Board of Supervisors*, 21 Wis., 688; 10 Ency. of Pleading and Practice, 913, 914; *Atilla County v. Niles*, 58 Miss., 48.)

The other questions made in the case seem to be settled in *Anderson Bridge Co. v. Negley*, 23 Ky. Law Rep., 476; *Louisville Bridge Co. v. Louisville*, 23 Ky. Law Rep., 1645; *Campbell County v. Bridge Co.*, 23 Ky. Law Rep., 2056.

The judgment is reversed and cause remanded, with direction to sustain the demurrer to so much of the answer as pleads the former adjudication in bar of the action and for further proceedings consistent herewith.

GARDNER, &c. v. CONTINENTAL INS. CO., &c.

(Filed June 19, 1903—Not to be reported.)

1. Mortgage—Insurance—Mistake in policy—Pleading—A. Had a mortgage for \$1,800 on land owned by B., containing 140 acres, on which he and his family resided. B. made a deed to C., conveying to him the land except the homestead. C. agreed to assume and pay the mortgage debt. Appellee company issued to C. a policy of fire insurance on the buildings for

\$1,700. This action was brought by said company to enforce so much of said mortgage as amounted to \$1,612.50, which had been assigned to it by A. A., in his answer, alleged that this amount had been paid him by the insurance company on a loss under said policy which had been made payable to him, and in accordance with the terms of the loss clause in said deed he had assigned his claim to said company. C., in his answer, alleged that the loss clause which was added to said policy, which was to the effect that in the event of loss and the payment of it by the company it should be subrogated to the rights of the mortgagee, and he would thereby forfeit his right to have credit on the mortgage debt for the amount of his insurance, was inserted by mistake, and that he did not discover said mistake until after the fire, and asked that the mistake be corrected so as to give him credit for the amount paid A. on the loss. The policy, with the mortgage clause, was filed with the answer of C., but was not copied in the record on appeal. The court sustained a demurrer to the answer of Gardner, and a judgment was entered in favor of the insurance company, and A. foreclosing the mortgage on the land. On appeal it is insisted that the ruling of the lower court on the demurrer should be sustained in the absence of the exhibit. Held—The rule is that an exhibit will not cure a defective pleading, or supply averments omitted in the pleading. But it is also the rule that in a suit on a written contract, if the contract shows that no cause of action exists, the court on demurrer will consider the exhibit. In other words, while an exhibit can not make a pleading good, it may make it bad. The exhibit will be considered for another reason: The record on a former appeal is filed with this record, and was considered as a part of it by the parties in briefing the case, and while it might have been stricken out on motion, this objection will be considered as waived. The court should have overruled the demurrer to the answer of C. Under the facts alleged in the answer the payment of the loss by the insurance company to A. extinguished the mortgage to this extent, and no recovery can now be had in favor of the company.

2. Usury—The judgment in favor of A. should be purged of usury.

A. E. Cole & Son for appellants.

Thos. R. Phister, E. L. Worthington and W. D. Cochran for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hobson.

This action was filed by the Continental Insurance Co. against appellees, J. D. Gardner, S. D. Gardner and Marlam Gardner. It was alleged in the petition that on May 2, 1895, S. D. Gardner executed to J. D. Mayhugh his promissory note for \$1,800, due three years after date, with interest at the rate of 8 per cent. per annum until paid, and to secure it he and his wife, Marlam Gardner, executed to Mayhugh a mortgage on a tract of 100 acres of land, on which they resided; that \$25 was paid on the note on August 26, 1897, and that nothing more had been paid; that on April 20, 1897, S. D. Gardner conveyed the land, except his homestead of \$1,000 in value, to J. D. Gardner, in consideration of his assuming the payment of the mortgage debt; that on July 15, 1899, Mayhugh, in consideration of \$1,612.50, paid him by the insurance company, assigned to it this much of the note and mortgage security. The mortgage and deed referred to were filed as part of the petition. The deed is in the usual form, but concludes with these words:

"But it is expressly understood that the party of the first part does not relinquish his homestead in the land hereinbefore described, but retains the same." J. D. Mayhugh was made a defendant to the action and filed an answer, in which he stated that on June 1, 1897, the Continental Insurance Co. issued to J. D. Gardner a policy of insurance, insuring him in the sum of \$1,000 on the dwelling on said land, \$500 on barn No. 1, and \$200 on barn No. 2, and at his special instance and request a mortgage clause was attached to the policy, making the loss payable to him as his interest might appear; that thereafter the dwelling house and barn No. 1 were burned, exceeding in value the amount of the insurance thereon; that the company refused to pay the policy and he sued it and recovered a judgment which was paid on July 15, 1899, amounting to \$1,612.50, and he then executed to it the assignment referred to in the petition, but on the understanding and agreement that its lien was to be inferior to his. He made his answer a cross petition against the other defendants, and prayed judgment for his debt and the foreclosure of his mortgage. The defendant, J. D. Gardner, filed an answer, in which he alleged that on June 1, 1897, in consideration of the sum of \$28 paid by him to it, the insurance company executed to him the insurance policy referred to, and agreed to insure him against the loss of the property by fire in an amount not exceeding the sums named; that on April 2, 1897, his father, S. D. Gardner, had executed to him a deed conveying to him the property in consideration of his assuming the mortgage, but reserving to himself his homestead exemption, and that at the time of the execution of the policy he was the owner of the land subject to the mortgage; that when he procured the policy and paid the premium he neglected to have it provided in the policy that the amount of the loss, if any, should be payable to the mortgagee, J. D. Mayhugh, to the extent of his interest, and being reminded of this by the mortgagee, he requested the agent of the insurance company to make an addition to the policy to the effect named, which the agent agreed to do; but being unfamiliar with the different kinds of mortgage clauses, from the fact that he had been in the business but a few weeks, the agent by mistake attached to the policy a mortgage clause, to the effect that in the event of loss and the payment of it by the insurance company it should be subrogated to the rights of the mortgagee, and he would thereby forfeit his right to have credit on the mortgage debt for the amount of his insurance; that he did not discover the mistake, nor did the agent, the policy being in the possession of Mayhugh, and he supposing that the ordinary mortgage clause had been attached; that if he had known of the mistake he would not have accepted the instrument; that he and his father had agreed with Mayhugh to keep the property insured, and for this reason it was agreed that the ordinary mortgage clause should be attached to the policy, as he thought had been done; that the attaching of the other paper to the policy was by mistake of the agent and without his knowledge; that thereafter, in October, 1897, the buildings burned, and that he gave notice immediately of the loss and furnished proofs within sixty days, which the company assured him was all that was necessary for him to do to entitle him to the payment of the policy. He prayed judgment reforming the paper and crediting the amount paid by the insurance company on the mortgage. Other allegations were made in an amended answer charging fraud in the transaction. The

court sustained a demurrer to the answer of Gardner, and entered a judgment in favor of the insurance company and Mayhugh, foreclosing the mortgage on the land.

In the answer of Gardner the policy and the mortgage clause attached thereto are filed as part, marked "Exhibit A." In copying the record the clerk certifies that "Exhibit A" is not filed with the papers, and it is not included in the transcript. Appellees insist that for this clause the judgment must be affirmed, as the court must presume that the exhibit sustains the judgment. The rule is that an exhibit will not cure a defective pleading, or supply averments omitted in the pleading. But it is also the rule that in a suit on a written contract, if the contract shows that no cause of action exists, the court, on demurrer, will consider the exhibit. In other words, while an exhibit can not make a pleading good, it may make it bad.

But there has been a former suit between J. D. Gardner and the Continental Insurance Co. on this policy, which was appealed to this court. The original policy was filed in that action, and for that reason, perhaps, its absence in this case is accounted for. The record of that case has been filed with the record in this case. It is insisted for appellees that we can not look to the record of that case, although placed with this record. There would be great force in this contention if presented by a motion to strike out the record before submission. If the motion had then been sustained appellants might have supplied their record. No motion to strike out was made; the attorneys have briefed the case with the knowledge that the papers were filed with the case, and if their objection be sustained now the appellants would be left without remedy. Under the circumstances appellees must be held to have waived the irregularity by not presenting the objection by motion to strike out before submission; as the case being submitted, appellants had a right to understand it was to be tried on the record before the court.

The ground upon which the court appears to have sustained the demurrer is that in the deed of J. D. Gardner, S. D. Gardner reserved his homestead. It was stipulated in the policy that it should be void if the interest of the insured be other than unconditional and sole ownership. This condition is one of the many exceptions contained in the policy in different clauses. It was unnecessary for the insured to anticipate a defense based on a violation of this condition. If the company relied on such defense it must plead the violation of the condition affirmatively. (2 Wood on Insurance, section 522; Stephens on Pleading, side page 350.) When the company sets up this clause of the policy to defeat its liability upon it the insured may reply, setting up matter of waiver or estoppel, if any he has. It would be unnecessary prolixity and tend rather to confusion to require all these matters to be anticipated and availed by the plaintiff in the first place. The insured alleged that he was the owner of the property, and this was sufficient to enable him to maintain the action, unless some breach of the conditions of the policy was set up by the defendant. Under the facts alleged in the answer the payment of the loss by the insurance company to Mayhugh extinguished the mortgage to this extent, and no recovery can now be had in its favor thereon.

The judgment in favor of Mayhugh is too large. The promise to pay interest at 8 per cent., as contained in the note, so far as appears, was usurious as to the excess over 6 per cent. In the deed from S. D. Gardner to J. D.

Gardner the latter only assumes the mortgage indebtedness of \$1,800 and interest. This, in legal contemplation, includes only the debt of \$1,800, with legal interest. Judgment should, therefore, have been entered in favor of Mayhugh only for \$1,800, with interest at 6 per cent. from May 2, 1895, subject to a credit of \$35 paid August 25, 1897, and \$1,612.50 on July 15, 1899.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the answer of J. D. Gardner and for further proceedings consistent herewith.

MCNULTY, &c. v. TOOPF, &c.

(Filed June 20, 1903.)

Municipal government—Construction of statute—Validity of ordinance—Police regulations—This appeal involves the validity of an ordinance of Paducah, a city of the second class, prohibiting the sale, dispensing or giving away of spirituous, vinous or malt liquors between the hours of 10:30 o'clock p. m., and 5 o'clock a. m., closing saloons, coffee houses and like places of business during said hours, and providing for removal of obstructions to the interior view from the exterior and front of such houses during these hours. Held—That said ordinance does not violate section 3059, Kentucky Statutes, which provides that no ordinance shall embrace more than one subject, and that shall be expressed in the title, as the title really means that the ordinance is one to further regulate the sale of spirituous, vinous and malt liquors. It is a proper exercise of the police power of a city to prescribe the hours when the sale of intoxicating liquors shall be prohibited; also to provide for the removal of screens that obstruct the view in such places during said hours, but the inhibition of a druggist dispensing spirituous, vinous or malt liquors between the hours of 10:30 o'clock p. m., and 5 o'clock a. m., is invalid as an unreasonable exercise of the police power. Said ordinance is invalid in so far as it attempts to prescribe the fact that persons during the time the keeping of saloons open is prohibited are seen to enter or leave such places prima facie evidence of guilt. The legislature has not delegated to the city the right to legislate upon the question of evidence. As the objectionable features may be eliminated without affecting the remainder of the ordinance, it will not be held invalid in other respects.

Thos. E. Moss for appellants.

Read & Berry for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge O'Rear.

This proceeding and appeal involves the validity of the following ordinance, passed by the general council of the city of Paducah, a city of the second class: "An ordinance prohibiting the selling, dispensing or giving away of any spirituous, vinous or malt liquors between the hours of 10:30 o'clock, p. m., and 5 o'clock, a. m., closing saloons, coffee houses and like places of business during said hours; providing for the removal of obstructions to an interior view from the exterior and front of any building occupied by a saloon, coffee house or like business or calling, on certain days

and certain hours, and prescribing penalties for violation of its provisions:

"Be it ordained by the General Council of the city of Paducah, Ky:

"Section 1. That it shall be unlawful for any saloon, coffee house or other place, where spirituous, vinous or malt liquors are sold by the drink in the city of Paducah, to sell, offer for sale or give away either or any of said liquors between the hours of 10:30 p. m. and 5 o'clock a. m.

"Sec. 2. That each and every saloon, coffee house or other place where spirituous, vinous or malt liquors are sold by the drink, in the city of Paducah, shall be tightly closed, front, side and rear at 10:30 o'clock p. m., and the same shall not be reopened until 5 o'clock a. m., the succeeding morning, and the entrance to or exit from any saloon, coffee house or other place where spirituous, vinous or malt liquors are sold by the drink in the city of Paducah by any person or persons during the time herein specified that same shall be closed, shall be held as prima facie evidence of a violation of this section.

"Sec. 3. That whereas the police of the city are deterred by the regulations governing the police department from entering the saloons, each and every saloon, coffee house or other place where spirituous, vinous or malt liquors are sold by the drink in the city of Paducah shall, in the front doors and front partitions of same, hoist all blinds, open all screens, remove stained glass or frosted windows, and remove boxes or merchandise, and any other matter or thing which may obstruct the view of the interior of such place from the front thereof on all days now fixed by the State law that these places shall be closed, and between the hours of 10:30 p. m., and 5 o'clock a. m., as provided for closed hours in the preceding section.

"Sec. 4. That it shall be unlawful for any druggist, groceryman, wholesale liquor dealer or other person to dispense, sell or give away any spirituous, vinous or malt liquors between the hours of 10:30 o'clock p. m., and 5 o'clock a. m.

"Sec. 5. That for the violation of any of the provisions of any of the foregoing sections the offender, upon conviction of the first offense, shall be fined any amount not less than \$10 nor more than \$15; upon the conviction of the second offense the offender shall be fined in any amount not less than \$50 nor more than \$60; upon conviction of the third offense the offender shall be fined in any amount not less than \$75 nor more than \$100, and in addition thereto the license to sell spirituous, vinous or malt liquors in the city of Paducah issued to such offending person, or firm, shall be forfeited.

"Sec. 6. That all ordinances, or part of ordinances, conflicting with any of the provisions of this ordinance are to the extent of such confliction hereby repealed, and this ordinance shall take effect from and after its passage and approval.

"Adopted by the council November 17, 1902.

"CHAS. REED, President.

"Adopted by the board of aldermen December 4, 1902.

"CHAS. Q. C. LEIGH, President.

"Approved December 19, 1902.

"D. A. YEISER, Mayor."

The first objection to the ordinance is, it is claimed that its title embraces more than one subject, and is, therefore, repugnant to section 3059 of the

statutes, namely: "No ordinance shall embrace more than one subject, and that shall be expressed in the title."

The court is of the opinion that the fact that the subject-matter is detailed in the title more minutely than is necessary does not invalidate the ordinance. (*Allen v. Hall*, 14 Bush, 85.) What this title really means, and the sum of it, is that the ordinance is one "to further regulate the sale of spirituous, vinous and malt liquors in the city of Paducah."

The main objection to the provisions of this ordinance is, it is argued, that it is an improper exercise of the police power of the State.

Among the powers conferred upon the municipalities of cities of the second class is that (subsection 10 of section 8058, Kentucky Statutes): "To restrain, regulate and prohibit the selling or giving away of any spirituous, vinous or malt liquors by any person within the city other than those duly licensed; to forbid and punish the selling or giving away of any spirituous, vinous or malt liquor to any woman, minor or habitual drunkard."

Subsection 28, section 8058: "To impose, enforce and collect fines, forfeitures and penalties for the breach of any provision of this act or any ordinance." * * *

Subsection 25, section 8058: "To pass all such ordinances, not inconsistent with the provisions of this act, or the laws of the State, as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce same by fines and penalties; and any enumeration of subjects and matters herein to be regulated shall not be construed as a limitation upon this general power."

The State has a right to determine what employments or business shall be permitted, and to forbid those which are deemed prejudicial to the public good.

"Under this right it forbids the keeping of gambling houses, and other places where games of chance or skill are played for money; the keeping for sale of indecent books and pictures, and the keeping of houses of prostitution and the resort thereto, and in some States the sale of intoxicating drinks as a beverage. These several kinds of business have a tendency which is injurious and demoralizing; and this tendency is recognized even in States where they are not forbidden, and they are subjected to regulations with a view to reducing their evils to a minimum." (*Cooley's Constitutional Limitations*, 743.)

Under this general power of the State to regulate the traffic in such articles and such employments as are deemed to be deleterious to the public peace, welfare or morals there has been delegated expressly to the municipality of which Paducah is one of the class the power to likewise regulate the same within its borders. The keeping open of saloons and resorts where intoxicating liquors are sold as a beverage, or where tippling is indulged between the hours of 10:30 at night and 5 o'clock in the morning, is a matter that may be regulated by the municipality under the grant of the police power above conferred upon it by the State. Nor is in an unreasonable regulation, or beyond the fair exercise of this power, for the municipality to require not only that these places should be closed between the hours mentioned, but that at such time as they are by the laws of the State or the ordinances of the municipality required to be closed the operators shall, in the front door

and front partitions of their business houses, hoist all blinds, open all screens, remove stained glass or frosted windows, and remove such obstacles as may obstruct the view of the interior from the front thereof.

Under a statute conferring substantially the same powers upon cities of the fourth class, regarding the restraining and punishing of vagrants and prostitutes and whoremongers, it was held by this court (*Dunn v. Commonwealth*, 105 Ky., 884, 20 Ky. Law Rep., 1649) that it was a fair exercise of the police power to prohibit prostitutes from being found on the streets between the hours of 7 o'clock p. m. and 4 o'clock a. m., except in instances of reasonable necessity. Concerning the inhibition of a druggist dispensing spirituous, vinous or malt liquors between the hours of 10:30 p. m. and 5 o'clock a. m., we are of opinion that the ordinance is invalid. The druggist is not permitted to dispense or sell spirituous, vinous or malt liquors at any time by the drink or as a beverage. It must be disposed of only as a medicine, and generally upon prescription. It may be important, and indeed necessary, that this right of the druggist to lawfully dispose of this ware at any time of the day or night should be unrestricted by such interference. Nor is it a reasonable exercise of the police power of the State to prohibit wholesalers of liquors from moving or disposing of their wares at wholesale, not to be drunk on the premises or adjacent premises, at any hour that may best suit the convenience of the parties.

We are also of the opinion that while the State might by statute make the fact that persons during the time when the keeping open of saloons and such places is prohibited are seen to enter or leave them prima facie evidence of the violation of the act (*Piqua v. Zimmerlin*, 35 Ohio State, 507), we are unable to find where the State has delegated to the municipality the right to legislate upon the question of evidence and of its weight and effect before the courts. The provision in the ordinance making such fact prima facie evidence of the violation of the act is invalid. In other respects, except the three specifically mentioned, the court is of opinion that the ordinance is not violative of any term of the Constitution or statute law of this State. As the objectionable features may be eliminated without affecting the remainder of the ordinance, it will not be held invalid in other respects because of their presence.

Appellants, McNulty and Graham, saloon keepers, tendered and offered to file an answer controverting the validity of the ordinance upon the ground that it had not been published as required by section 3045, Kentucky Statutes, which requires such publication before an ordinance shall be in force. If the publication has not been made in fact as required by the statute, then the ordinance would not be enforced. The answer should have been permitted to be filed and the question of fact that it presented investigated. However, there is no limitation as to when the ordinance should be published. We are of opinion that it would become effective from the time that it was, or shall be, published, as provided in that section. A further complaint is made in the answer of McNulty and Graham, that the ordinance "was never recorded into the journal of the proceedings of the board of council of date November 17, 1902, or November 3, 1902, nor was it recorded in the journal of proceedings of the board of aldermen on November 20, 1902,

or December 4, 1902." Those were the dates at which the ordinance had its first and second readings, respectively, and was put upon its passage in the two houses of the city council.

Section 3045, Kentucky Statutes, also provides: "Each board shall keep a correct journal of its proceedings." And section 3068: "The general council shall cause all ordinances, resolutions and by-laws passed by them to be fairly recorded in the journal of proceedings. After the adjournment of any session of either house, all of the original ordinances and all resolutions which may have become laws thereat shall be filed with the auditor, who shall record the same in well-bound books provided for the purpose by the city: Provided; That no ordinance shall be recorded until it shall have become a law."

The averment of the answer upon this subject is merely that the ordinance was not recorded in the journal on the days at which it is said to have been passed by the respective houses of the council. It is not averred that the proceedings of the board were not recorded upon the journals of the two bodies at all. We are of opinion that if the proceedings were enrolled upon the journals, and thereafter approved by the bodies whose action they represented, and signed by their respective presiding officers, that the requirements of the section would have been complied with.

The judgment is reversed and this cause remanded, with directions for proceedings consistent herewith.

GARTH'S GUARDIAN v. TAYLOR, &c.

(Filed June 20, 1908—Not to be reported.)

McMillan & Talbott for appellant.

Brent & Thomas for appellees.

Appeal from Bourbon Circuit Court.

The court delivered the following response modifying the opinion:

It is not necessary for a decision of this case to determine whether the order of the county court was void or voidable, as in either event it was properly set aside. So much of the opinion as holds it void is withdrawn, and no opinion is expressed as to whether the order was void or voidable.

The petition for rehearing is overruled.

OWENSBORO WATERWORKS CO. v. CITY OF OWENSBORO, &c.

(Filed June 20, 1908—Not to be reported.)

Municipal taxation—Penalties—Under section 3332, Kentucky Statutes, the common council of a city of the third class had authority to impose a penalty of 10 per cent. on the amount of taxes past due in addition to interest at 8 per cent. authorized by section 3400, Kentucky Statutes.

Sweeney, Ellis & Sweeney for appellant.

Geo. W. Jolly for appellees.

Appeal from Daviess Circuit Court.

Judge Barker delivered the following response to petition for rehearing:

Our attention has been called in the petition for a rehearing to section 3392 of the Kentucky Statutes, which authorizes the common council of cities of the third class to prescribe such penalties for the dilatory payment of taxes as, in their discretion, may be proper; and to the fact that the record shows that, under the power conferred by this section of the statutes, the common council of Owensboro, which is a city of the third class, have passed ordinances inflicting a penalty for the nonpayment of municipal taxes to the extent of 10 per cent. on the amount due. We see no reason why these ordinances, in so far as they are applicable to the tax bills involved in this case, should not be enforced; and the opinion is modified to the extent of directing, when the case returns to the circuit court, that the ordinances in question, in so far as they may be applicable to the tax bills involved here, shall be enforced by adding the penalty authorized by them, in addition to the 8 per cent. interest authorized by section 8400 of the Kentucky Statutes.

Otherwise, the petition for a rehearing is overruled.

EDWARDS v. LOGAN.

(Filed June 20, 1908.)

W. B. Gaines, John E. DuBose and Edward W. Hines for appellant.

Wm. Cromwell, Wilkins & Lay, D. W. Wright and M. Hazelip for appellee.

Appeal from Edmonson Circuit Court.

Judge O'Rear delivered the following modification of opinion:

The very earnest petition for a rehearing has induced a careful re-examination of the record, and that by other judges than the one who wrote the opinion. As the result, the court concludes to adhere to the former opinion. However, there are two matters, unimportant as affecting the result or any conclusion of law announced, that we desire to correct.

We do not, and did not, intend, by anything said in the opinion respecting the action of the two commissioners who canvassed the returns, to intimate that they were actuated by other than perfectly honest motives, or that their count of the ballots was not absolutely fair. The order appointing the commissioners recites that "this order is made without prejudice to the rights of either party." This the court construed into being a formal exception, though it appears the order was endorsed "O. K." by one of the parties, and by the attorney of the other. It is said this operated as a consent to the order. And perhaps it did.

Lewis Hill and George Parsley were held by the lower court to be illegal voters. But their votes were not deducted because there was not sufficient evidence in the opinion of the trial judge as to how they voted to authorize it. Hill we held to be an illegal voter, but as to Parsley we did not decide

whether or not he was a legal voter. We concluded also that there was not sufficient evidence as to how they voted to warrant the deduction of their votes from those of either candidate. It is due to the trial judge to say that the result of his finding respecting these two votes is sustained. But as neither he nor this court rejected those votes, the result is not affected.

The petition for rehearing is overruled.

Whole court sitting, except Judge Settle.

SWICE'S ADM'X v. MAYSVILLE & BIG SANDY R. R. CO., &c.

(Filed June 20, 1908.)

1. Railroads—Lessor and lessee—Negligence—Removal of actions—Appellant's intestate was employed by the Chesapeake & Ohio Railway Co., and was killed by falling from a narrow elevated platform while engaged in the performance of his duty. This action to recover damages was instituted against the Maysville & Big Sandy R. R. Co., a Kentucky corporation, and the Chesapeake & Ohio Railway Co., a Virginia corporation. The former owned the road and had leased it to the latter. The Chesapeake & Ohio Railway Co. filed its petition to remove the case to the Circuit Court of the United States. The court ordered the removal, and plaintiff appeals. The question involved on this appeal is whether a cause of action is stated against the Maysville & Big Sandy R. R. Co., which is jointly sued with the Chesapeake & Ohio Railway Co. Held—That a servant in the employ of a lessee company, who is injured by the negligence of his employer alone, has no cause of action against the lessor company. The rights and duties of the servant arise from his contract of employment, and the relation of the lessor company to him is not the same as to the rest of the public.

A. E. Cole & Son for appellant.

W. H. Wadsworth and E. L. Worthington for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hobson.

Appellant filed this suit against the Maysville & Big Sandy R. R. Co., a Kentucky corporation, and the Chesapeake & Ohio Ry. Co., a Virginia corporation, to recover for the death of her intestate. The Chesapeake & Ohio Ry. Co. filed its petition to remove the case to the Circuit Court of the United States for the Eastern District of Kentucky. The court ordered the removal, and the plaintiff appeals. The Chesapeake & Ohio Ry. Co. is the lessee of the Maysville & Big Sandy R. R. Co. The intestate was a laborer in the service of the Chesapeake & Ohio Ry. Co., on a coal dock in a coal yard near the city of Maysville, and while walking on a narrow elevated platform adjoining the coal dock he fell therefrom by reason, as alleged, of its not being sufficiently secured. The order of the circuit court removing the case rests on the idea that no cause of action was stated against the Maysville & Big Sandy R. R. Co., and the fact that it was made a defendant to the petition did not affect the right of the real defendant to a removal of the case.

The lease made by the Maysville & Big Sandy R. R. Co. to the Chesa-

peaks & Ohio R. R. Co., and the authority under which it was made, are set out in case of McCabe's Adm'r v. Maysville & Big Sandy R. R. Co., 28 Ky. Law Rep., 2328. It was there held that the lessor company continued liable to the public for the discharge of the obligation imposed on it by law; but whether it would be liable to the servants of the lessee for injuries received by reason of its negligence was a question not decided. The cases holding that the lessor is not liable for injuries to the servants of the lessee from its negligence are referred to in the opinion, and distinguished from the case before the court. The case now presented requires a determination of this question, as Swice was in the employment of the lessee and was injured as alleged by reason of its negligence.

In *Lee v. Southern Pacific R. R. Co.*, 116 Cal., 97, 58 Am. St. Rep., 140, the court, in passing on the question, said: "In all cases where a valid lease is found (or, as in this discussion, where it is assumed) the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of the relationship of employer and employe under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company when it attaches does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employe of the operating company may be regarded as one. Thus in those cases where the injury has resulted to an employe of the operating company by reason of the negligence of a fellow servant, or want of skill and care in the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible."

In a note to this case, 58 Am. St. Rep., 155, after a review of many cases, it is said: "As to employes of a lessee corporation, the weight of authority, whether the lease is authorized or not, is to the effect that they can not recover for injuries received through the negligence of such lessee or its servants or agents. (*Virginia, &c., Ry. Co. v. Washington*, 86 Va. St., 629; *Hukill v. Maysville, &c., R. R. Co.*, 72 Fed. Rep., 745.) The duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road; and it may be asked, does the latter owe him the duty of a master to his servant, or guarantee that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's roadbed, and was inflicted upon one of its own employes by reason of a defect in machinery entirely under its

control, it is difficult to see upon what principle of policy or justice the lessor would be held liable merely because it owned the road. (East Line, &c., Ry. Co. v. Culberson, 72 Tex., 375, 13 Am. St. Rep., 805.)"

When the legislature authorized the Maysville & Big Sandy R. R. Co. to lease its road it necessarily contemplated that the lessee should have servants to run it, for the lessee could not otherwise operate it. And to hold the lessor responsible to these servants would not be to give fair effect to the legislative action. The question is fully discussed also in Virginia Midland R. R. Co. v. Washington, 86 Va., 629, and in that opinion other authorities are collected. It seems to us that the distinction made is sound, and there seems to be little or no conflict of authority on the subject. The other questions discussed were disposed of in Davis' Adm'r v. Chesapeake & Ohio Ry. Co., decided at this term.

The former opinion herein (Swice's Adm'r v. Maysville & Big Sandy R. R. Co., 24 Ky. Law Rep., 1142) is withdrawn and the judgment appealed from is affirmed.

N. Y. LIFE INS. CO. v. JOHNSON'S ADM'R.

(Filed June 20, 1903.)

Humphrey, Burnett & Humphrey for appellant.

Harris & Marshall, O'Neal & O'Neal and W. McJohnston for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

The court delivered the following response to petition for modification:

As no objection seems to have been made to the introduction of the memorandum book, so much of the opinion as relates to the right to introduce the same as evidence is withdrawn, and the question will remain an open one, without this court being committed to any view of it.

LOUISVILLE & NASHVILLE R. R. CO. v. ROBERTS.

(Filed June 20, 1903—Not to be reported.)

C. R. McDowell, R. P. Jacobs and Edward W. Hines for appellant.

Robert Harding, John W. Rawlings and E. V. Puryear for appellee.

Appeal from Boyle Circuit Court.

Judge O'Rear delivered the following response to petition for modification:

The opinion in this case is modified by withdrawing it to the extent that it holds that unless the objecting party offers an instruction presenting correctly the law applicable to the point in question he will not be heard on appeal to complain of an erroneous instruction given by the court on that point. In this case the court is of opinion that the inaccuracy of the instruction in question was not prejudicial to appellant.

The petition for rehearing is overruled.

STUART v. HARMON.

(Filed June 20, 1908—Not to be reported.)

Nelson & Pendleton and Hazelrigg & Chenault for appellant.

J. M. Benton for appellee.

Appeal from Clark Circuit Court.

The court delivered the following modification of opinion:

The opinion is modified to the extent of leaving open the question whether or not Harmon should be charged with the proceeds of the sale to those claiming under the Swan patent.

ILLINOIS CENTRAL R. R. CO. v. WHITWORTH.

(Filed June 20, 1908—Not to be reported.)

Quigley & Quigley and Pirtle & Trabue for appellant.

Hendrick & Miller for appellee.

Appeal from McCracken Circuit Court.

Judge Hobson delivered the following dissenting opinion:

A very delicate duty is imposed on the State courts when called upon to define the jurisdiction of the Federal courts under the acts of congress. Conflicting decisions always unfortunate, are here more than usually to be regretted. The court follows the numerical weight of authority, and seems to rely entirely thereon. But as the question turns simply on the proper construction of the statute, and has not been determined by the United States Supreme Court or Circuit Court of Appeals, it seems to us it should be decided by this court on the construction of the statute itself. The contrary view to that followed by the court is adopted in an able opinion in *Foult v. Graw*, 120 Fed., 156, and in that opinion a number of other cases holding the same view are collected.

The first section of the act of March 3, 1887, as amended by the act of August 18, 1888, confers jurisdiction on the circuit courts of the United States, among other things, of all suits of a civil nature where the matter in controversy, excluding interest and cost, exceeds \$2,000, in which there is "a controversy between citizens of different States." Then this is added: "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

By the second section of the act any civil action "of which the circuit courts of the United States are given original jurisdiction by the preceding section * * * may be removed by the defendant or defendants therein into the circuit court of the United States for the proper district."

By the third section the defendant entitled to remove the case may, at or before the time for answer, file a petition "for the removal of such suit into the circuit court, to be held in the district where such suit is pending, and file therewith a bond, with good and sufficient surety," for his entering a copy of the record in that court at its next term and paying all costs if the case be improperly removed. It is then provided: "And the said copy being entered as aforesaid in said circuit court of the United States, the same shall then proceed in the same manner as if it had been originally commenced in the said circuit court."

The three sections must be read together. By section 1 a civil suit, where the jurisdiction is founded only on the fact that the action is between citizens of different States, can only be brought in the district of the residence of either the plaintiff or the defendant. By section 2 any civil action of which the circuit courts of the United States are given original jurisdiction by the preceding section may be removed by the defendant to the circuit court of the United States for the proper district. By section 3 the removal must be to the circuit court of the United States in the district where the suit is pending, and the case must then proceed in the same manner as if it had been originally brought in that court. When the three sections are thus read together it is apparent that the case can not, by removal, be taken out of the district in which it is brought, and that it stands in the court to which it is removed just as if brought originally in that court. It will also be observed that the only authority in the act for the removal of a case is section 2, and that thereby any civil action of which the circuit courts of the United States are given original jurisdiction by the first section may be removed by the defendant into the circuit court of the United States for the proper district. As by section 3 the removal must, in all cases, be to the circuit court of the district in which the action is pending, the words "proper district" in section 2 must refer to the provisions of section 2, defining the district in which suit may be brought, for there is nothing else in the act to which they can refer. The meaning of sections 1 and 2, so far as here material, is, therefore, that the circuit courts of the United States are given jurisdiction of civil actions involving the required amount in which there is a controversy between citizens of different States; but the suit must be brought in the district of the residence of the plaintiff or defendant; and if brought in a State court, it may be removed to the United States Circuit Court in the district if the suit might have been properly instituted in that court. That this is the meaning of these sections is also shown by the provision of section 3, that the action when removed shall proceed "as if it had been originally commenced in the said circuit court." To hold otherwise is not only to ignore this provision, and to allow the action to proceed on removal, although it could not have proceeded except by consent if begun in that court; but also to omit the words "for the proper district" from section 2, and read it as though it provided that any civil action "of which the circuit courts of the United States are given original jurisdiction by the preceding section * * * may be removed by the defendant or defendants therein into the circuit court of the United States." To do this seems not to give fair effect to the act of congress. The second section was not intended to confer jurisdiction on the Federal court of cases excluded from

their cognizance by the first section. The words "for the proper district" were obviously added to prevent its being so construed, and to show that the right of removal to the Federal court was confined to cases which might properly be brought therein in the first place. This view of the statute was taken by the United States Supreme Court in *Railroad Co. v. Davidson*, 157 U. S., 201, where it said: "The jurisdiction of the circuit court on removal by the defendant under this section is limited to such suits as might have been brought in that court by the plaintiff under the first section."

Previous to the act of 1875 there could be no removal where the plaintiff and defendant were citizens of different States, and neither resided in the State where the suit was brought. (*Shute v. Davis*, Pet. C. C., 431; *Moffat v. Soley*, 3 Paine, 103; *White v. Ferner*, 1 Mason, 520.) That act extended the jurisdiction of the Federal courts, and under it the right to remove this class of cases was upheld; but the words of that act under which this right was maintained are omitted from the present statute, and the record of its passage clearly shows it was aimed to confine the Federal courts in this class of actions to cases between parties, one of whom lived in the district. It is also clear that the purpose of the act was to restrict the jurisdiction then exercised by the Federal courts. The right to removal does not exist except as it is conferred by statute. It is apparent that congress aimed to place the plaintiff and defendant on an equal footing, and the fair effect of the act is denied when this is not done. The plaintiff could not have brought his suit in the court to which the removal was asked as either he nor the defendant resided in that district. He had the right to sue in the State court. The defendant, by removing the case and failing to object to the forum, may waive its right to object to it, but the plaintiff has not waived his right to object and the suit can not be maintained in that court without the consent of both the parties. The fallacy of the entire argument for the defendant is aptly illustrated by the order made in the United States Circuit Court on the action to remand. It was in effect held that the case would be remanded unless the defendant would consent to try the case in that forum. But its consent alone could not confer jurisdiction. This would follow if the plaintiff had sued in that court, but this he declined to do. He had the right to a trial of his case, if tried in the Federal courts, in the Federal courts in the district of his residence. He has not consented to try elsewhere, and by the act of the defendant alone he can not be required to try his case in the United States Circuit Court out of the district of his residence.

The purpose of the statute is to relieve the defendant of the burden of trying his case in the State court at the home of the plaintiff, where, from local reasons, he may be at a disadvantage. But where neither of the parties reside in the State, this does not apply, and no reason exists for removing the case to the Federal court. There is in this event no proper district to which the case may be removed.

I, therefore, dissent from the opinion of the court.

STEPHENSON'S ADM'R v. ILLINOIS CENTRAL R. R. CO., &c.

NICHOLS v. SAME.

(Filed June 20, 1903—Not to be reported.)

Removal of actions—Waiver of objections—These separate appeals, involving the same question, are heard together. These actions to recover damages for personal injuries were brought by appellants against appellee, its engineer and conductor jointly, alleging their negligence in committing the injuries and the residence in this State of the engineer and conductor. Petitions were filed for a removal of the causes to the Federal court on the ground of nonresidence of defendants, and the order of removal was made, and the court overruled a motion to set aside that order. In the Federal court a motion was made to remand, which was overruled. Appellees then answered, which answers appellants then controverted of record, and then dismissed the actions without prejudice. On appeal, Held—That the order of removal was improperly made as there was a failure to deny the residence of one of the employes that was joined in the action, but this error was waived by appellant's conduct in the Federal court.

Taylor, Gilbert & Lucas for appellants.

Wheeler & Hughes, J. M. Dickerson and Pirtle & Trabue for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Nunn.

The questions involved in these cases on this appeal being the same, we dispose of them together.

Appellants in November, 1902, instituted actions in the McCracken Circuit Court against appellees, charging, in substance, that by reason of the negligence of appellees in the management, running and operation of a train of cars, it ran over and killed Lucy Stephenson and maimed Annie Nichols. Appellee, I. C. R. R. Co., at the first term of the court, filed a petition and bond, asking a transfer of the action to the United States Court for the Western District of Kentucky, alleging that it was a corporation organized and existing under the laws of Illinois, and that its office was in Chicago; and alleged "that the controversy was wholly between citizens of different States and could fully be determined without the presence in the action of its co-defendants, N. T. Cole and Robert Bean." Robert Bean filed a like petition and bond, claiming that at the date of filing the petitions of plaintiffs he was, and had been since, a resident of the State of Mississippi, and also asked a transfer. The court allowed their petitions and bonds to be filed, and made an order approving them. Appellants then moved the court to set aside the orders of approval. The court overruled their motions, to which they excepted and prayed an appeal, which was granted. The petitions of appellants charged that the defendants, Robert Bean and A. T. Cole, were engineer and conductor, respectively, of the train of cars which killed Lucy Stephenson and maimed Annie Nichols, and that they both saw the peril of appellants in sufficient time to have stopped the train and saved them from injury, but negligently failed to do so; and also alleged that de-

pendants, Cole and Bean, were then, and at the time of filing their actions, residents of the county of McCracken and State of Kentucky. The appellee company and Bean did not traverse the petitions of appellants as to the residence of defendant, A. T. Cole. For these reasons the court erred in allowing the petitions to be filed and accepting their bonds. (Winston's Adm'r v. I. C. R. R. Co., 23 Ky. Law Rep., 1288; Dixon v. C. & O. R. R. Co., 20 Ky. Law Rep., 1888.) But appellants, by their actions since that error was committed by the lower court, have lost their right to have same corrected. The appellees took a transcript of the record and filed it in the United States Court at Paducah, and appellants appeared in that court and made a motion to have the cases remanded to the State court, which motion was overruled; then appellee filed its answer and the appellants controverted it of record. On their motion the actions were dismissed without prejudice. The appellants, by their conduct, recognized the fact that these cases were transferred, and dismissed them. Consequently they have no actions pending now in either court. But under the authority of Adams Express Co., &c., 23 Ky. Law Rep., 1120, they have the right to bring other actions for the same negligence, if not barred by lapse of time.

For these reasons the motions of appellee to dismiss these appeals are sustained.

KELLEY v. CULVER'S ADM'R, &c.

(Filed June 20, 1908.)

Liens—Lis pendens—Laches—An action was brought by the administrator of C. to settle his estate, and a sale of a part of his land was sought to pay his debts. The heirs at law and certain creditors, including B. and G., were made defendants. A report of claims was made and confirmed without objection, but B. and G. failed to file their claims. Two sales of part of the land were made, and a part of the land was not required to be sold to pay the debts, and appellant purchased a part of the land from the heirs, and two years from the institution of the suit B. and G. brought their action to subject the land to the payment of their debts, alleging that they were entitled to a lien to satisfy same, and that appellant was liable as a lis pendens purchaser. Held—That B. and G., by their laches, are barred from asserting lien against the benefit of a lis pendens. The party asserting it must have not only a suit in which a relief in rem is sought against specific property sufficiently identified by the record, to which the other claimant or title holder must be a party in fact, but he must prosecute his suit with reasonable diligence. The doctrine of lis pendens does not depend at all upon, nor is it affected by, the actual knowledge of the stranger as to the purposes of the suit or the specific facts to be gathered from its record. He is bound, if bound at all, by the sufficiency of the record alone. If a suit is not prosecuted with reasonable diligence, it is the same as if the suit had not been brought. Section 2067, Kentucky Statutes, affecting purchasers for value from the heir at law or devisee, does not require that the purchaser shall have been an innocent purchaser or one without notice of the ancestor's in-

debtedness. It merely requires that he be a purchaser in good faith and for value. If after six months from the death of the ancestor one becomes such a purchaser, it does not matter how much he knows about who were the creditors of the decedent. The only thing that can at that time affect the land as a lien is a valid *lis pendens*.

John S. Kelley and Geo. S. & John A. Fulton for appellant.

Nat W. Halstead for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge O'Rear.

This suit was begun in 1896 by Jacob Culver's administrator to settle his estate. There was not enough personalty to pay the debts of the decedent, and his lands were described in the petition with the view to selling enough of them to pay the indebtedness. The heirs at law, and certain creditors, including appellees, Bowling & Greenwell, were made defendants, and had actual notice of the pendency and nature of the suit. A reference was had to the master commissioner November 14, 1896, to audit the claims against the estate. On the 29th day of May, 1897, the commissioner, who had previously publicly advertised for claimants, filed his report, showing all claims presented. There were no exceptions to this report. The court decreed a sale of enough of the land, after the allotment of a homestead to the widow, to satisfy the claims reported by the commissioner. The land was sold in August, 1897, and reported to the court at the following October term. Upon exceptions filed to the sale by certain of the heirs it was set aside, as was the former judgment of sale for a misprision. A resale was adjudged to pay the indebtedness allowed. That judgment was entered March, 1898. The sale was made under it May 9, 1898, and was confirmed, without exception, May 28, 1898. It was not necessary, as developed by this sale, to sell all the decedent's land to pay the indebtedness presented against the estate. On the 5th day of October, 1898, appellant bought the remainder of the land from the heirs at law, paid them the purchase money, an adequate price therefor, and took their deed of conveyance. On November 11, 1898, a claim for \$117.84 was filed in court on this action by Bowling & Greenwell. They sought to have enough of the remaining land (that sold and conveyed to appellant by the heirs October 5, 1898), sold to satisfy their claim. Appellant resisted the application on the ground that he was an innocent purchaser for value and without notice of Bowling & Greenwell's claim. He also plead their silence and delay in presenting their claim against the estate as an estoppel. The circuit court subjected the land to the payment of the claim. Bowling & Greenwell resided and did business in the county where the land lay, and in which the suit was pending.

It is insisted by appellee that appellant was a *lis pendens* purchaser, and took the title of the heirs subject to the right of the creditors of their ancestor to subject his property in this action to pay his debts. Section 2067, Kentucky Statutes, is relied on. It is: "When the heir or devisee shall

alien, before suit is brought, the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation, to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for a valuable consideration, unless action is instituted within six months after the estate is devised or descended to subject same."

This section was not intended to create a lien upon the lands descended or devised for the payment of the ancestor's debts for a longer period than for six months after an action might have been begun to settle the estate and subject the land. It merely held the estate subject to the decedent's debts until a reasonable time, six months, within which a *lis pendens* lien might be created against it. As to the validity and effect of the *lis pendens*, after it was begun, the section did not change the common law rule. Whether the creditor of the estate was made a party to the petition in the settlement suit or not can not effect the validity of the *lis pendens*, for the suit was brought for his benefit, in part, and by statute (section 482, Civil Code) his merely filing his claim therein made him a party. Then the allegations of the petition favorable to his proceeding became adopted as allegations on his behalf; that he was made a party to the petition in fact, merely brought actual notice to him earlier than the commissioner's advertisement could of the pendency and nature of the suit, of its privileges to him, and of the necessity of his availing himself of it if he would share in the distribution of its assets, and become entitled to all the other benefits that might flow from the *lis pendens*. His rights, and his duties as well, were those of an actual party to the suit.

To obtain the benefits of a *lis pendens* the party asserting it must have not only a suit in which a relief in rem is sought against specific property sufficiently identified by the record, to which the other claimant or title holder must be a party in fact, but he must prosecute his suit with reasonable diligence. Concerning this rule, and the limitations just adverted to, this court, in *Clarkson v. Morgan's Devisees*, 6 B. Mon., 447, said: "It has ever been regarded as a harsh and rigorous rule in its operation upon the rights of bona fide purchasers. The rule was dictated by necessity, as indispensable to the rights of litigants, and as the means of terminating litigation about the matter in contest. But being a hard rule, and operating with great severity, in many instances upon the rights of innocent purchasers, it should never be carried in favor of a complainant asking its enforcement beyond the purpose and reason of its creation. To entitle him to enforce it against bona fide purchasers, he has been held to reasonable diligence in the prosecution of his suit, and should be guilty of no palpable slips for gross irregularities in the management of the same, by which injury may accrue to the rights of others who are not parties." (*Watson v. Wilson*, 2 Dana, 406; *Erhman v. Kendrick*, 1 Met., 146; *Debell v. Foxworthy's Heirs*, 9 Ben Mon., 238.)

The doctrine, as announced in *Clarkson v. Morgan's Devises*, supra, is approved by the text in *Freeman on Judgments*, section 908, and sustained by the authorities there cited. It is founded in part upon the idea that a stranger to a suit should not intermeddle with its subject-matter, except upon pain that he be bound by its conclusion; that he must take notice of its existence, and to that end he is required, at his peril, to exercise due diligence in informing himself as to its existence and nature. It would be an anomalous rule, indeed, that would require diligence of the innocent stranger, while condoning the most culpable negligence of the controlling party to the suit. The doctrine of *lis pendens* does not depend at all upon, nor is it affected by, the actual knowledge of the stranger as to the purposes of the suit, or the specific facts to be gathered from its record. He is bound, if bound at all, by the sufficiency of the record alone. So that if the suit be permitted to abate, or revivor be not had for unreasonable length of time (*Watson v. Wilson*, 2 Dana, 406), or if it is not prosecuted with reasonable diligence, it is the same if the suit had never been brought, so far as the doctrine under discussion is concerned.

In the case at bar the creditors, Bowling & Greenwell, were named and joined in the suit as creditors, and thereby, as well as by the advertisement of the commissioner, were called upon to file their claim as creditors, if they had any, and desired to avail themselves of the benefit of the action. They, without excuse or explanation, failed to do so till after the commissioner had reported all claims ascertainable; till after two judgments of sale had been rendered in the action; till after the last sale to pay the debts of the decedent and the costs of the suit and of the administration had been confirmed; and till after the heirs had sold and conveyed to an innocent purchaser for value the residue of the land, after deducting all that was necessary to discharge the known liabilities of the estate. And not till more than two years after they might and should have set up their claim do they attempt to assert it against this land. By their prolonged silence, under circumstances ordinarily calculated to produce action, they not unreasonably produced the impression upon any one investigating the record that they were not in fact creditors, or that they elected not to avail themselves of the purposes of the suit. It is equivalent to their having said to intending purchasers from the heirs at law: "I have no claim against this land." For silence may be as potent as a disclaimer, under conditions calling for action, as would be a positive declaration.

"No one is permitted to keep silent when he should speak, and thereby mislead another to his injury." (2 Herman on Estoppel, page 1069.)

The admirably clear text of 1 Herman on Estoppel and *Res Adjudicata*, section 6, thus epitomizes this branch of estoppel: "If a man has led others into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show

that state of facts did not exist. A man is not permitted to charge the consequences of his own fault on others, and complain of that which he has himself brought about."

It is very earnestly claimed that the allegations of the petition filed by the administrator brought to settle the estate were enough to put appellant upon notice as to the existence of Bowling & Greenwell's claim, as if his knowing of it affected him in the least. The language of the petition that is referred to is this very vague and indefinite averment: "The defendant, Mary Culver, holds a mortgage on a part of the land hereinafter described, and which was a debt against said decedent, amounting to about \$450, and which is due and unpaid. And the defendants, Bowling & Greenwell, and Dr. James Muir, and said Mary Culver are the only creditors of said decedent known to plaintiff."

It is to be observed that the section of the statute before referred to (section 2087), affecting purchasers for value from the heir at law or devisee, does not require that the purchaser shall have been an "innocent" purchaser, or one without notice of the ancestor's indebtedness. It merely requires that he be a purchaser in good faith and for value. If after the six months mentioned one becomes such purchaser, it does not matter how much he knows about who were the creditors of the decedent. The only thing that can at that time affect the land as a lien is a valid *lis pendens*.

There is no question of fraud involved in this suit. Upon the facts recited we are of the opinion that the pendency of the action ceased to constitute a *lis pendens* lien upon the land by reason of Bowling & Greenwell's negligence in failing for so long to present their claim, and to prosecute it with reasonable diligence.

The judgment of the circuit court is reversed and the cause is remanded for proceedings not inconsistent herewith.

Whole court sitting.

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[Reported by Walter G. Chapman, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

ROBARDS v. JENKINS, &c.

(Filed September 23, 1903—Not to be reported.)

Thos. E. & E. C. Ward for appellant.

F. M. Hutchison for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge O'Rear.

There was no objection to the manner of pleading, nor to the instructions given to the jury. Alleged errors in allowing pleadings and in giving instructions will not be noticed on appeal, when there was no objection to the proceedings in the trial court. Nor did the motion for a new trial rely upon any such error.

Where the evidence is conflicting, as it is in this case the verdict of the jury will not be disturbed on the ground that it is contrary to the evidence. Judgment affirmed with damages.

NATIONAL BUILDING AND LOAN ASSOCIATION v. FRISBIE, &c.

(Filed September 23, 1903—Not to be reported.)

1. Building and loan associations—Borrowing stockholders—Tender—A borrowing stockholder in a building and loan association which is a going concern is chargeable only with his loan and legal interest and should be credited with all payments, whether made as dues, premiums or interest. But after the association has made an assignment for the benefit of its creditors it is too late for a borrowing stockholder to have payments made by him on his stock subscription applied as a credit on his loan.

2. Offer to pay—A mere offer on the part of a borrowing member to pay his indebtedness to the association while it was a going concern was not equivalent to a tender of payment of the debt.

Simon & Bailey for appellant.

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J. I. Blanton for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Chief Justice Burnam.

Appellant, the National Building and Loan Association, instituted this action on May 4th, 1901, against the appellees, O. E. Frisbie, &c., to enforce its mortgage lien upon a house and lot in Cynthiana, made to secure a loan of \$3,000 upon thirty shares of the stock of the company on the 24th of January, 1894. It alleges that its debt and interest aggregate the sum of \$3,855, and credit is given for fifty-seven payments of \$43.50 each, made up of \$18 dues, \$15 interest, and \$10.50 premium, and dividends amounting to \$176.58. These credits aggregate \$2,678.08, but it alleges that it is entitled to deduct therefrom 15 cents per share per month for fifty-seven months, of \$256.50, for expenses, losses and taxes, and \$18 for fines, and interest from the 2d day of November, 1898, the date of the last payment by defendant, up to the institution of this suit, which amounts to \$214.67. It alleges that its expenses during the time defendants were borrowing stockholders in the association was \$89,566.46; and that during this time its losses amounted to \$40,589.07; that the number of its stockholders during this interval varied from one thousand and ninety-two to two thousand and fifty; and that the number of shares of stock in the association was 18,456 for the same time, which was divided into paid-up stock, installment investors' stock, and borrowers' stock; that to meet these losses, expenses and taxes the company charged to each share of installment investors' stock and borrowers' stock 15 cents per share per month, which was necessary to pay their proportion of these various sums. On the 9th day of September, 1901, the defendants filed their answer, in which they admit that they owe appellant \$1,105, which they tendered to the plaintiff and paid into court; and which they allege is the full balance due upon their debt to the plaintiff; that on the 21st day of November, 1898, they tendered this money to the plaintiff and demanded the surrender of their note and the cancellation of the mortgage, and deny liability for the charge of 15 cents per share per month to meet expenses, losses and taxes, or that they were liable for interest on the balance due from the date of their tender in November, 1898. It appears that in November, 1898, the defendant tendered to the local agent of plaintiff \$1,105, the balance due upon the \$3,000 borrowed of the company, with 6 per cent. interest, after deducting the cash payments made thereon, which he refused to receive upon the ground that he was entitled to a larger sum. It also appears that at this date the defendant company was a going concern and that they continued to do business until after the institution of this suit, when by a vote of the stockholders a voluntary liquidation of the association was decided upon.

It has been held in numerous decisions of this court that a borrower in a going concern of this character is only chargeable with his loan and legal interest, and should be credited with all payments, whether made as dues, premiums or interest. (*Safety B. and L. Asso'n v. Eclar*, 20 Ky. Law Rep., 1707; *Redding v. U. S. B. and L. Asso'n*, 20 Ky. Law Rep., 1720; *Globe B. and L. Asso'n v. Spillman*, 23 Ky. Law Rep., 1431; *U. S. B. and L. Asso'n v. Reed*, 23 Ky. Law Rep., 342; *Kleimeir v. C. B. and L. Asso'n*, 24 Ky. Law Rep., 735.) The question to be determined, therefore, is whether appellant was a going concern at the date of the tender of the appellee in November,

1898, of the balance then alleged to be due upon the debt sued on. The evidence of Mr. Phillips, the secretary and treasurer of the board which had the affairs of the association in charge, and the statement of the financial condition of the association published in June, 1897, leave no room to doubt either proposition.

It was held in the case of the United States Building and Loan Association's Ass'ee v. Reed, 23 Ky. Law Rep., 342, that after the association had made an assignment for the benefit of its creditors that it was too late for a borrowing stockholder to have payments made by him on his stock subscription applied as a credit on his loan. And in the Globe Building and Loan Co.'s Ass'ee v. Spillman, 23 Ky. Law Rep., 1431, it was held that a mere offer on the part of a borrowing member to pay her indebtedness to the association while it was a going concern was not equivalent to a tender of payment of the debt; and that after the company had gone into the hands of an assignee it was too late to do so; and that the principal enunciated in the Reed case should prevail. Whilst in this case the appellee made an actual tender of the balance due to the association whilst it was an active going institution, and when sued on the debt, still before the liquidation, she actually paid the balance admitted to be due into court, we are of the opinion that under this showing that appellant does not occupy the position of the U. S. B. and L. Asso'n in the Reed case; and that the lower court properly refused to enter a judgment for any sum in excess of the amount borrowed from appellee, with 6 per cent. interest thereon up to the date of her tender of payment in 1898.

Judgment affirmed.

SHORT v. COMMONWEALTH.

(Filed September 23, 1903—Not to be reported.)

1. Peremptory instructions—Appellant was convicted under an indictment for housebreaking. A reversal is asked because the trial judge refused to peremptorily instruct the jury to find him not guilty. Such an instruction would have been authorized only upon the ground that there was no evidence upon which to base a verdict of conviction.

2. Evidence—The lower court properly refused the peremptory instruction as the evidence introduced by the Commonwealth showed that the shop of Schwaner had been feloniously broken into; that the shoes which at the time were stolen therefrom were found by an officer and were identified by Schwaner as those stolen from his shop; that these shoes were traced to the possession of appellant by the testimony of R., and the appellant's claim to be the owner of them was established by his letter to R., introduced in evidence, which was proved by the latter's uncontradicted statement to be in his handwriting. The facts proved by the Commonwealth, unexplained and uncontradicted as they were before the introduction of appellant's evidence, made it necessary for appellant to account for his possession of the stolen goods, and to show that such possession was rightful, or at least not inconsistent with his innocence.

3. Conflicting evidence—Verdict of jury—Where the evidence produced upon a trial is conflicting, and it can not be said that it furnishes no proof whatever of the defendant's guilt, this court will not interfere with the verdict of the jury.

4. Instructions—The lower court did not err in failing to instruct the jury that they could not convict on the testimony of an accomplice without other evidence to connect the accused with the commission of the crime charged, where there is no evidence in the record upon which to base such an instruction.

Lev. Russell for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Settle.

Under an indictment for housebreaking the appellant was convicted in the Marion Circuit Court, and his punishment fixed at a year's confinement in the penitentiary.

A reversal is asked by his counsel because of the refusal of the trial judge to peremptorily instruct the jury to find him not guilty. As such an instruction would have been authorized only upon the ground that there was no evidence upon which to base a verdict of conviction, it will be necessary to consider the evidence in order that we may determine whether or not the peremptory instruction should have been given.

It appears from the evidence introduced by the Commonwealth that one C. Schwaner is the proprietor of a shoe shop in the city of Lebanon which was, on the night of the 27th or 28th of December, 1902, feloniously broken into by some person or persons who took therefrom three pairs of shoes. Schwaner promptly reported the injury to his shop and the loss of his shoes to J. A. Thompson, chief of police, who, in March following, ascertained from some colored people found in possession of a pair of the stolen shoes that they had bought them of a negro known as Napoleon Rollins; he then saw Rollins and found a pair of the missing shoes on his feet. Rollins admitted that he had sold two pairs of shoes for appellant, and that he had retained those on his feet, which he claimed to have gotten from appellant, to pay him for his service in selling the others. Apparently, without suggestion from the officer, Rollins made the necessary affidavit, and procured a warrant for the immediate arrest of the appellant, charging him with the crime of feloniously breaking into Schwaner's shop and stealing the shoes.

Upon the trial the three pairs of shoes found by the officers were produced in court and fully identified by Schwaner and Osborne as the same stolen from the former's shop. Rollins was also introduced by the Commonwealth, and testified that in December, 1902, he and the appellant were in the employ of the L. & N. R. R. Co., at Lebanon, and boarded with George Miles near the section house; that he and appellant went to bed together at the house of Miles, and soon thereafter some one called appellant, who got up and went down stairs, and after remaining a short time, returned to the room where they slept and again went to bed; that appellant got the shoes down stairs, but there was no light in the room where they slept and Rollins did not see the shoes until the next morning; that appellant afterward went to Louisville and later wrote Rollins from that place, requesting him to sell the shoes, and that two pairs of the shoes were sold by Rollins and the third pair retained for his use, and to compensate him for selling the others.

The letter from appellant to Rollins requesting him to sell the shoes was introduced in evidence and proved by Rollins to be in the handwriting of appellant. On cross-examination Rollins further testified that appellant upon his return to the room where they slept remained therein all night; that he remained down stairs about ten or fifteen minutes when called out, and that it was three-fourths of a mile from their boarding house to Schwaner's shop.

Upon proof of the facts thus far stated the Commonwealth rested its case and counsel for appellant then asked for the peremptory instruction refused by the court.

We think the lower court properly refused the peremptory instruction as the evidence introduced by the Commonwealth showed that the shop of Schwaner had been feloniously broken into; that the shoes were at the time stolen therefrom; that the shoes found by the officer were identified by Schwaner as those stolen from his shop; that these shoes were traced to the possession of appellant by the testimony of Rollins, and the appellant's claim to be the owner of them was established by his letter to Rollins, introduced in evidence, which was proved by the latter's uncontradicted statement to be in his handwriting.

It is contended by counsel for appellant that the force of the Commonwealth's evidence is broken by the admission of Rollins that appellant, when called from the room in which they were sleeping, only remained out about ten or fifteen minutes, and if so that it was physically impossible for him to have gone to Schwaner's shop, three-fourths of a mile away, broken into it, and returned within that time. The argument is not without weight, but is by no means conclusive, in view of the claim from appellant, furnished by the letter, that the shoes were his; besides, it was not positively stated by Rollins that appellant on the night he got the shoes remained out of the room only ten or fifteen minutes; his statement was that he was out "about" that time, which shows the uncertainty of the witness' knowledge and recollection on that point, and simply means that appellant might have been less than ten minutes out of the room, or as much as twenty or thirty minutes, or even longer. It is not to the witness' discredit that he was unable to be more definite considering the fact that he was in bed, without a light in the room, and probably asleep, or in a sleepy condition, with nothing to call his attention to the passing of time. At any rate it can not be said that the facts proved by the Commonwealth, unexplained and uncontradicted as they were before the introduction of appellant's evidence, furnished no proof whatever of his guilt. Upon the contrary they made it necessary for appellant to account for his possession of the stolen goods, and to show that such possession was rightful, or at least not inconsistent with his innocence.

In testifying in his own behalf appellant admitted every material fact testified to by Rollins; that he was in possession of the stolen shoes; that he got them at the time Rollins said he left their bed room, and that he wrote the letter identified by Rollins, in which the latter was requested to sell the shoes for him. He further testified, however, that he bought the shoes of a negro, Logan Penick, who claimed to have purchased them from another negro, Jim Booker, a shoemaker, who was selling some of his effects. Miles and wife, with whom appellant and Rollins boarded, corroborated appellant

as to the purchase of the shoes from Penick, and testified that appellant borrowed of Miles \$1.50 with which to pay Penick for them. Appellant, however, testified that he got the shoes of Penick at night, on Saturday, the 18th, or Sunday, the 19th of December, 1902, which date he claimed to have been enabled to fix because it was just after the railroad pay train was at Lebanon. He was also corroborated by Miles and wife as to this date. Rollins was unable to give the date of appellant's leaving their sleeping room, but said it was the last of December. Schwaner said his shop was broken into and the shoes stolen on the night of Saturday, the 27th, or Sunday, the 28th of December, 1902, because he knew it was Saturday or Sunday following Christmas, and Thompson, chief of police, was positive in his recollection that he received information of the crime on Monday, December 29, 1902.

The jailer of Marion county, in rebuttal for the Commonwealth, testified from the jail register, which was likewise introduced in evidence, that Logan Penick was committed to his custody under charge of housebreaking, on December 22, 1902, and that he remained in jail until sent a few days later to the penitentiary for a term of five years. The purpose of this evidence was to contradict appellant as to getting the shoes of Penick, for if the jury accepted the statements of Schwaner and Thompson as to the date of the breaking into the shoe shop and the stealing of the shoes, it would follow that appellant could not have gotten the shoes of Penick, who was then in jail.

We have gone at length into a consideration of the evidence, to show that at no stage of the trial would a peremptory instruction have been proper. Upon the contrary, it is manifest that the facts were properly submitted to the jury under instructions that correctly presented the law of the case, and while the evidence was conflicting, it can not be said that it furnished no proof whatever of the appellant's guilt. Under such circumstances it is not the province of this court to interfere with the verdict of the jury.

We have also considered the further contention made by counsel for appellant, that the witness, Rollins, should be treated as an accomplice of appellant if the latter is to be deemed guilty; and if so, that the lower court erred in failing to instruct the jury that they could not convict on the testimony of an accomplice without other evidence to connect the accused with the commission of the crime charged. We are unable to find any evidence in the record upon which to base such an instruction. While it may be said that in receiving and selling the shoes at the request of appellant the circumstances ought to have apprised Rollins that appellant had not come by them honestly, we do not think it appears from the evidence that he in fact knew of the shoes having been stolen. Upon the contrary the appellant himself exonerates him from any wrongdoing in the entire transaction, for neither in his testimony upon the trial, nor in the letter which he wrote him in regard to the shoes, does he intimate that Rollins has any interest in the shoes, any connection with their theft, or any knowledge that they had been stolen.

Judgment affirmed.

LAWRENCE. &c. v. COMMONWEALTH.

(Filed September 28, 1908—Not to be reported.)

Bail bonds—Forfeiture—Pleading—The endorsement of the magistrate is sufficient evidence of the forfeiture of the bond. (Criminal Code, section 58.) It was not necessary to enter the forfeiture on the date fixed in the bond for appearance, if the accused then failed to appear. An entry at a subsequent date is good. Although the accused may have appeared on the day named in the bond, yet if he failed to deliver himself into custody upon the order of the court, on the following day, it was a breach of the undertakings of the bond. No pleading is required of the Commonwealth in proceedings upon forfeited bail bonds.

Campbell & Campbell for appellants.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant and another executed a joint bond for their appearance before the examining court, under a felony charge. The bond was forfeited as to appellant for his nonappearance. The surety claims that the bond was void. Under the Criminal Code (section 94, subsection 3) no pleading is required of the Commonwealth in proceedings upon forfeited bail bonds. The record showing nothing to the contrary, we feel warranted in assuming that the charge was joint. In that event the bail bond may be joint or may be several.

The bond undertook that the accused would make their personal appearance in the examining court on December 29, 1902, "and will at all times render themselves amenable to the orders and process of said court, in the prosecution of said charge, and if convicted, will render themselves in execution thereof," etc. The bond was endorsed by the judge forfeited on December 30. Under section 58, Criminal Code, the endorsement of the magistrate is made "sufficient evidence of the forfeiture of the bond." Although the accused may have appeared on the 29th of December, yet if he failed to deliver himself into custody upon the order of the court on the following day it was a breach of the undertakings of the bond. Nor was the magistrate required to enter the forfeiture on the 29th if the accused then failed to appear. An entry at a subsequent date is equally good. There is no reason shown why the forfeiture should not be enforced.

Judgment affirmed, with damages.

MEREDITH & DUVALL v. COMMONWEALTH.

(Filed September 28, 1908—Not to be reported.)

Appeals—Bill of exceptions—From an order of the county court granting a license to sell liquors as distillers, in quantities of not less than a quart, an appeal to the circuit court must be taken on a bill of exceptions. The circuit court can not hear the case de novo.

Wortham & Clark for appellants.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Nunn.

The appellants, as distillers, on a contest before the county court, obtained a license to sell liquors as distillers, in quantities of not less than a quart. The county attorney appealed from the order of the county court granting the license, but did not take the appeal on a bill of exceptions. The appellants moved to dismiss the appeal in the circuit for that reason. The court overruled the motion and heard the case de novo and overruled the action of the county court, and directed that the order granting the license be rescinded and the appellants have appealed from that order.

There are several questions raised on this appeal, but it is only necessary to notice the one referred to, and that is the failure to file the bill of exceptions in the circuit court. This question was settled by this court on June 5 of this year in the case of Hensley v. Metcalfe County Court, in an opinion rendered by Judge Hobson (25 Ky. Law Rep., 204).

The court in discussing sections 4211 and 4212 of the Kentucky Statutes used this language: "In *Thompson v. Koch*, 98 Ky., 400, it was held, where an appeal is taken to the circuit court from the license board under section 3083, the circuit court must hear the case not de novo, but on a bill of exceptions, as the board had a wide discretion, and if the case is heard de novo in the circuit court the municipality will be deprived of the judgment of the official selected by law to pass upon such questions, as in that event a different state of facts might be shown in the circuit court from what was shown on the original hearing. The same rule must be followed in appeals under section 4211, and is indicated by the use of the word 'reversed' in that section, which shows that the legislature contemplated that the circuit court should not grant or refuse the license, but simply affirm or reverse the judgment of the county court, and the circuit court could not properly pass upon the propriety of the county court's judgment unless it heard the case on the same evidence."

This case concludes the case at bar, and it is, therefore, reversed for further proceedings consistent herewith.

ZIMMERMAN, &c. v. McMASTERS, &c.

(Filed September 24, 1908—Not to be reported.)

1. Fraud—It appearing from the evidence that the alleged mortgage lien of appellants upon the property in controversy was a part of a fraudulent scheme to cover up the property, and thereby defraud the creditors of one of them, such mortgage will not be sustained as against the title of a purchaser of the property at execution sale.

2. Same—Accounting of rents and profits—The purchaser at execution sale will not be required to account to the execution defendants for rents and profits, the mortgage being held invalid, and he having, therefore, acquired title under his purchase after the expiration of the redemption period.

D. G. Park for appellants.

Robbins & Thomas for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barker.

This action involves a contest between the appellant, A. Zimmerman, who claims a lien on a tract of about ninety acres of land situated in Graves county, Kentucky, and the appellee, L. A. McMasters, who claims to own it by purchase at judicial sale. The facts are these:

Mrs. H. Z. Walker, who had been empowered to trade as a feme sole, owned the land in question. In an action against her by one of her creditors, Ed. W. Avey, a judgment was awarded him for \$191.40, in the Graves Circuit Court. On the 18th day of December, 1895, an execution was issued on this judgment, which, coming to the hands of the sheriff, was levied upon the land, and on the first day of the January term, 1896, it was sold at public sale by the sheriff, and purchased by L. A. McMasters.

The judgment debtor having failed to redeem the property within the time prescribed by law, a deed was made to the purchaser, and he was placed in possession by the sheriff. After appellee McMasters was thus placed in possession of the property in controversy, the appellant, Mrs. A. Zimmerman, who is the mother of the judgment debtor, H. Z. Walker, instituted this action in the Graves Circuit Court against H. Z. Walker and her husband, C. N. Walker, and the appellant, L. A. McMasters, setting up the fact that on the 23d day of July, 1895, H. Z. Walker and C. N. Walker, her husband, had executed and delivered to Ben L. Halle their three several promissory notes, aggregating the sum of \$700, bearing 10 per cent. interest, and to secure the payment of which the makers executed, acknowledged and delivered a mortgage on the land in controversy. These notes, she alleged, had been for value transferred and assigned to her by Ben. L. Halle, and that she was the owner, and entitled to their proceeds; that the notes were due, owing and unpaid, and she prayed for a judgment for her debt, and the enforcement of her lien.

It is alleged in the petition that L. A. McMasters had purchased the land subject to the mortgage of appellant, and that he was in possession, with full notice of her lien.

Appellee, L. A. McMasters, answered, pleading his purchase at judicial sale, in the case of Avey v. H. Z. Walker, and that there was no consideration for the execution or delivery of the notes and mortgage by Walker and wife to Ben L. Halle; that this was a mere fraudulent scheme to cover up the property of H. Z. Walker from her creditors; that the notes were transferred by Halle to appellant, who was the mother of H. Z. Walker, in pursuance of this fraudulent scheme, and that she had been holding them to cover up the property, for the protection and benefit of her daughter, and praying that the notes and mortgage be cancelled; that his title to the land be quieted, and also, if it should turn out upon investigation that appellant's lien was valid, that he be adjudged a lien upon the land bid in by him for the amount of his debt, with interest.

H. Z. Walker answered, setting up a counterclaim against L. A. McMasters, stating that he had only a lien upon her land, it having been incumbered when he purchased it at judicial sale; that he had wrongfully taken possession of the property, and the use and occupancy of it had more than paid his debt.

The conclusion we have reached as to the validity of the lien of Mrs. Zim-

merman will make it unnecessary to further notice the claim of Mrs. Walker for an accounting of the rents. The allegations of fraud and want of consideration were placed in issue by proper pleading of Mrs. Zimmerman, and this, in our opinion, constitutes the real question in this case. The evidence shows that C. N. Walker approached Ben L. Haile for the purpose of obtaining his assistance to cover up his wife's property, and in order to accomplish this he and his wife executed the three notes and mortgage in question, stating that they desired to obtain time in which to pay their debts. Haile says, and in this he is not contradicted, that he agreed to accommodate the Walkers, and accepted from them the three notes and mortgage, but he immediately indorsed or assigned the notes without recourse, and gave them back to the payor, C. N. Walker; that he did not lend the Walkers any money, and that they owed him nothing; that he received nothing for the assignment of the notes, and that the whole transaction was without consideration, and made for the sole purpose of accommodating the Walkers in their scheme to defeat their creditors.

Mrs. Zimmerman, however, stated that she, in good faith, loaned C. N. Walker the sum of \$510, and took his note therefor, to secure the payment of which he deposited with her the three Haile notes as collateral security; that she had no notice of the want of consideration for the notes, or of the fraudulent intent of the Walkers.

Upon the trial of the case the chancellor dismissed the petition of Mrs. Zimmerman and the counterclaim of Mrs. Walker; from which judgment they have appealed.

It is true that appellant Zimmerman testifies that she loaned C. N. Walker \$510, for which he executed his promissory note, and as this was a transaction between mother-in-law and son-in-law, with no witnesses thereto, it can not be controverted by direct and positive testimony; but it is established that there was no consideration for the original transaction between Haile and the Walkers; that this was an avowed scheme to defeat the creditors of H. Z. Walker; that in pursuance of this arrangement Ben L. Haile immediately assigned the notes without recourse, and delivered them back to the maker, C. N. Walker; that there was no transaction between Haile and Mrs. Zimmerman; she took the notes from her son-in-law.

The possession of the notes by the maker raised the presumption that they had been paid off and discharged, and this fact was sufficient to put Mrs. Zimmerman upon inquiry as to why the maker had possession of them. In her testimony she states that she paid over the money in cash, at her house. Women do not usually keep such large sums at their homes, and the contention that the loan was thus made bears upon its face strong evidence of fraud.

Mrs. Zimmerman's evidence shows that she had no transaction with Haile, and that the \$510, which she claims to have loaned, was not given to him to purchase the notes, but was given to her son-in-law for the avowed purpose of paying his debts. In her petition, however, she alleges that she purchased the notes from Haile for value, and that she owned them and was entitled to their proceeds. In her evidence she shows the notes were deposited as collateral security for another debt—a very different transaction from that set up in the petition. All of this conduces to the conclusion that the assignment of the notes to Mrs. Zimmerman was a part of the scheme of fraud

beginning with the execution of the notes to Halle, and of this she had notice.

But without discussing the details of this evidence further, it is sufficient to say that the chancellor evidently reached the conclusion that the transaction between Mrs. Zimmerman and her son-in-law was fraudulent and void, and that in this conclusion we think the evidence warrants our concurrence.

The claim for an accounting of the rents and profits of the land, set up in her counterclaim by H. Z. Walker, is based upon the supposition that the land was encumbered property when levied on and sold by the sheriff, and that the purchaser only acquired a lien for his purchase money, without a right to the possession, but the sweeping away of the lien claimed by Mrs. Zimmerman as fraudulent and void undermines his position. The land being unencumbered, the purchaser obtained a title to his purchase, which, not being redeemed in the statutory time, warranted the deed of the sheriff and the taking possession thereunder.

Wherefore, the judgment is affirmed.

DOORES v. COMMONWEALTH.

(Filed September 24, 1903—Not to be reported.)

1. Liquor selling—Admission of testimony—A defendant, charged with selling liquor in violation of the local option law, was not prejudiced by the refusal of the court to allow a witness to answer the question whether or not the defendant had been sent a written order for the liquor to his place of residence, which was outside of the local option county, where the defendant himself had made no claim of having received any order other than a verbal one while he was in the local option county.

2. Same—Agency—It appearing from the testimony that the sale of the liquor was solicited by another on behalf of and in the presence of defendant, the agent having no interest in the sale, it was proper for the court to submit to the jury the question as to whether the defendant acted by himself or through his authorized agent.

S. M. Payton for appellant.

C. J. Pratt and M. R. Todd for appellees.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Paynter.

The local option law prevails in Hart county. The appellant is a wholesale liquor dealer at Bowling Green, Warren county, Kentucky, and while appellant was in Munfordsville, Hart county, the arrangement or agreement was made to sell one Jagers a jug of liquor, to be shipped to him by the defendant through one Charles Jones. In the presence of the appellant Jones asked Jagers if he did not want a jug of liquor, telling him if he did that it could be shipped with other liquors, and thus save the expense to him and others who were to receive liquor by the same shipment. From the testimony it appears that Jagers wanted more expensive liquor than the others, and that a tag was to be placed upon the jug with his name upon it. Afterwards the appellant shipped the liquor according to the arrangement to Jones for Jagers. Jagers received it and subsequently paid appellant for it. It was agreed that Jagers was to be charged by appellant with

the price of the liquor. The record fails to show that Jones had any personal interest in the transaction except to save express or freight charges upon the liquors which he was to receive for himself.

The appellant seeks a reversal because it is claimed the court erred in rejecting competent testimony, and in giving an erroneous instruction to the jury.

While Jagers was on the stand the defendant's attorney asked him the following question: "You do not know whether Charles Jones sent a written order to Bowling Green?" The court refused to allow witness to answer. If the witness had answered the question as counsel suggested he wanted it answered the answer would not show that such an order was sent. If the court erred it was not prejudicial. The appellant was on the witness stand and did not claim that he had received a written order at Bowling Green to ship the liquor to Jagers. He does not claim that he had any order for the liquor other than that which he received in Hart county. On the contrary, the inference to be drawn from his testimony is that he had no other order. The following question and answer appear on the cross-examination:

"Q. How come you to charge upon your books the price of that whisky against Tom Jagers."

"A. Why, Mr. Jones told me to send a gallon and charge it to Jagers."

In instruction No. 2 the court submitted to the jury the question as to whether appellant, "by himself or by his authorized agent, agreed in Hart county to ship the liquors to T. J. Jagers." It is urged that there was no evidence upon which to base the instruction upon the question as to whether defendant sold by an agent, etc. We think that there was an abundance of evidence upon this question. As we have stated, Jones was not shown to have had any personal interest in the sale; that it was shipped to him to be delivered to Jagers. Jones solicited the order in the presence of the appellant for him. The jury was bound to reach the conclusion that Jones was acting for the appellant.

The judgment is affirmed.

RIORDAN v. COMMONWEALTH.

(Filed September 24, 1903—Not to be reported.)

This court will not consider an error done to the rights of a defendant during the progress of the trial, which was not excepted to, but appeared for the first time in the motion for a new trial. (Criminal Code, sections 280-1.)

John G. Craddock for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Barker.

The appellant was indicted by the grand jury of Hart county, charged with the offense of selling, by retail, spirituous liquor in Hart county, without a license, in violation of the local option law in force in the county.

Upon the trial of the case he was found guilty, and his punishment fixed by a fine of \$60 and imprisonment for ten days in the county jail. Judgment having been entered in pursuance of this verdict, and appellant's motion for a new trial having been overruled, the case is here on appeal.

The only error complained of is that the judge, upon the trial of the case, instructed the jury orally. No exception was taken by appellant to the action of the court in orally instructing the jury, and this error appears for the first time in the motion for a new trial.

In construing sections 280 and 281 of the Criminal Code this court has frequently decided that it would not consider an error done to the rights of a defendant during the progress of the trial, which was not excepted to, but appeared for the first time in the motion for a new trial. (*Fuqua v. Commonwealth*, 24 Ky. Law Rep., 2204, and the cases therein collated.)

As the error complained of in this case was not excepted to at the time it was made, and appears for the first time on motion for a new trial, it can not be considered under the rule as stated.

Wherefore, the judgment is affirmed.

FRAZIER v. COMMONWEALTH.

(Filed September 24, 1903—Not to be reported.)

One charged with crime can not be convicted alone upon the testimony of an accomplice. (Criminal Code, section 241.)

E. L. England for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barker.

The appellant, Harrell Frazier, was jointly indicted with Richard Ferrel, by the grand jury of Marion county, Kentucky, charged with the offense of breaking into an outhouse belonging to L. A. Spaulding, and used in connection with his dwelling house in Marion county, with the fraudulent intention to steal, and stealing, therefrom a lot of chickens, being property of value.

When the case was called for trial appellant demanded, and was awarded, a separate trial. The jury found him guilty, as charged, and fixed his punishment at confinement in the penitentiary for two years. Of this he is now complaining.

On the trial the evidence showed clearly that the chicken house of L. A. Spaulding was broken into, and many chickens stolen therefrom, but the only testimony which at all tended to connect appellant with the crime of which he stood charged was the following statement made by Richard Ferrel, as testified to by several witnesses: "At Mattie Bowling's, on the Wednesday night the chickens were said to have been stolen, Richard Ferrel said: 'Me and Flunkey (meaning Hassell Frazier) are going out to get some 'light steppers' (meaning chickens), and when they came back Richard was laughing, and some one asked him what he was laughing about, and he said: 'We went to one house and there was only one setting hen there, and

we went to another house and an old rooster went coo, coo, and Flunkey started to run. I told him Mr. Spaulding had no gun to hurt him.' "

The bill of exceptions does not show that appellant was present when Ferrel made the foregoing statement concerning his connection with the breaking of L. A. Spaulding's chicken house, and, therefore, it was merely hearsay, and incompetent. But even if Richard Ferrel had gone on the stand, and under oath made this statement concerning appellant, which the witnesses say he made to them, he could not have been convicted alone upon this testimony. Richard Ferrel was appellant's accomplice, and one charged with crime can not be convicted alone upon the testimony of an accomplice. Section 241 of the Criminal Code provides: "A conviction can not be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show that the offense was committed and the circumstances thereof."

There was no evidence upon the trial of this case tending to corroborate the statement said to have been made by Richard Ferrel, and the court should have sustained appellant's motion for a peremptory instruction to the jury to find him "not guilty." This conclusion renders it unnecessary that we should discuss the question as to whether or not the trial court erred in refusing the instructions offered by appellant at the close of the testimony, and after his motion for a peremptory instruction had been overruled.

The judgment is reversed for proceedings consistent with this opinion.

SLUSHER v. FIRST NATIONAL BANK OF LONDON.

(Filed September 24, 1903—Not to be reported.)

Title to real estate—The title to real estate having been taken to two parties jointly, and it appearing from the testimony that each claimed an interest in it, the claim of one of them, that he was entitled to the whole of it under a parol agreement with the other, must fall before the lien of a third party, to whom it had been mortgaged by the other to secure a debt, and the one-half interest of that one is subject to the mortgage.

N. J. Weller for appellant.

D. B. Logan for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 2d day of December, 1898, J. F. Slusher executed his two promissory notes to R. C. Ford for \$1,500 each, due respectively in four and six months, with interest from date, the payment of which was secured by a mortgage upon several tracts of land situated in Bell and Leslie counties. These notes were assigned for value to appellee, the First National Bank of London. Not being paid at maturity, the bank instituted this suit on the 15th day of April, 1899, against both Ford and Slusher and asked an enforcement of their mortgage lien and a sale of the various tracts of land made to secure their payment. The appellant, R. C. Slusher, upon his own petition, was made a party to this proceeding and filed his answer, which he made a cross

petition against the defendant, J. F. Slusher, in which he alleged that on the 17th day of March, 1890, Elizabeth Hutchings and James B. Hutchings, her husband, had sold and conveyed a tract of about 200 acres of land located on Red Bird creek, in Bell county, to the defendant, J. F. Slusher, and himself jointly, in consideration of \$500, which was paid by J. F. Slusher; that at the date of this purchase he had a contemporaneous parol agreement with J. F. Slusher, that when he had been paid back the \$500 advanced by him the entire tract of land should belong to appellant; that this tract was included in the mortgage made by J. F. Slusher to R. C. Ford; that long prior to this transfer he had paid back to J. F. Slusher the whole of the \$500, and that he was under the agreement entitled to a deed for J. F. Slusher's interest and asked that the court might so adjudge. The averments of the answer and cross petition of Robert Slusher were controverted by reply of the First National Bank, and it further alleged that when their assignor, R. C. Ford, loaned the money for which the notes were executed to J. F. Slusher and took the mortgage to secure their payment that he had no notice of the alleged parol agreement, or that appellant claimed any interest on the land. The evidence upon the issues of fact raised by the pleadings is conflicting.

The testimony of the appellant supports the averments of his petition, but he also took the depositions of Harry Todd and George M. Knuckles. Todd testifies that in 1896 he cut most of the timber upon this tract of land under a contract with appellant, who lived in the neighborhood; that J. F. Slusher at that time lived in the city of Middlesborough, and that he saw him with regard to this timber, and he claimed an interest therein, and was present when it was counted and collected the money. George M. Knuckles, a witness for appellant, also testified that he was a cousin of both Robert and J. F. Slusher; that he knew the land at the time it was purchased from Hutchings in 1890; and that he understood both from Robert and J. F. Slusher; that J. F. Slusher paid the whole of the purchase money, which was to be returned to him from the proceeds of the land; and that the profits of the investment were to be equally divided between J. F. and Robert Slusher. The trial court adjudged appellant to be the owner of one-half interest in this tract of land, and that the other half belonged to J. F. Slusher, and that appellee was entitled to subject J. F. Slusher's one-half interest to the payment of their debt.

Whilst there is testimony in the record conducing to show that J. F. Slusher had been paid the \$500 advanced by him from the proceeds of timber sold, we are of the opinion that the decided preponderance of the testimony, when coupled with the fact that the title to the land was taken to the parties jointly, support the judgment of the chancellor.

For reasons indicated the judgment is affirmed.

BARCLAY v. COMMONWEALTH.

(Filed September 24, 1903.)

1. Mock marriages—Accessories before the fact—Sufficiency of indictment—Appellant was indicted for procuring a mock marriage between him and C. Section 1128, Kentucky Statutes, provides: "In all felonies accessories

before the fact shall be liable to the same punishment as principals, and may be prosecuted jointly with principals or severally, though the principals be not taken or tried unless otherwise provided in this chapter." The indictment is found under section 2110, Kentucky Statutes: "If any person not authorized shall solemnize a marriage under pretense of having authority, * * * he shall be confined in the penitentiary not exceeding three years." The indictment follows the statute. It was not necessary to aver a conspiracy between appellant and the person performing the ceremony to seduce C. under a mock marriage according to the common precedents, for the statute has created a new offense. Nor was it essential to set out what pretense of authority was made by the person who performed the ceremony. The indictment was sufficient.

2. Evidence—When wife competent witness against her husband—Section 2097, Kentucky Statutes, declares a marriage void when not solemnized or contracted in the presence of an authorized person or society. But section 2180 provides: "No marriage solemnized before any person professing to have authority therefor shall be invalid for the want of such authority, if it is consummated with the belief of the parties, or of either of them, that he had authority and that they have been lawfully married." The marriage was consummated with the belief on C.'s part that they had been legally married. Though she was appellant's wife she could testify against him, as the case falls within the well-settled exceptions to the rule that a wife can not testify against her husband. (1 Greenleaf on Evidence, section 348.)

Samuel H. Crossland for appellant.

Clifton J. Pratt, H. J. Moorman and M. R. Todd for appellee.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Hobson.

The first question made in this case is as to the sufficiency of the indictment. The charging part of the indictment is in these words: "In the said county of Fulton on the 1st day of September, 1902, and before the finding of this indictment, some man whose name to this grand jury is unknown, did, without authority, solemnize a marriage between Charley Barclay and Adeline Chandler, under pretense of having authority to do so, and that Charley Barclay at the time being present, and well knowing that said man, whose name to this grand jury is unknown, did not have authority to solemnize a marriage, did counsel, advise, procure, persuade, command, cause, hire, aid and abet the said man, whose name to this grand jury is unknown, and who was not authorized to do so, to solemnize a marriage between him, the said Charley Barclay and Adeline Chandler, under pretense of having authority, against the peace and dignity of the Commonwealth of Kentucky."

The indictment was found under section 2110, Kentucky Statutes: "If any person not authorized shall solemnize a marriage under pretense of having authority, * * * he shall be confined in the penitentiary not exceeding three years."

Section 1128, Kentucky Statutes, also provides: "In all felonies accessories before the fact shall be liable to the same punishment as principals and may be prosecuted jointly with principals or severally, though the principals be not taken or tried unless otherwise provided in this chapter."

The indictment follows the statute. Ordinarily an indictment for a statutory offense is sufficient if it follows the statute. It was not necessary to

state in the indictment a conspiracy between Barclay and the person performing the ceremony to seduce the woman under a mock marriage according to the common law precedents, for the statute has created a new offense. Nor was it essential to set out what pretense of authority was made by the person who performed the ceremony. To require this would be to add to the words of the statute and to make a conviction impossible in many cases provided for by the statute. We, therefore, conclude that the indictment was sufficient.

The court allowed Adeline Chandler to testify against appellant on the trial, and of this he complains also. Section 2097, Kentucky Statutes, declares a marriage void when not solemnized or contracted in the presence of an authorized person or society. But section 2102 provides: "No marriage solemnized before any person professing to have authority therefor shall be invalid for the want of such authority, if it is consummated with the belief of the parties, or either of them, that he had authority and that they have been lawfully married."

It was shown on the trial that after the pretended marriage appellant took the woman into the State of Tennessee and there lived with her a week as his wife, she supposing that they had been regularly married. It is insisted for appellant that as the marriage had been consummated with the belief on her part that they had been lawfully married, it was by the terms of the statute not invalid for want of authority in the person solemnizing it, and, that, therefore, Adeline Chandler was appellant's wife, and so could not testify against him. We can not concur in this conclusion. The case falls within one of the well-settled exceptions to the rule that a wife can not testify against her husband. In 1 Greenleaf on Evidence, section 348, it is said: "To this general rule, excluding the husband and wife as witnesses, there are some exceptions, which are allowed from the necessity of the case, partly for the protection of the wife in her life and liberty, and partly for the sake of public justice. But the necessity which calls for this exception for the wife's security is described to mean 'not a general necessity, as where no other witnesses can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed, without remedy, to personal injury.' Thus a woman is a competent witness against a man indicted for forcible abduction and marriage, if the force were continuing upon her until the marriage; of which fact she is also a competent witness; and this, by the weight of the authorities, notwithstanding her subsequent assent and voluntary cohabitation; for otherwise, the offender would take advantage of his wrong."

Other authorities might be cited, but the principle is so well settled that we deem it unnecessary. If the rule were otherwise it would be in the power of the defendant, by consummating the marriage and thus adding another wrong to the crime he had already committed in procuring the mock marriage, to protect himself from punishment for the crime.

We see no substantial error in the admission of evidence. It was proper to allow Adeline Chandler and Bob Lee Chandler to testify as to the place she showed him as the spot where the mock marriage took place, for this was done to show that it took place in Kentucky, and not in Tennessee, as she did not know the location of the State line. The evidence of Dr. Farribo

and others as to the statements made to them by Charley Barclay was competent, for the admissions of the defendant may always be given in evidence, and it was a question for the jury what weight they would give them. There was nothing in the case calling for an instruction under section 240 of the Criminal Code, to the effect that a confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such offense was committed. There was other proof that the offense was committed, and there was no confession of the defendant proven on the trial. The statements proved to have been made by him were simply admissions which were more or less inconsistent with his testimony on the trial.

We do not think that the circuit judge abused a sound discretion in refusing to open the case during the argument and allow the newly-discovered evidence to be given, which only went to impeach Adeline Chandler's testimony.

The testimony as to what Bill Clark said when they went to take his deposition should not have been admitted as this evidence was only competent for the purpose of contradicting his testimony, and proper foundation was not laid for the contradiction as he had not been asked as to these statements. But Bill Clark was shown to be so sick at this time that we do not think the jury could have paid any attention to his saying under the circumstances that he wouldn't tell anything, and didn't know anything to tell, adding that he didn't know whether he would live three days. He looked like he was liable to die any time; and, besides, Bill Clark was otherwise successfully impeached.

While the evidence is conflicting we can not reverse on facts.

Judgment affirmed.

OWEN v. COMMONWEALTH.

(Filed September 24, 1903—Not to be reported.)

Robbery—Indictment—Averment of ownership—In an indictment for robbery the statement of the ownership is only a part of the description of the stolen property; and if it is otherwise identified, the failure to charge in the indictment the ownership would not be material under Kentucky Criminal Code. The charge that the property was stolen from the person of A. was just as definite as a charge that it was his property, since proof of the taking of the property from his person would have been held sufficient proof of his ownership.

Campbell & Campbell for appellant.

Clifton J. Pratt for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, Bitts Owens, was indicted in the McCracken Circuit Court for the crime of robbery and on the trial was found guilty and his punishment fixed at eight years in the penitentiary. The evidence heard on the trial is not embraced in the bill of exceptions. The second count of the indictment

set out that the defendant had been previously indicted and convicted in the McCracken Circuit Court on the charge of feloniously breaking a storehouse with the intent to steal, and had been sentenced to one year's confinement in the penitentiary. It is urged that this count of the indictment was insufficient, but it is unnecessary for us to determine the question for the reason that by the instructions to the jury the trial court entirely eliminated the former conviction from the case, and there is nothing before us to show that any evidence was introduced on the subject.

It is also urged that the other count of the indictment setting out the offense charged against the defendant is insufficient. It is in these words: "The grand jurors of the county of McCracken, in the name and by the authority of the Commonwealth of Kentucky, accuse Bitts Owens of the offense of robbery, committed in manner and form as follows: The said Bitts Owens in the said county of McCracken, on the 15th day of December, 1902, and before the finding of this indictment, did feloniously and by force and violence, and by putting in fear, take from the person of Marsh Atkinson one pocketbook and one 50 cent piece, same being property of value, with the fraudulent intent to deprive said Atkinson permanently of his property and of converting same to the use and benefit of the said Bitts Owens."

It is objected to the indictment that it does not show the ownership of the property alleged to have been stolen, and it is insisted that the indictment was for this reason bad on demurrer. The rule is that an indictment for robbery should contain all of the allegations essential in simple larceny, and, in addition, the matter that makes the larceny robbery. (2 Bishop Crim. Pro., section 1001.) The rule is also that as a part of the description of the stolen property, and to aid in its identification, the indictment must aver its ownership or show that the owner is unknown, if that is a fact. (2 Bishop Crim. Pro., section 718.) But the statement of the ownership is only a part of the description of the stolen property; and if it is otherwise identified, the failure to charge in the indictment the ownership would not be material under our Code. The rule as to the certainty of the description necessary is that it must be sufficient to enable the jury to decide whether the thing proved to have been stolen is that upon which the indictment is founded, and to enable the defendant to plead the judgment in bar of a subsequent indictment. (1 Bishop Crim. Pro., 576.) By section 122 of the Code the indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case. By section 123, if an offense involve the taking of property and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the owner of the property is not material. At common law property stolen from a bailee or agent might be described in the indictment as the property either of the bailee or the true owner; and property stolen, even from a thief, might be described as the property either of the thief or of the person from whom he had stolen it. (2 Bishop Crim. Pro., section 721; 1 Roberson Crim. Law, section 412.)

The indictment before us charges that the property stolen was taken from

the person of Marsh Atkinson by the defendant with the fraudulent intent to deprive said Atkinson permanently of his property. If it had been charged in addition that the things taken were Atkinson's property, nothing would have been added to the legal sense or to the definiteness of the description of the stolen property. The charge that it was stolen from the person of Marsh Atkinson was just as definite as a charge that it was his property, since proof of the taking of the property from his person would have been held sufficient proof of his ownership. To identify the property as that taken from the person of Marsh Atkinson is certainly as sufficient to apprise the defendant of what is meant as it would be to identify it as belonging to Atkinson. By section 340 of the Code a judgment of conviction may be reversed for any error of law appearing on the record when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby. No substantial right of the defendant was prejudiced by the form of the indictment. It sufficiently apprised him of the offense with which he was charged, and the facts were stated with enough certainty to enable the court to enter judgment according to the right of the case or to make the judgment a bar to a subsequent prosecution for the same offense.

Judgment affirmed.

CONTINENTAL INSURANCE CO., &c. v. VALLANDINGHAM & GENTRY.

(Filed September 25, 1903.)

1. Fire insurance policies—Arbitration clause—These suits were brought by appellees to recover of appellants, fire insurance companies, the amount of damage to a stock of general merchandise insured by appellants. The principal defense is that the insured failed and refused to submit the amount of their loss or damage to arbitration, or appraisement, as required by the policies. Appellees insist that the agreement to submit to arbitration is void. An agreement to submit a possible controversy to arbitration, made before the controversy has arisen, if it involves the determination of the right of recovery, both as to law and facts, is void, because it tends to oust the courts of their jurisdiction, and substitutes a contract tribunal in the stead of the one provided by law for the trial of law suits. But an agreement to submit some fact involved in a controversy to arbitrators, or to some third person as a referee, is not an invalid provision; and where the agreement makes the award or finding a condition precedent to a right of action, it is enforceable, in that the failure without good excuse to submit the question as provided is a good defense to a suit upon the contract.

2. Waiver of arbitration clause—The arbitration clause of the policy was inserted wholly for the protection of the insurer. The courts have allowed and encouraged it as an inexpensive and not unjust check upon the danger of overvaluation and fraud by dishonest insured property holders who have sustained loss by fire. But the insurer will not be permitted to misuse this clause oppressively, or in bad faith. When the insurer so misuses it it will be held as a waiver by it of that provision.

3. Appraisers—If a person for whose benefit a clause in a contract is inserted would have the advantage of it, he must bring himself within its terms, and will not be excused because the other party has likewise failed. Unless the insurer asks for the arbitration or appraisal before suit brought,

the failure to appraise is not a defense. When the insurer demands the appraisal it must in good faith nominate a competent, disinterested person as appraiser before it can defend upon the ground that the insured has failed to keep that part of his contract. Appellants did not nominate such a person as appraiser. Having once waived the appraisal by its conduct, the insurer can not require that the matter in dispute be again submitted to arbitrators.

Chas. Strother, John S. Gaunt, Frank C. Green and Bargen & Hicks for appellants.

Lindsay & Botts and W. S. Pryor for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge O'Rear.

Appellees affected an insurance for \$6,000 with appellants, six fire insurance companies, upon a stock of general merchandise at Wheatley, Ky. By the reason of the burning of an adjacent building, threatening the one containing the insured goods, appellees removed the goods into the street and to a nearby lot. In the excitement, hurry and reckless manner of handling by the crowd the goods were badly damaged, by being soiled and otherwise abused. These suits are to recover the amount of the damage, laid at \$4,000.

The principal defense is that the insured failed and refused to submit the amount of their loss or damage to arbitration, or appraisal, as required by the policies. All the policies are alike in this particular. Their form is what is known as the "New York Standard Policy." The clause in question is as follows: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or if they differ, then by appraisers as hereinafter provided, and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. * * * In the event of disagreement as to the amount of the loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser selected by them and shall bear equally the expenses of the appraisal and umpire. * * * And the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. * * * No suit or action on this policy for the recovery of any claim shall be sus-

tained in any court of law or equity until after full compliance by the insured with all the foregoing requirements. * * * This policy is made and accepted subject to the foregoing stipulations and conditions."

The fire occurred on the night of November 1. The insurance companies were promptly notified of the loss, and sent adjusters. Failing to agree upon the amount of the loss, on December 7, following, the insurers and the insured entered into an "agreement for submission to appraisers," the material part of which, so far as affects the question now in hand is as follows:

"This agreement, made and entered into by and between Vallandingham & Gentry, of Wheatley, Ky., of the first part, and the insurance company or companies whose name or names are signed hereto of the second part, each for itself and not jointly:

"Witnesseth, That C. G. Boerner and T. J. Boyd shall appraise and ascertain the sound value of and the loss upon the property damaged and destroyed by the fire of November 1, 1900, as specified below: Provided, That the said appraisers shall first select a competent and disinterested umpire who shall act with them in matters of difference only. The award of any two of them, made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement as to the amount of such loss.

"It is expressly understood that this agreement and appraisal is for the purpose of ascertaining and fixing the amount of sound value and loss and damage only to the property hereinafter described, and taken into consideration every article on schedule attached hereto, whether totally or partially destroyed, and is to be in settlement of the entire loss, and shall not determine, waive or invalidate any other right or rights of either party to this agreement."

Boerner was selected by the insured, and Boyd by the insurers. Boerner was a merchant living in a village some few miles from Wheatley. Boyd was a merchant living at Columbus, Ohio. The arbitrators spent most of the day of December 7 in trying to agree upon an umpire, but failed. All names then proposed by each were rejected by the other. About 2 or 3 o'clock in the afternoon Boerner announced that they were unable to agree on an umpire, and signed an endorsement to that effect on the appraisal agreement. Boyd did not sign it, but did not then offer to make further effort toward an agreement. Boyd and the adjuster for the insurance companies left together. That evening, after they had arrived at the railroad station, some miles from Wheatley, Boyd wrote to Boerner offering to re-open the matter. Boerner responded some days later that he had nothing more to do with it, and that the insured had opened their store (which had been kept closed since the fire), and begun selling the goods, and that it was, therefore, impossible to make an appraisal. Later Boyd offered to Boerner to accept as umpire one of the persons whom Boerner had offered at the first meeting. Boerner peremptorily declined to act further. The insurers wrote, in answer to letters from the insured enclosing the proof of the loss and itemized statements thereof, insisting that Boyd and Boerner should continue to act as arbitrators, and should complete the appraisal as provided in the agreement of December 7. This was refused by the insured. No other specific objection was made or intimated as to the amount of damage claimed, or touching any item of it. The companies refused to pay, because of the failure to have the appraisal made, and these suits followed.

It is not clear that appellants were entitled to an arbitration under their contracts in this case. The policies provided that the amount of loss or damage was to be fixed by the agreement of the parties, and only in event of a difference was there a right to demand an appraisal. The insured promptly furnished complete itemized statements, showing in detail the values claimed by them, and the amount of loss or damage asserted. Whether the articles were fairly valued in their sound condition was a matter easily enough to be ascertained by those familiar with the markets of such goods. It does not appear that appellants' adjuster ever expressed an opinion or made such an examination as would warrant it, before his testimony in this suit, that could be made the basis of intelligent action by the insured. A general proposition to pay so much in the aggregate smacks more of a proposition to compromise than one to compensate. Arbitrarily rejecting the insured's estimate, without an earnest intention and effort to make a settlement upon the basis first fixed in the policies, in order that vexatious delays, and questionable diplomatic advantages might be gained in the matter of arbitrators, to lessen the sum that should be paid for the actual loss, is contrary to both the letter and the spirit of the contract. The insurers merely declined to pay the sum fixed in the schedule and itemized accounts of the insured, is not a disagreement, or differing, as contemplated by the contract, so as to authorize a demand of appraisal. It should have been a real difference, based upon the facts which should have been candidly and fully submitted for acceptance by the other side. However, in the preparation of this case the parties have treated it as one where the difference between the insured and the insurers had occurred.

Appellees insist that the agreement to submit to arbitration is void. An agreement to submit a possible controversy to arbitration, made before the controversy has arisen, if it involves the determination of the right of recovery, both as to law and facts, is void, because it tends to oust the courts of their jurisdiction, and substitutes a contract tribunal in the stead of the one provided by law for the trial of law suits.

But the courts have held with marked unanimity that an agreement to submit the determination of some fact involved in a controversy to arbitrators, or to some third person as a referee, is not an invalid provision; and where the agreement makes the award or finding a condition precedent to a right of action, it is enforceable, in that the failure without good excuse to submit the question as provided is a good defense to a suit upon the contract. (Joyce on Insurance, section 3232, et seq.; May on Insurance, 8d edition, section 493; Hamilton v. L. & L. & G. Ins. Co., 186 U. S., 242; U. S. v. Robeson, 9 Peters, 319.)

The arbitration clause in insurance policies issued upon personal property, if lived up to in the spirit that justifies their encouragement by law, is a serviceable method of settling the question of loss or damage. While the facts are yet fresh, and the damaged articles are to be seen, it is reasonable to suppose that impartial men, familiar with the character and value of such goods in that community, can, by personal inspection, and by the use of their judgments and experience, more nearly come to a true valuation than any number of men, not on the scene, inexperienced in every probability in the business of valuing such articles, trying to get at the values upon the testimony, often of biased, or incompetent, or careless witnesses.

This clause of the policy was inserted wholly for the protection of the insurer. The courts have allowed and encouraged it as an inexpensive and not unjust check upon the danger of overvaluation and fraud by dishonest insured property holders, who have sustained loss by fire. But the insurer will not be permitted to misuse this clause oppressively, or in bad faith.

To prevent such, when the insurer so misuses it, it ought to be held a waiver by it of that provision.

From the record we find that the person selected by appellants as their appraiser had served many times in that capacity before, and as many as three times before for one of the appellants. This fact alone need not be inconsistent with his impartiality, but his conduct throughout this transaction was more like that of an employe than of a disinterested person. That he was brought from such a remote point, at great expense undoubtedly to the insurers; that he was willing and even anxiously persistent in serving their interests, as a partisan would; that his examination of the injured goods affected his judgment exactly as it did the paid adjuster of the companies, fixing the amount of the damage at \$600, when all the other witnesses, many of them apparently disinterested and equally qualified, placed it at \$4,000; that he was directed and counseled with by appellants' adjuster, and submitted to him the correspondence and other information gained bearing on the attempt to arbitrate the loss, all convince us that this person did not have the qualification implied in the contract, that is, a discreet, disinterested, impartial man. This fact was evidently known to the insurers, or to their adjuster, having this settlement in charge. That an improper advantage was sought by them in making this selection is equally evident, if we can accept the judgment and opinion of every other witness in the record, except these two representatives of appellants, concerning the amount of the damage. The evidence of the extent of damage is convincing. An adjuster may be, and ought to be, more competent than the ordinary merchant, and equally as honest in fixing such valuations. But the great preponderance of the evidence in this case seems to be against the valuation fixed by appellants' adjuster.

We may say in passing, that the arbitrator selected by appellees seems to have been equally as partisan as the other. But if a person for whose benefit a clause in a contract is inserted would have the advantage of it, he must bring himself within its terms, and will not be excused because the other party has likewise failed. Unless the insurer asks for the arbitration or appraisal before suit brought, the failure to appraise is not a defense. (*Sun Mutual Ins. Co. v. Crist*, 19 Ky. Law Rep., 306; *Bergman & Co. v. Commercial Union Ins. Co.*, 12 Ky. Law Rep., 942; Sup. Ct.; *Chenoweth v. Phoenix Ins. Co.*, 12 Ky. Law Rep., 232, Sup. Ct.; ; *Scottish Union and Rational Ins. Co. v. Strain*, 24 Ky. Law Rep., 958.) And when the insurer demands the appraisal, it must in good faith nominate a competent, disinterested person as appraiser, before it can defend upon the ground that the insured has failed to keep that part of his contract. (*Chapman v. Rockford Ins. Co.*, 89 Wis., 572; *Brook v. Dwelling House Ins. Co.*, 102 Mich., 583.) Having once waived the appraisal by its conduct, the insurer can not require that the matter in dispute be again submitted to arbitrators. It was, therefore, within the legal right of appellees to decline to renew the arbitration

at the hands of Boyd and another. or any other appraisers. (McCullough v. Phoenix Ins. Co., 118 Mo., 606; Chapman v. Rockford Ins. Co., supra; Uhrig v. Williamsburg Fire Ins. Co., 101 N. Y., 362.)

The judgment of the circuit court was in conformity to these views, and is consequently affirmed.

FRAZER, &c. v. FRAZER, &c.

FIDELITY AND DEPOSIT CO. OF MD. v. FRAZER.

(Filed September 23, 1903—Not to be reported.)

1. Judgment in bar—Decedent's estate—The judgment rendered in an action by the widow of a decedent, who had renounced the provisions of the testator's will, for a settlement of the estate, and against the executor for the additional amount found to be due the widow, and which judgment was not rendered against the surety of the executor who was a party to the suit, can not be plead in bar of a subsequent proceeding for judgment against the surety by amended petition in the same suit, after a return of "no property found" on an execution issued against the executor.

2. Same—The purpose of the subsequent proceeding against the surety being to subject it to the payment of such part of the decedent's estate as the executor had misappropriated, its contention that it is not liable because the former judgment was not against the estate and against the administrator de bonis non with the will annexed is untenable.

3. Estoppel—Res judicata—The executor having in the first proceeding litigated the issue as to whether the widow was estopped to renounce the provisions of the will by reason of her alleged acceptance thereof, and the same having been determined adversely to the executor, the surety can not again litigate the question.

4. Appeal—Expiration of time—No appeal having been taken from the judgment permitting the widow to renounce the will within the two years allowed by law, this court has no power to consider or reverse the case.

5. Compensation of executor—While under ordinary circumstances the provisions of the testator's will that the testator be not allowed compensation for his services should be upheld, the changed condition of affairs arising from the renunciation of the will by the widow entitles the executor to at least some compensation, and it is proper that the estate should pay the court costs of the executor incurred in the actions brought for the settlement of the estate and against him and his surety.

Simon & Bailey for appellant, Jane B. Frazer.

Berry & Webster for appellant, Deposit Co.

White & Ray and M. C. Swinford for appellee.

Appeals from Harrison Circuit Court.

Opinion of the court by Judge Nunn.

These cases are, by agreement of parties, to be tried together. It appears that N. W. Frazer died in Harrison county, Kentucky, in the month of August, 1897, and left a will, which was probated in the month of September of the same year, and his son, W. D. Frazer, qualified as the executor thereof. By this will he divided his estate into five equal parts, giving one-fifth to each of his three children, two daughters and his son, W. D. Frazer, one-fifth to his grandchild, the son of W. D. Frazer, who was to have the

use of this fifth until his child arrived at the age of twenty-one years, and the other fifth to his wife, the appellee, M. Kate Frazer, for life, and at her death to revert to his children. His estate consisted of \$58,000 personal property, about \$55,000 of which was life insurance, and about \$12,000 real estate.

In August, 1898, and within twelve months from the probaton of the will, she renounced its provisions, and elected to claim her distributable share under the statutes.

On the 26th of January, 1899, the widow, M. Kate Frazer, appellee, filed an action in the Harrison Circuit Court for a settlement of the estate of her husband, N. W. Frazer, making the executor, children and grandchild, Jesse Frazer, and the Fidelity and Deposit Co. of Maryland, who was the surety of the executor on his official bond, defendants. The executor, W. D. Frazer, filed his answer to the petition, stating that on the 26th of October, 1897, the appellee elected to take under the provisions of the will, and filed a paper signed by her purporting to state that fact, and also showing that on that day he had paid her \$12,000, which was at that time considered one-fifth of the personal estate. The appellee replied, and alleged that her signature to this paper was obtained by fraud, deceit and misrepresentation of the executor; that at the time she signed the paper she understood that she was signing only a receipt for the \$12,000, a part of what was due her, and a bond to refund to the executor any part of the sum received that might appear upon settlement she was not entitled to, and that the first information she had that the paper contained any provisions showing her acceptance of the will was after it was filed with the executor's answer. The executor denied these allegations, and upon this issue the proof was taken.

On the 15th of March, 1901, this issue was tried and the court adjudged that the paper referred to, dated October 25, 1897, was signed by her through a misunderstanding on her part and by the fraud and sharp practice of W. D. Frazer, the executor, and that she was not bound by this writing, and that she was entitled to take and receive such of the estate of N. W. Frazer as she would have taken had no will been made, that is, she was entitled after the payment of his debts and the costs of administration to receive one-half of his personal estate and dower in the real estate owned by him at the time of his death. To this judgment objections and exceptions were taken and an appeal prayed and granted, but no appeal was ever taken from it.

At this same term of the court another order was made referring the case to the master commissioner to take proof and report the amount and value of the estate of N. W. Frazer, what disposition had been made of it and the balance in the hands of the executor. The commissioner filed his report, and on the trial of exceptions filed thereto the court, at the September term, 1901, adjudged that the estate of W. D. Frazer was indebted to M. Kate Frazer, appellee, in the sum of \$12,819.81, after deducting \$1,599.70, the amount overpaid Jesse Frazer as one of the devisees of the will, which appellee remitted to Jesse on conditions unnecessary to mention. The daughters and devisees of N. W. Frazer refunded \$6,468.12, the amount overpaid them, which left \$6,351.69 as a balance of amount due appellee from the estate of W. D. Frazer. She caused execution to be issued against the estate of W. D. Frazer for the amount of her judgment, which was returned by the officer "no property found." To the judgment against the estate of W. D.

Frazer in favor of appellee all of the defendants, including the Fidelity and Deposit Co., of Maryland, objected and excepted, and prayed an appeal to the Court of Appeals, which was granted, and the appeal from this judgment is the one styled first above.

On the 24th of January, 1902, the appellee filed in the Harrison Circuit Court what she denominated an amended petition against the Fidelity and Deposit Co. of Maryland, in which she set forth the recovery of a judgment against the estate of W. D. Frazer, and the issual of execution thereon and return of "no property found," and that there was still due her the amount of \$6,351.69, and setting forth again the qualification of W. D. Frazer as the executor of the estate of N. W. Frazer, deceased, and the execution of a bond, for the faithful discharge of the duties of his trust, with the appellant, the Fidelity and Deposit Co. of Maryland, as his surety, alleging that the covenants of the bond had been broken on the part of W. D. Frazer and his personal representative (W. D. Frazer having died previous to the last judgment) by the failure to pay to her the amount due her. She caused another summons to be issued and executed against the appellant company. The appellant company moved to strike the amended petition from the files, then filed a demurrer, which the court overruled, and then it filed its answer. By the first paragraph of the answer it in substance pleaded the judgment of September, 1901, as a bar to the further prosecution of the action, claiming that that judgment was final and settled all the rights of the parties thereto, and that the defendants had appealed from that judgment, and that it was now pending in this court and undetermined. By the second paragraph, that the judgment of September, 1901, was a final judgment and settled all the rights of the parties thereto, and that by it no judgment was rendered against the estate of N. W. Frazer or John L. Dunlap, administrator de bonis non, with the will annexed of N. W. Frazer, and for that reason this appellant was not a necessary or proper party to this action. The third paragraph was in substance the same defense as in the previous paragraphs. By the fourth paragraph it pleaded that the judgment of September, 1901, was a final judgment, and that this appellant was a party defendant to the action, and in the judgment the court failed and refused to render any judgment whatever against this appellant, and that the matters and issues in controversy in this action were in controversy in that action, and it pleaded that judgment in bar of her right to maintain this action. By the fifth paragraph it pleaded the writing signed by the appellee, Mrs. Frazer, in which the words "I hereby accept the provisions of the will" were inserted, and her receipt for \$12,000 in full of her part of the estate under the will, and that by reason of the execution of the writing she was estopped from maintaining any action against this appellant whatever. To this answer, and each paragraph thereof, a demurrer was filed and sustained by the court, and the appellant failing to plead further, the court rendered a judgment in favor of appellee against appellant company for \$6,351.69, to which judgment the appellant objected and excepted and prayed an appeal.

As to the appellant company's contention in the first paragraph of its answer pleading the judgment of September, 1901, and the appeal therefrom pending in this court as a bar to further prosecution against it, we are of the opinion that it is not well founded. The lower court could not at that,

time have properly rendered any judgment against the appellant company; it was not known then for what its principal had defaulted. It afterwards occurred that the devisees refunded the amount that they were overpaid, and brought the amount of the judgment down from \$12,000 and more to \$6,000, or thereabouts. And if the judgment had been rendered at that time against the appellant company, it would have been erroneous to the extent of the difference between the two sums.

As to its contention of its nonliability in this action for the reason that the judgment of September, 1901, was not against the estate of N. W. Frazer or John L. Dunlap, administrator de bonis non, with the will annexed of N. W. Frazer, it can not be sustained for the reason that this appellant company was not the surety, in any sense, for the estate of N. W. Frazer which had not been lost or misappropriated by its principal, W. D. Frazer, executor of the estate. At least it is not sought in this action to make it liable for any part of the estate not misappropriated by its principal. Nor was it the surety of John L. Dunlap, administrator de bonis non with the will annexed of the estate of N. W. Frazer. The purpose of this action was, and is, to make it liable only for the amount of the estate of N. W. Frazer, for which its principal, D. W. Frazer, defaulted.

From what has been said above we need only now to refer to the fifth paragraph, wherein the writing signed by the appellee, in which it was alleged that she had accepted the provisions of the will, and the receipt in full for her part of the estate under the will, were attempted to be pleaded as an estoppel to her claim in this action, and it is sufficient to say the issue as to whether or not she had accepted the provisions of the will was made by his principal and tried and a judgment rendered thereon in January, 1901. The surety can not again raise and litigate this question. (*National Surety Co. v. Arterburn*, 23 Ky. Law Rep., 281.)

The only reasons offered, necessary to be referred to for the reversal of the case styled first above, are that the lower court erred in giving appellee that part of the estate allowed her by law instead of confining her to the provisions of the will and declaring that the paper in which it is alleged she accepted the provisions of the will was obtained by the fraud and sharp practice of the executor, W. D. Frazer; and, second, that the court failed to make any allowance and give him any credit for his services as such executor.

As to the first proposition it is sufficient to say that the evidence on that question was conflicting, and even if the preponderance was in favor of appellants, which we do not concede, we have no power to reverse the case for that reason, as the judgment on this question was final and rendered in January, 1901, and no appeal from that judgment has been brought to this court, and more than two years have elapsed since it was rendered.

As to the second proposition it is more serious. By the will of N. W. Frazer he named his son, W. D. Frazer, as executor, and stated in positive terms that he should act without any compensation for his services. W. D. Frazer accepted the trust with the full knowledge that that provision was in the will, and there are several decisions of this court to the effect that under such circumstances the executor is not entitled to anything as compensation. But possibly it was not in the mind of the testator or the executor that ap-

pellee would renounce the provisions of the will and take under the statutes, and it is reasonable to presume that the testator placed that provision in his will for the reason that he was giving him and his son, Jesse, an advantage in the division of the estate. But by reason of the changed condition of affairs by the renunciation, we deem it inequitable to hold the executor rigidly to the contract, but under the circumstances of the case, we do not think that he ought to have anything near the statutory compensation. It appears from the record that the appellee and the estate of N. W. Frazer paid the appellant company \$200 to obtain its signature to the bond of W. D. Frazer, as executor, and have also paid something near \$1,000 costs in these actions, all or nearly all of which should have been paid by the estate of W. D. Frazer. With this compensation received, we are of the opinion that it would be equitable that the appellee and the estate of N. W. Frazer pay the further unpaid costs and the costs of these appeals, which would be sufficient compensation under all the circumstances.

Wherefore, the judgments in both cases are hereby affirmed.

BOURBON STOCK YARD CO. v. WOOLEY.

(Filed September 25, 1903—Not to be reported.)

1. Nuisance—Obstruction of street—Damages—A property owner who is peculiarly and specially damaged by reason of the obstruction of a public street by another may maintain an action independently of the municipality for the removal of the obstruction and for damages resulting therefrom.

2. Equitable action—Transfer of common law issue—The chancellor properly transferred to the common law division of the court such part of an equitable action as sought to recover damages for the injury sustained by reason of the obstruction of the street.

Gibson, Marshall & Gibson for appellant.

R. W. Wooley for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Nunn.

The appellee filed his petition in the Jefferson Chancery Court against the appellant, alleging that he was the owner as tenant for life of several lots and one in fee simple, on and adjacent to Bickel avenue, between Main and Market streets, in the city of Louisville, and that the appellant wrongfully and without authority had erected chutes, buildings and other obstructions which closed Bickel avenue at the point where it intersected Market street and for several hundred feet along it in the direction of Main street, and that such obstruction was a public nuisance, which especially and peculiarly damaged his property, and reduced the value of it for sale and rental, by greatly obstructing his means of egress and ingress from and to it.

Bickel street had been dedicated and accepted by the city as one of the streets of the city. He asked for an order of court compelling appellant to remove the obstruction from this street, and for more than \$6,000 damages for the injury already done him and his property.

The substance of appellant's answer was that appellee was not specially or

peculiarly damaged, or his property injured more than the public in general, or damaged in any sum, and denied his right to maintain this action; but that the right of action, if any at all, was in the city, and that it had an action pending to remove the obstruction; and it pleaded the action of the city as a bar to his right to maintain this action. Upon these issues and the proof the lower court adjudged that appellant was then, and was at the institution of the action and long prior thereto, unlawfully obstructing and occupying Bickel avenue, 60 feet in width and about 740 feet in length between Main and Market streets in the city of Louisville, and was thereby maintaining a nuisance, and directed the abatement thereof by removing all the obstructions, giving appellee free and unobstructed use of the highway, and transferred to the common law division of that court that part of appellee's action in which he sought to recover damages for the injuries sustained. The appellant appealed from the first part of the judgment and the appellee from the last.

We are of the opinion that the appellee had the right to maintain in this action his claim for damages, and the chancellor did not abuse his discretion in refusing to try this question, and in transferring it to the common law division of that court to have a jury pass upon and fix the amount of damages to which he is entitled, if anything. The transfer of this part of the action does not deprive the chancellor of his power to enforce the order with reference to the obstruction and nuisance on Bickel avenue. We are of the opinion that the proof shows that the appellee was specially and peculiarly interfered with and damaged by reason of the nuisance and obstruction referred to, and under the law he clearly had the right to maintain this action for the removal thereof independently of the action of the city.

In 10 Bush 639, in the case of *Dulaney v. L. & N. R. R. Co.*, the court said: "And it was further said that private individuals seeking relief against a public nuisance must show that they suffer an injury distinct from that suffered by the general public." * * *

In 21 Ky. Law Rep., 848, in the case of *L. & N. R. R. Co. v. Sonne, &c.*, the court used this language: "It is, however, distinctly held in those cases that when the street is sought to be wholly appropriated, and that, too, without municipal or other authority, private individuals may maintain their action. In this case we think either the city or these property owners, or both, might bring the suit to prevent the exclusive appropriation complained of."

This was a case in which the L. & N. R. R. Co. had placed a gate or obstruction across Magnolia street, in Louisville, Ky., which prevented a free use of the street by Sonne and others, who were specially and peculiarly injured by reason thereof. There are many other authorities to the same effect, but we deem it unnecessary to refer to them.

Wherefore, the judgment of the lower court is affirmed on both the appeal and cross appeal.

BITZER v. UTICA LIME CO.

(Filed September 25, 1908—Not to be reported.)

Pleading—Notes—Plea of non est factum—The allegation of the answer to a suit on promissory notes, to the effect that as to a part of the sum included in the notes there was no consideration, and that such sum was included therein by mistake and oversight of the draftsman, and that, therefore, neither of the notes, nor any part of them, was the act and deed of the promissor, is not a sufficient plea of non est factum; and it was proper for the court to enter judgment for the uncontroverted part of them. There being no bill of exceptions and the allegation of the answer having been denied by reply, the pleadings were sufficient to support a verdict of the jury in favor of the payee.

Lane & Harrison for appellant.

Gibson, Marshall & Gibson for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Settle.

This was an action on two promissory notes, one of \$507.85, the other of \$510.35, executed by appellant to appellee.

The answer fails to deny the execution and delivery of the notes, but avers that \$71.05 of the amount evidenced by the notes was without consideration, and that by mistake and oversight of the draftsman the notes, which were drawn and executed at the same time, embraced \$71.05 in excess of the amount intended by both parties to be included therein, and that "by reason of the mistake, error or oversight in the drafting of said notes he (appellant) is not liable for said notes, or either of them, or any part of either of them, and that in consequence of said mistake neither of said notes, nor the execution of either, is his act and deed."

Reply was filed by appellee controverting the affirmative matter in the answer, and thereafter the court, upon appellee's motion, rendered judgment in favor its against appellant for the amount of the notes respectively, less a credit of \$64.66, paid August 7, 1901, on one of them, and less the \$71.05 claimed by appellant to have been embraced in the notes by mistake or oversight on the part of the draftsman.

Appellant moved the lower court to set aside the judgment for the uncontroverted part of the notes and grant him a new trial, which motion was overruled. Later a trial was had before a jury as to the \$71.05 claimed by appellant to have been embraced in the notes by mistake, and upon the conclusion of the evidence the jury, upon a peremptory instruction from the court, found for the appellee as to that issue, and judgment was duly entered by the court in appellee's favor for the \$71.05. Thereupon appellant entered motion and filed grounds for a new trial as to the item of \$71.05, which motion was likewise overruled by the court, and from the judgments of the lower court overruling the two motions for a new trial appellant prosecutes this appeal.

There is no bill of exceptions in the record, consequently the evidence introduced upon the trial of the issue as to the \$71.05 is not before us. So the only matter to be determined is as to the sufficiency of the pleadings to support the verdict of the jury on the issue presented to them, and the judg-

ment rendered thereon, and also the judgment for the uncontroverted part of the notes sued on.

The attempted defense of non est factum contained in the answer is not sufficiently pleaded and is inconsistent with the admissions made therein of the execution of the notes and the pleader's indebtedness thereon except as to \$71.05. The answer in fact admits the execution by the appellants of the notes sued on and fails to deny the indebtedness thereby evidenced, except to the extent of \$71.05, for which it is averred there was no consideration, and this averment, together with that of the alleged mistake of the draftsman in writing and causing the notes to be executed for \$71.05 more than appellee was entitled to, presented the only issues contained in the answer.

It was proper, therefore, for the lower court, in view of the state of the pleadings, to render judgment in appellee's favor for the uncontroverted part of the notes sued on, and as the verdict of the jury as well as the state of the pleadings entitled the appellee to a judgment for the \$71.05 also, the judgment of the lower court should be, and is hereby, affirmed.

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[Reported by Walter G. Chapman, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

VOSS v. SCHEBECK.

(Filed September 25, 1903—Not to be reported.)

1. Contract—Action to enforce payment—Counterclaim—In an action to enforce the payment of the contract price of an improvement on a house, an answer and counterclaim which, while not denying the execution of the written contract sued on, attempted to plead that the contractor had agreed to so construct a stairway that certain articles of furniture might be carried up was not good on demurrer, where the contract contained no provision with reference to the passage of the furniture up it, in the absence of an allegation that the contract failed to contain all the agreement between the parties, and that the omission was either through mistake or fraud.

2. Same—Evidence—In the absence of an allegation of omission of part of the agreement from the contract through fraud or mistake, it was not relevant to admit any evidence that would tend to either enlarge or contradict the written contract sued upon.

H. Gunkel, Jr., for appellant.

Thos. P. Carothers for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant agreed with appellee, by a contract in writing, to construct for her a stairway, and to alter a room in her house, at a stipulated price. Upon the completion of the work appellee failed to pay, and this suit was brought to enforce the payment by way of a builder's lien upon the property. Appellee's answer and counterclaim admitted, at least did not deny, the execution of the written contract, but attempted to plead, by way of counterclaim, that appellant had agreed to so construct the stairway that a piano and a certain book case might be passed up it. Nothing was said in the contract about the dimensions being so as to accommodate the passage of the piano or the book case. There was not an allegation in the answer that the contract failed to contain all the agreement between the parties, or that the

omission was either through the mistake of the parties or through the fraud of appellant.

A demurrer to this answer was overruled. In this we are of opinion that the circuit court erred; so that in the trial of the question of alleged damages it was not relevant to admit any evidence under the state of pleadings, when properly considered, that would tend to either enlarge or contradict the written contract sued upon. As the case must be returned for a new trial, we think it proper to say that the law governing the rights of the parties is that, under the state of pleadings as now formed, appellant is entitled to a judgment for the sum sued for. If the pleadings are reformed so as to present an issue upon the matters pleaded as a counterclaim by appellee, then the jury should be told to find for appellant the amount sued upon, unless they believe from the evidence that by the mistake of the parties, if a mistake is relied upon, or by the fraud of appellant, if that should be relied upon, the written contract failed to state all the terms of the agreement, in which event the jury should find for the plaintiff such sum as would reasonably represent the value of the work and material furnished to the defendant as it was done, for it is manifest that appellee's damage, if any, growing out of the breach of contract, is the difference between the value of the work, if done as contracted, and its value as actually done.

For the reasons indicated the judgment is reversed and the cause remanded for a new trial not inconsistent with the views herein expressed.

BROWNING v. COMMONWEALTH.

(Filed September 25, 1903.)

1. Criminal libel—Oral words which do no more than imply a purpose or intention on the part of the person spoken of to commit a crime, or describe him as possessing a disposition, or as wanting in qualities, which would permit him to commit a crime, or amount to a charge that if opportunity offers he would commit it, are not *per se* actionable. But there is a well defined difference between written and spoken words. It does not require the imputation of a crime to render a publication libelous. Any defamatory words calculated to degrade or injure the reputation of a person in society when written and published maliciously are libelous. Written words which import that another intended to commit a crime, or that he had a criminal disposition, are actionable without proof of special damages. Where a defamatory libel on the character of an individual will support an action for damages the publication amounts to an indictable offense.

2. Privileged communications—If the matter charged as libelous be false and the publication malicious, it can not be privileged. A privileged communication is one made upon a proper occasion, from a proper motive, in a proper manner and based upon reasonable or probable cause. In such cases there is no *prima facie* presumption of malice from the publication. There must be some evidence beyond the mere fact of publication. It may be intrinsic from the style and tone of the communication. Or it may be extrinsic as by proof of actual malice, or that the statement was knowingly false, or that it was made without probable cause or in any way that fairly and reasonably tends to overcome the *prima facie* presumption of protection under the privilege. The immunity of a privileged communication is an exception. The general rule is that nothing but proof of its truth is a de-

tense of a libel, and he who relies on an exception must prove the fact necessary to bring himself within it. The defendant must show the information on which he relies in the publication to show probable cause.

Lockett & Lockett for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, David Browning, prosecutes this appeal from a judgment for \$85 rendered against him in the trial of an indictment for criminal libel, which was based upon the following words in a letter written by the appellant to one L. C. Newman concerning George Beard, viz.: "You never answered my letter, and I have since learned that you have gone to work for Beard. Don't let the type and outfit of the Banner get scattered until the 28th, when we can do something with it. Did Thompson pay you \$75? Beard will purloin all of the outfit if he has a chance at it, so I will look to you to protect it for the present."

The first and most important question presented by the record for decision is whether in law the communication upon which the indictment was based should be deemed libelous. It is insisted for appellant that the words, "Beard will purloin all of the outfit if he has a chance at it," are not a libel, because they do not charge that he has actually purloined, but are the mere expression of an opinion on the part of the writer as to what Beard would do if an opportunity presented itself; that it is indispensable that the words, whether spoken or written, should charge "an act done or a condition existing;" that if they merely charge that the party referred to will do a dishonorable or criminal act, that is not a defamation for which action will lie.

It seems well settled in the law of slander that words which only imply a purpose or intention on the part of the person spoken of to commit a crime, or describe him as possessing a disposition, or as wanting in qualities, which would permit him to commit a crime, or amount to a charge that if opportunity offers he would commit it, are not per se actionable. (Newell on Defamation, Slander and Libel, section 101; 1 Stark on Slander, 24; Townsend on Slander and Libel, 162; Bays v. Hunt, 60 Ia., 251; Fanning v. Chace, 17 R. I., 388, 18 L. R. A., 134.) But the law makes a clear and well-defined difference between spoken and written words. It does not require the imputation of a crime to render a publication libelous. Any defamatory words calculated to degrade or injure the reputation of a person in society, when written and published maliciously, are libelous. (Riley v. Lee, 88 Ky., 668; Allen v. Wortham, 89 Ky., 486.) And the law is equally well settled that where a defamatory libel on the character of an individual will support an action for damages, the publication amounts to an indictable offense, inasmuch as it tends to provoke violence and disturb the peace of society. (1 Stark, 211.) In Duncan, &c. v. Brown, 54 Ky., 15, it was held prima facie libelous to write and publish of one "that he would put his name to anything that another would request him to sign that would injure a third person." In this case there was no charge that the plaintiff had actually committed a crime, but was in effect a charge that he could be made the

tool of other persons to injure the plaintiff. This distinction between slander and libel is very clearly defined in the A. & E. Ency. of Law, 2d edition, volume 18, page 918, in these words, viz. : "Oral words which do no more than imply a purpose or intention on the part of the person spoken of to commit a crime * * * are not slanderous per se. But it is otherwise when the words are written, and it is well settled that written words which import that another intended to commit a crime, or that he had a criminal disposition, are actionable without proof of special damages." (See numerous cases cited in note to support text.)

We think it is impossible to escape the conclusion that the words on which the indictment is grounded in effect charge that Beard, if opportunity offered, would steal the printing outfit, and such a charge was certainly calculated to bring him into odium and contempt in the community in which he lived, and were, therefore, per se actionable and sufficient to support the indictment. Appellant's next contention is that the extract from his letter, which is made the basis of the charge, clearly shows that a confidential relation existed between himself and Newman; and that it was written with the sole intention of having him guard certain property which he had intrusted him from the rapacity of Beard, and was privileged.

A privileged communication has been defined as one made upon a proper occasion, from a proper motive, in a proper manner and based upon reasonable or probable cause. In such cases there is no prima facie presumption of malice from the publication. There must be some evidence beyond the mere fact of publication. It may be intrinsic from the style and tone of the communication. If it contains expressions which exceed the limits of privilege, such expressions are evidence of malice. Or it may be extrinsic, as by proof of actual malice, or that the statement was knowingly false, or that it was made without probable cause or in any way that fairly and reasonably tends to overcome the prima facie presumption of protection under the privilege.

The immunity of a privileged communication is an exception. The general rule is that nothing but proof of its truth is a defense of a libel, and he who relies on an exception must prove the fact necessary to bring himself within it. Actual malice can rarely be proven, and the only chances for redress for the plaintiff is ordinarily the want of probable cause in the publication. It, therefore, follows that the defendant must show the information on which he relies in the publication to show probable cause. In this case the defendant has not attempted to show any facts which reasonably induced him to believe that his property was in danger from Beard, or any necessity for his communication on this point to Newman. And it is well settled law that if the matter charged as libelous be false and the publication malicious, it can not be privileged. The instructions in this case submit this question to the jury, and they have found against the plaintiff.

It follows that the judgment must be affirmed.

COMMONWEALTH v. ELKINS.

(Filed September 25, 1903.)

Penal action—Limitation—An action by the Commonwealth to recover the penalty imposed by statute for violation of the local option law against the sale of spirituous liquors instituted more than one year after the commission of the offense charged is barred by limitation; and the fact that an indictment had been returned against the offender within one year after the commission of the offense did not serve to suspend the statute, where the indictment was dismissed after the expiration of the limitation period without a resubmission to the grand jury.

C. J. Pratt and M. R. Todd for appellant.

S. Walton Forgy for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Settle.

By the petition in this case, which was filed in the Todd Circuit Court on the 10th day of November, 1902, the appellant, Commonwealth of Kentucky, sought to recover of the appellee the sum of \$200, and the costs of the action, as a penalty under the statute for an alleged violation of the local option law, which appellant is charged to have committed by selling spirituous liquors in the town of Trenton, in May or June, 1901.

The lower court sustained a demurrer to the petition upon the ground that the action was barred by limitation, and the only question presented for consideration by this appeal is whether or not the prosecution was barred by the statute of limitation.

Section 1138 of the Kentucky Statutes provides that "prosecutions by the Commonwealth for felony, unless otherwise especially provided, shall not be barred by lapse of time, or any law of limitation. Prosecutions by the Commonwealth to recover a penalty for a violation of any penal statute or law, and an action or procedure at the instance of any person to recover any such penalty, shall be commenced within one year after the right to such penalty accrues, and not after, unless a different time is allowed by the law imposing the penalty." * * *

It appears from the averments of the petition that appellee was indicted on the 7th day of December, 1901, in the Todd Circuit Court for the same offense for which the penalty is sought to be recovered against him in this case. The indictment was allowed to remain on the docket without trial or other action until the 16th day of July, 1902, at which time an order was entered by the court dismissing it without a re-reference to the grand jury. It does not appear from the record that the appellee was ever before the court under the indictment.

So upon the face of the record it is conclusively shown that more than a year elapsed between the commission of the offense by appellee and the date of the dismissal of the indictment, and the petition in this case was not filed until about four months after the dismissal of the indictment, and about seventeen months after the alleged commission of the offense. It is contended, however, by counsel for appellant that limitation did not run against this action to recover the statutory penalty as long as the indictment was pending, and that the filing of the petition was but a continuation of the

prosecution begun by indictment, in other words, that the time during which the indictment was pending should be excluded from the statutory period within which the prosecution was required to be commenced.

No authority is cited in the brief of counsel in support of this contention, and we apprehend that none can be found.

In *Commonwealth v. T. J. Megibben Co.*, 101 Ky., 195, a second indictment was returned against the defendant for maintaining a nuisance which showed on its face that the offense charged was committed more than a year before the finding of the indictment, but as the indictment contained the averment that the offense therein charged was the same charged in the former indictment returned in the same court, it was contended for the prosecution that the second indictment was not barred by limitation, but should be regarded as a continuation of the prosecution set on foot by the first indictment, but this court held that a prosecution under the second indictment would not be regarded as a continuation of the former prosecution, so as to avoid the statute of limitation, as it was not alleged in the second indictment that the other indictment had been quashed and the case re-referred to the grand jury, or dismissed by the Commonwealth's attorney and re-referred. Consequently a demurrer was sustained to the last indictment because of the bar interposed by the statute of limitations. To the same effect was the decision of this court in *Tully v. Commonwealth*, 18 Bush, 158, and of the Superior Court in *N. N. & M. V. R. R. Co. v. Commonwealth*, 14 Ky. Law Rep., 197, and *L. & N. R. R. Co. v. Commonwealth*, 4 Law Rep., 627.

In no case that we have been able to find has it been held in this State that where a prosecution for an offense has been commenced by indictment, and the indictment dismissed without a re-reference to the grand jury, a second indictment for the same offense or action to recover the penalty denounced by statute against such an offense, is to be regarded as a continuance of the former prosecution, even though such second indictment be found, or action commenced, within a year after the commission of the offense, and much less can it be so regarded if commenced more than a year from the date of its commission.

If an indictment is quashed upon any of the grounds mentioned in section 158, Criminal Code, section 159 makes it the duty of the judge of the circuit court to make an order that the case be submitted to another grand jury, and that the defendant, if in custody, shall be remanded to jail, or required to give bail for his appearance to answer a new indictment, if one be found at that or the next term of the court. It is further provided by section 160 that unless a new indictment be found before the final discharge of the next grand jury the defendant shall be discharged from custody, or bail, unless for good cause the court shall otherwise order.

In the state of case thus provided for, if a new indictment be returned against the defendant, though beyond the period fixed by the statute of limitations, for the prosecution of one guilty of the offense charged, the prosecution would not be barred by the statute, for the prosecution under the second indictment would be but a continuation of that commenced under the first indictment, the defendant being all the time before the court by virtue of its order made at the time of re-referring the case to the grand jury.

Section 178, Criminal Code, provided in substance that the dismissal of an indictment by the court on demurrer, or for objection to its form or substance taken during the trial, or for variance between the indictment and proof, shall not bar another prosecution for the same offense. Section 245 likewise provides that when the indictment is dismissed by the attorney for the Commonwealth with the permission of the court, such dismissal shall not bar a future prosecution for the same offense. While not expressly authorized by sections 178 and 243, we know of no rule of law or practice that would forbid the re-reference to the grand jury of an indictment dismissed as therein provided, or the holding of the defendant in jail, or on bond to answer the new indictment that might be found by the grand jury. However, where the dismissal of the indictment results as authorized by sections 178 and 243, and without a re-reference to the grand jury, that body may nevertheless return another indictment against the same defendant for the same offense, at any time within the statutory period fixed for the prosecution of such an offense, but it is only where an order of re-reference is made upon the dismissal of the indictment that the return of a new indictment for the same offense by the grand jury will be treated as a continuation of the prosecution begun by the finding of the first indictment.

It is not averred in the petition that a re-reference to the grand jury was had upon the dismissal of the indictment against appellee, consequently its dismissal ended the prosecution against him, never to be revived, because the dismissal occurred more than a year after the commission of the offense charged.

If the indictment had been dismissed within the year succeeding the commission of the offense, though without a re-reference of the case to the grand jury, another prosecution for the same offense might have been instituted against appellee at any time before the expiration of the year, by indictment or by civil action, as here attempted, but this case must, in our view of the law, be regarded as an original action, without support from the indictment under which the prosecution against appellant was originated, and it being shown on the face of the petition that it was not brought within a year next after the right to recover the penalty accrued, viz., of the date of the commission of the offense complained of, it follows that no error was committed by the lower court in sustaining the demurrer and dismissing the petition.

Therefore, the judgment is affirmed.

COMMONWEALTH v. LYONS.

(Filed September 25, 1903—Not to be reported.)

Turnpike road—Failure of officers to make report—An indictment, drawn under sections 4718 and 4719 of the Kentucky Statutes, which provide penalties for the failure of the president and managers and the president and directors of turnpike companies to make report to the county court at the time provided, against the "president and treasurer" of a turnpike company is fatally defective in failing to negative the presumption that the managers and directors had performed their duty by making a report, as a report by them would have answered the requirements of the statute.

Clifton J. Pratt and M. R. Todd for appellant.

W. G. Welch for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Nunn.

The grand jury at the March term, 1903, returned into the court an indictment against the appellee as follows: "The grand jury of the county of Lincoln, in the name and by the authority of the Commonwealth, accuse C. G. Lyons of the offense of failing and refusing to make a full and sworn report or settlement as president and treasurer of the Hustonville and Coffey's Mill Turnpike Road Co. to the Lincoln County Court during the month of July, 1902, showing an itemized statement of its entire earnings, committed in manner and form as follows: "The said C. G. Lyons, in the county and State aforesaid, on the — day of July, 1902, and before the finding of this indictment, was the president and treasurer of the Hustonville and Coffey's Mill Turnpike Road Co., which was an incorporated company under and by virtue of the laws of Kentucky, and in which corporation the county of Lincoln owned stock, did fail and refuse to make a full report or settlement, sworn to by him as such officer, as required by law, or any report at all to the county court of Lincoln, Ky., during the month of July, 1902, showing an itemized account of the entire earnings of said turnpike road company, against the peace and dignity of the Commonwealth."

A demurrer was sustained to this indictment by the lower court, and the Commonwealth has appealed.

This indictment was drawn under sections 4718 and 4719 of the Kentucky Statutes. It will be seen that the first section referred to requires the president and managers of turnpike companies, in the month of July, to make a full settlement with the county court showing an itemized account of their entire earnings, and in the event of their failure the corporation shall be indicted and fined not less than \$25 nor more than \$100. The other section of the statutes referred to states that if the president and directors of any turnpike company shall fail or refuse to make such a report and settlement, they shall be fined in a sum not less than \$100, and made jointly and severally liable therefor. The sections do not refer to treasurer unless he might be included in the first section as one of the managers. It is nowhere indicated that the president alone is required to perform the duties imposed. The other managers and directors were authorized and could have made the report of the net earnings of the road, and, so far as the language of the indictment is concerned, may have done so. The indictment only charges the appellee as president, with failing to do so, but does not negative the presumption that the managers and directors of the company performed their duty in making the report and a report from them would have been sufficient and would have answered the requirement of the statutes.

Wherefore, the judgment of the lower court is affirmed.

MILLS v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed September 29, 1903.)

1. Railroads—Fire resulting from sparks from engine—Evidence—In an action against a railroad company to recover for the loss of a house by fire, alleged to have been occasioned by sparks from a railroad locomotive pass-

ing along the tracks about fifty feet distant, it is competent, where the locomotive which passed the house a short time before the fire can not be identified, to admit evidence to show that a few days before the fire fences along the track, and another about the same distance from the track as the house, were set on fire by sparks from the engines of the company.

2. Same—Instruction—Error—The court should not instruct the jury upon the burden of proof, but simply frame the instructions so as to indicate on whom the burden lies; hence so much of an instruction as instructs the jury that the burden is on the plaintiff to prove that the engines of a railroad company were operated negligently, thereby causing a fire, is erroneous, although not sufficient in itself to authorize a reversal.

3. Same—An instruction of the court which exempts the railroad company from liability if the engines were equipped "with suitable and approved fire arresters, in reasonably good condition, which prevented sparks from escaping from said engines as far as practicable," is not in the form approved in the settled decisions of the court; and in lieu of it the jury should be told that they should find for the defendant company if they believed from the evidence that the engines were provided with the most effectual spark arrester known to science and of practical use, properly adjusted, that would prevent as far as possible sparks escaping, unless they believed that the engines were negligently operated, resulting in sparks escaping and setting fire to the house.

S. R. Crewdson and W. P. Sandidge for appellant.

Wilbur F. Browder, J. C. Browder and Edward W. Hines for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Hobson.

Appellant's residence was destroyed by fire in June, 1899, and he filed this action to recover damages therefor of the appellee on the ground that the fire originated from a spark emitted from one of its engines. On the trial of the case the jury returned a verdict in favor of the defendant, and the plaintiff appeals.

The track of the road as it passes appellant's house runs north and south. The house was situated on the east side of the track and something over fifty yards from it. As shown by the plaintiff's evidence, there had been no fire in the front of the house for several months and no fire in it at all on that day except the kitchen fire to get breakfast, between five and six in the morning. The house was discovered afire in the roof over one of the front rooms facing the railroad about ten o'clock. The kitchen fire had then been out several hours. The kitchen was at the back of the house; a strong wind was blowing from the west or from the railroad towards the house. The evidence for the plaintiff also showed that about twenty minutes before the fire was discovered a freight train passed going south, and that at this part of the road being up grade going south, the engines puffed a good deal. There was also testimony to the effect that along this part of the track, and as far from it as the house was situated, a great many cinders were found on the ground, varying in size from a pea to the size of a man's thumb nail. At the time that the house was set on fire the fence, which ran along the railroad, took fire north of the house and about one-eighth of a mile from it, the fence being on the same side of the railroad as the house. The plaintiff offered to prove that a few days before the fire a fence in the field as far

from the track as the house took fire from sparks from an engine that was passing. He also offered to prove that a few days before another fence was set on fire near the plaintiff's house by sparks emitted from a locomotive that was passing on the road. This evidence was excluded by the court, to which the plaintiff excepted. The court allowed the evidence to be given of fires occurring on the day that the house burned, but rejected the evidence as to other fires on other days, though about the same time. The propriety of this rule is the first question to be determined on the appeal.

In 2 Shearman and Redfield on Negligence, section 675, after stating that the plaintiff must show by reasonable affirmative evidence that the fire originated from the defendant's locomotive, the learned authors say: "Evidence showing that the engine emitted sparks in size and number sufficient to account for the fire, and flying near the shed or building which actually caught fire, and that the fire was discovered very soon afterwards, no other cause being known, is sufficient to go to the jury on this point. And when the particular engine which caused the fire can not be fully identified, evidence that sparks and burning coals were frequently dropped by engines passing on the same road upon other occasions, at or about the time of the fire, before or after, is relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same cause."

So in 18 Am. & Eng. Ency. of Law, 2nd edition, 515, the rule is thus stated: "It has been held generally that in an action for damages from fires alleged to have been caused by sparks from a locomotive, the plaintiff may introduce evidence to show that about the time the fire in question happened the engines of the defendant running past the location of the fire were in such a condition, or were so managed, as to be likely to set fire to objects in the position of the property burned, or that sparks emitted by engines of the company about that time had set fire to other property similarly situated, and this without showing that these engines were run by the same engineer or were of the same construction as the one that occasioned the particular damage."

The same rule is laid down in 2 Thompson on Negligence, sections 2373-2374, and was recognized and approved by this court in *Kentucky Central R. R. Co. v. Barrow*, 89 Ky., 648, where the court said: "The evidence introduced on the trial of which appellant complains was substantially that trains frequently set fire to the fences and grass at other places in the vicinity of appellee along the line of that road, and at different times during the fall of 1881." The court then, after quoting with approval from *Sheldon v. Hudson River R. R.*, 14 N. Y., 218, a leading case announcing the rule above stated, said: "In our opinion the reasons given in the case referred to in favor of the competency of the evidence there considered apply to this case, and the evidence objected to was properly admitted by the court."

This case was followed and approved in *L. & N. R. R. Co. v. Samuels*, 23 Ky. Law Rep., 303, and *I. C. R. R. Co. v. Scheible*, 24 Ky. Law Rep., 708.

The locomotives of the defendant are under a unity of management. The screens used in all are the same. The proof for the defendant tended to show that they were all in substantially the same condition as to safety from sparks. The engine that passed just before the house was discovered afire could not be identified by the plaintiff. The fact that other fires occurred

on property similarly situated set by these locomotives was a circumstance tending to show that the house, although so far from the track, might have been set afire in the same way. And the fact that other fires occurred tended to show either that there was some defect in the screens used by the defendant or in the management of the engines. We, therefore, conclude that the evidence rejected by the court should have been admitted.

Appellant also complains that the court erred in its instructions to the jury. The court gave three instructions. The first is not objected to. The second and third are as follows:

"2d. If plaintiff's dwelling house was set on fire otherwise than by sparks or coals of fire from defendant's engines, then the jury should find for the defendant. And if all defendant's engines passing plaintiff's premises at the time of the fire were equipped with safe and approved fire arresters, in good condition, and the trains were run and operated without negligence on the part of defendant's servants, then the jury should find for the defendant.

"3d. The court instructs the jury that if they shall believe from the evidence that defendant's locomotive engines which passed by plaintiff's premises on the morning of June 20, 1899, between the hour of eight o'clock and the time his house caught fire, were equipped with suitable and approved fire arresters, in reasonably good condition, which prevented sparks from escaping from said engines as far as the same was practicable, they must find for the defendant, even if they shall believe from the evidence that said fire was caused by sparks escaping from the engines; unless they shall further believe that the defendant's employes in charge of said engines operated them so negligently as to cause fire, and the burden is on the plaintiff to prove said engines were operated negligently and carelessly at said time and place.

"Negligence is the absence of ordinary care, and ordinary care is such care as an ordinarily prudent man would use under similar circumstances involving his own interests."

The first clause of instruction 2 is not objected to. But it is hard to understand why the second clause of this instruction and instruction 3 were both given, as the same idea is expressed in both. So much of the third instruction as told the jury that the burden was on the plaintiff to prove that the engines were operated negligently should not have been given as the court should not instruct the jury upon burden of proof, but simply so frame the instructions as to indicate on whom the burden of proof lies. And while this alone would not be sufficient grounds for reversal, it is better that such instructions should not be given. It is insisted also for appellant that the instructions do not follow the rule heretofore laid down, in so far as they exempted the defendant from liability if the engines were equipped "with safe and approved fire arresters, in good condition," as expressed in instruction 2, or "with suitable and approved fire arresters, in reasonably good condition, which prevented sparks from escaping from said engines as far as the same was practicable," as expressed in instruction 3.

Section 782, Kentucky Statutes, is as follows: "All companies shall place in, on or around the tops of the chimneys of engines a screen, fender, damper or other appliances that will prevent as far as possible sparks of fire from escaping from such chimneys."

In *Ky. Central R. R. Co. v. Barrow*, 89 Ky., 638, this court, after quoting

the statute, said: "In some of the States railroad companies are, by statute, made absolutely liable for injuries caused by fire proceeding from their engines, irrespective of any question of negligence; but as such companies are in this State authorized by law to operate their railroads by steam, which necessitates the use of fire, they should not on principle, in the absence of a statute requiring it, be held liable for injuries unavoidably produced by fire kept and used to generate steam; and that view is in harmony with the act just quoted; for persons and companies operating railroads are not required by that act to provide appliances that will effectually and certainly, under every condition, prevent the escape of sparks from the chimneys of their locomotives and cars, but only to provide and use the best and most effectual preventative known to science so as to prevent as far as possible injury being done in the mode described in the statute to property near railroads."

This case was approved in *L. & N. R. R. Co. v. Taylor*, 92 Ky., 55, where it was said that the company is "only required to use the best and most effectual preventive known to science and of practical use that will prevent as far as possible sparks escaping from the chimneys of their locomotives."

It was again followed in *L. & N. R. R. Co. v. Dalton*, 102 Ky., 290, where it was held that the company was liable, though the spark arrester was in good condition, if the engine was handled negligently, and thereby sparks escaped from it and ignited the house. These cases were recently approved in *L. & N. R. R. Co. v. Samuel's Ex'or*, 22 Ky. Law Rep., 303, and *I. C. R. R. Co. v. Scheible*, 24 Ky. Law Rep., 1708. The construction of the statute thus so often announced should not now be departed from, and in lieu of the last clause of instruction 2 and the whole of instruction 3 the court should have told the jury that if they believed from the evidence that the plaintiff's dwelling house was set on fire by sparks escaping from one of the defendant's engines, yet if they further believed from the evidence that said engine was at the time provided with the best and most effectual spark arrester known to science and of practical use, properly adjusted, that would prevent as far as possible sparks escaping from the chimney of the engine, they should find for the defendant unless they further believed from the evidence that said engine was operated negligently, and by reason thereof sparks escaped from it and set fire to the house. The definition of negligence should also be given as in instruction 3. While the evidence was conflicting on the whole case we conclude that a new trial should be granted.

Judgment reversed and cause remanded for a new trial and further proceedings consistent herewith.

Whole court sitting.

HOGG v. POTTER.

(Filed September 29, 1903—Not to be reported.)

1. Dower—Relinquishment of—The fact that the husband made an assignment for the benefit of creditors and in the action instituted by the assignee for a settlement of the estate, to which the wife was not a party, an order was entered permitting the husband to continue in the possession of the homestead then occupied by him until the further order of the court, which suit is still pending and undetermined, and that the wife resided with her husband until his death on the homestead referred to, does not operate as a

relinquishment of her right to claim dower in lands of the husband which were sold under execution many years before, which claim she made soon after the death of her husband.

2. Same—Purchase-money lien—Where the husband paid for the land with money borrowed from a third party, and no lien was retained in the deed for purchase money, it can not be said that the widow is not entitled to dower in the land afterwards sold under execution on the ground that it was a sale to collect the purchase price.

3. Pleading—In an action by the widow to recover dower in lands of her husband previously sold at execution sale it is not relevant for the purchaser of the land to plead by way of defense to the action that the widow, having been made a feme sole during the life of her husband, had profited by the purchase, at low prices, of the husband's property at decretal sale, and that she ought not to be allowed to claim dower in the land, such a plea being one which one who is not a creditor of the husband can not set up.

Tinsley & Faulkner, John D. White and Forcht & Field for appellant.

Cook & Jones, D. K. Rawlings and Lyttle & Jeffries for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Nunn.

Prior to the year 1877 appellee and R. G. Potter were married and resided in Clay county as husband and wife until her husband's death, which occurred in 1894. In the year 1897 she brought this suit to recover dower in the lands described in the petition which were owned by her husband in fee simple, but which had been sold from him by an execution in the year 1878. Appellee never conveyed nor joined in any conveyance for her dower interest therein.

Under the statute in existence at the time of the marriage of appellee and her husband, and which has existed ever since, 'the wife shall be endowed for her life of one-third of the real estate of which her husband, or any one for his use, was seized of an estate in fee simple at any time during the coverture unless her right to such dower shall have been barred, forfeited or relinquished. Under this statute the appellee is entitled to dower in this land unless by reason of some action or nonaction of hers she is barred or has forfeited or relinquished her interest therein.

The appellant contends that such is the case. She contends, first, that the appellee relinquished her dower right in this land by accepting homestead in other lands in lieu of dower, and that she is now estopped from claiming the dower; second, she claims that this land was sold in 1878 to satisfy a lien for the purchase price, and that by reason of section 2135 of the Kentucky Statutes she is not entitled to dower in this land. As to appellant's first contention, that a homestead had been allotted to her, and that she had accepted and continued to occupy same, and for that reason she can not now claim dower, the record in substance shows this state of fact: In 1878 her husband, R. G. Potter, being involved in amounts greater than he could pay, made and executed a deed of assignment to his trustee of all of his property for the benefit of his creditors. The assignee instituted an action in the Clay Circuit Court to settle and distribute the estate assigned to him. Appellee was not a party thereto. It appears that action is still pending and undetermined. Soon after that action was instituted the court made

this order: "R. G. Potter's Receiver v. A. M. Combs, & Co. The court further adjudges that the property conveyed by R. G. Potter in his deed of trust, but now in the possession of the said Potter and occupied by him as a homestead, or residence, shall continue in the possession of said Potter until the further order of this court, together with all the household and kitchen furniture that was by former judgment herein directed to remain in the hands of said Potter."

The other judgment referred to in this order allowed R. G. Potter to hold the personal property therein named until the further order of the court. It is by the authority of this judgment that the appellant contends that a homestead was allotted, and that by reason of appellee and her husband continuing on the premises it must be deemed as an election on her part of claiming a homestead, and that she is now estopped from claiming dower. We can not agree with appellant in this; the judgment does not allot a homestead, it only permitted her husband to remain in possession of the premises (calling it a homestead or residence) until the further order of the court. It appears that there has been no order with reference thereto, but that action is still pending and the court can yet direct a disposition thereof. R. G. Potter died in 1896, and very soon thereafter this action was brought for dower, which shows an election by her to take dower in his estate, and by her election she will be confined to her claim of dower. She can not have both homestead and dower.

We agree with appellant's counsel that the widow can not claim dower in lands sold to enforce a lien for the purchase price, but as it appears from this record that state of case does not exist here. The facts, without contradiction, show that appellee's husband, R. G. Potter, bought and paid for the land in controversy, and that no lien was reserved for the purchase price, or any part thereof, in favor of the vendor or in favor of any one from whom he might have borrowed the money and paid for it. The simple borrowing of money from one to pay for land does not give the lender of the money any lien whatever.

The appellant offered a fourth paragraph of her answer, which the court refused to allow to be pleaded, which stated in substance that after her husband's deed of assignment and after she had been authorized to act as a feme sole by a judgment of the Clay Circuit Court, that appellee should not, in good conscience and in equity, be allowed to claim dower in the land in controversy for the reason that by the labor, means and business sagacity of her husband she was enabled to, and did, become the ostensible owner of many thousand dollars worth of supposed worthless notes and accounts and many tracts of land, which were sold at public sale by the commissioner of the court in the action to settle the estate of R. G. Potter.

We are of the opinion that the court was right in refusing to allow this plea, for if there was any wrongdoing on the part of appellee, this was a matter which affected the creditors of R. G. Potter. The appellant not being one of them, and R. G. Potter not being a vendor of the land in controversy, the same having been sold by the sheriff under an execution, his estate not being responsible on account of any warranty, we can not see the relevancy of this plea. This plea in effect says, appellee, you and your husband have beaten his creditors by your low purchases at decretal sales of his property, now you must divide the profits with me.

Perceiving no error in the judgment it is, therefore, affirmed.

HENDERSON TOBACCO EXTRACT WORKS v. WHEELER.

(Filed September 29, 1908.)

Master and servant—Duty of master—Personal injuries—It appearing from the evidence that the servant, who was without authority and subject to the orders of his superiors, was directed to operate a machine which was dangerous to operate, and that the slightest loss of balance in the operation of the machine was liable to result in personal injury, it was the duty of the master to provide safe and secure steps by which to reach the platform on which the machine was located, and to provide a place on which to set the bucket in which was contained the liquid used in feeding the machine, instead of necessitating the placing of it on the platform, thereby causing the standing place of the operator to become wet and slippery; and the servant was not called upon to examine the approaches to the platform when ordered to operate the machine, but was entitled to rely upon the assumption that they were in a solid and substantial condition. Under such circumstances it was proper to let the case go to the jury on the evidence.

R. H. Cunningham for appellant.

A. O. Stanley and Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Melton Wheeler, instituted this action against the appellant, the Henderson Tobacco Extract Works, to recover damages for a personal injury sustained by him whilst in their employ, which he alleges was due to negligence on their part. The record discloses that appellant is a corporation which has been engaged in the manufacture of an extract from tobacco, which is principally used as a sheep wash. The machine used for this purpose consisted of a stationary iron cylinder, which was set upon a solid brick foundation two feet six inches in height. Within this cylinder, which extended about three feet above the foundation, where was a brass cylinder, which was revolved within the heavy stationary iron cylinder by steam power, by means of a belt connecting it with an engine. Inside of the brass cylinder, which was about two feet in diameter and fourteen inches deep, a bag was sewed at the top to a wire hoop, into which the liquid extract was poured from a water bucket, and the motion of the cylinder revolving twelve hundred times a minute threw the extract against the sides of the bag, through which it strained and ran off from the bottom through an iron pipe. The foundation under the iron cylinder projected six and one-half inches. The liquid extract was carried to the cylinder in buckets by a man who went up a step ladder of three steps eight inches wide, which rested on a brick floor at the bottom, and the top step of which was even with the foundation of the iron cylinder. These steps were entirely unsecured at the bottom. There is some testimony conducing to show that a plank was nailed to the top step, which projected slightly over the top of the foundation. The steps were movable and were frequently carried from one place to another around the foundation. The man who poured the extract into the revolving cylinder stood with one foot on the top step and the other on the narrow projecting foundation, and leaned over so as to pour the fluid into the center opening slowly. The liquid was about twice as heavy as water,

and quite slimy, and the testimony shows was frequently spilled on the steps and the projecting foundation. The appellee, a negro man, had been employed in the factory for eight or nine years as a laborer under the supervision of a foreman, and on the 23d of February, 1902, was instructed by the foreman to pour the extract into the cylinder, which was called a "centrifugal," and operate the machine. He testified that after he had poured in four or five buckets of the extract, and while he was standing looking into the cylinder with one foot on the projecting foundation and the other on the movable steps, something gave way beneath him, and he was thrown against the cylinder and his arm caught, and he was instantly jerked into the revolving cylinder, and after being carried around several times was thrown out upon the floor with a broken arm, which was afterwards amputated, two broken ribs, and severe injuries about the head, face and body, entirely unconscious, and from which injuries he was for a long time confined under the care of a physician. The trial resulted in a verdict for appellee for \$1,000, under instructions which are not seriously complained of, and which were in fact as favorable to the defendant as the law authorized. Substantially the only ground upon which a reversal is asked is the failure of the trial court to direct a verdict in favor of the defendant. This contention is based upon the claim that the appellee knew the danger of the service which he was directed to perform and assumed the risk incident thereto.

Whilst it is the duty of a servant to exercise that degree of care which is commensurate with the character of his occupation, in order to protect himself from injury, and if he fails to exercise this care can not recover of the master for an injury to which his own negligence has contributed, it is the primary duty of the master both to provide and keep in a reasonable safe condition the place of work, and this duty is more important than the duty of the servant to use reasonable care to protect himself. (*Ashland Coal and Iron Co. v. Wallace*, 19 Ky. Law Rep., 854; *Crabtree Coal and Mining Co. v. Samples*, 24 Ky. Law Rep., 1706.) We think it is conclusively shown by the testimony in this case that this primary duty has not been complied with by the defendant. Mr. Routsch, the assistant manager of the company, was introduced as a witness, and upon cross-examination testified as follows on this point:

"Q. Do you know whether anything was fastened to the top of those steps?"

"A. I do not."

"Q. That sheep wash when dropped out of the bucket is slippery, is it not?"

"A. Yes, sir."

"Q. Was there any place to set the bucket on except the projecting foundation, and don't that leave a slippery place?"

"A. Yes, sir."

"Q. Ought there not to be some place to set the bucket besides where the foot would get in it?"

"A. He might have gone down the steps with it and set it down."

"Q. They usually set the bucket here, did they not?"

"A. Yes, sir."

"Q. Would it not have been safer to have a shelf to set the bucket on?"

"A. Yes, I think it would."

"Q. Would it have taken much time or expense to put a guard rail there?"

"A. No."

"Q. Would it not have been much safer for the man leaning over the centrifugal?"

"A. Yes, sir."

"Q. Are you not much less liable to slip with a guard rail there?"

"A. Yes."

"Q. Do you consider these steps safe?"

"A. They might be better."

"Q. You say they might be better?"

"A. I think so."

"Q. You say you have known Milton Wheeler for nine years; what character of workman is he?"

"A. He is careful, trusty and faithful."

"Q. He had no authority in the premises?"

"A. No; he did what he was told; he had no discretion."

The testimony shows that whilst appellee had on several occasions performed the services in which he was engaged during the course of his employment, that it was not his regular service, and that he had not been so engaged prior to the day on which the accident occurred for more than a year. It is not claimed that appellee was directed to make any change in the steps or the approaches to the centrifugal in any way; and that he had no authority to do so without direction is testified to by appellant's manager. When appellee was directed by appellant's foreman to carry the sheep wash to the centrifugal and operate it, he was not called upon to make any minute examination of the approaches thereto, but had the right to believe that they were in a solid and substantial condition. The service was dangerous. The slightest loss of balance on his part was liable to occasion the accident for which he sues. Neither the steps nor the foundation afforded a safe place on which to perform such dangerous service. A small expenditure of time and money would have rendered the place comparatively safe. Appellant can not be permitted to escape liability for such primary negligence by the charge that it was appellee's duty, before he obeyed the commands given him, to have carefully examined the approaches and the steps. It was appellee's duty to obey the directions of the foreman, and he had a right to believe that the steps were safe. The care which parties are required to use in the discharge of their respective duties varies so much with the situation of the parties and the circumstances of each particular case that it is the policy of the law to leave questions of this kind to the jury, and we are unable to discover any reason why this rule of law should not be applied in this case.

Judgment affirmed.

Judge Barker dissents.

BOOKER, &c. v. CITY OF LOUISVILLE, &c.

(Filed September 29, 1903—Not to be reported.)

1. Judicial sales—Inadequacy of price—The court will not, on appeal, set aside a judicial sale of real estate upon the ground of mere inadequacy of price. Moreover, the fact that the purchaser had transferred the benefit of

his bid to another would indicate that the price bid at public outcry was not inadequate.

2. Setting aside judicial sale—A judicial sale will not be set aside on the ground that one of the parties to the suit was prevented by severe illness from giving attention to the sale, where it appears that such party had even prior to the suit transferred her interest to her daughter, who showed no reason why she could not have given the matter attention.

3. Same—Divisibility of property—The contention that the property was susceptible of division without materially impairing its value is not available as a ground for setting aside the sale, as the original and cross petitions alleged that it was not divisible without impairing its value, and those allegations were not denied.

4. Same—Appraisalment—Where the commissioner sold exactly the amount of land set out in the judgment and described in the mortgage sued on, the sale will not be set aside on the ground that the appraisers had failed to appraise the entire lot, which was larger than the dimensions stated in the judgment, in the absence of a tender of the amount of the various debts for which the property was sold.

W. T. Burch for appellants.

August C. Reverman for purchaser.

Wallace & Miller for appellee Garr.

N. R. Peckinpugh for appellee City of Louisville.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Burnam.

This suit was instituted on the 25th day of May, 1900, against F. M. McNichols to collect the taxes assessed against lot thirty-two in block eight hundred and sixty-four for the years 1896-97-98-99-1900, which aggregate \$250.27. The process which issued on the petition was executed upon the defendant on the 19th day of June, 1900, as shown by the return of the officer. On the 23d day of February, 1901, the executors of S. A. Garr filed their petition to be made a party to this proceeding, and when they made a cross petition and counterclaim against Charles F. Mehler, F. M. Dangler, F. Dangler, Ida McNichols and Peter Bitzer, in which they allege that F. M. McNichols on September 22, 1892, had executed and delivered to them her certain promissory note for \$1,000, due three years after date, and to secure the payment thereof had executed to them a mortgage upon the same lot sought to be subjected to the payment of taxes by the city of Louisville, and which is described as fronting on Maple street fifty-three feet six and three-quarters inches, and running back in parallel lines seventy-four feet on one side and seventy-seven feet on the other, being lots three and four in block one of Erdman's subdivision of Louisville; that after the execution and delivery of the mortgage F. M. McNichols conveyed the lot of ground to Ida L. McNichols, who was the owner. They allege that the plot of ground could not be divided without materially impairing its value; and that Charles F. Mehler and Peter Bitzer held lien claims against the lot for improvements. It is also alleged that F. M. McNichols had, after the conveyance of the property to her daughter, Ida McNichols, intermarried with one Dangler. Peter Bitzer filed an answer to the counterclaim of Garr's executor, in which he alleged that he held, as assignee of one Figg, an apportion-

ment warrant for the cost of an adjoining alley, which had been regularly issued by the board of public works against the lot for \$30.38, for which he prayed judgment. C. V. Mehler also answered, setting up a claim due to him upon the apportionment warrant, which had been assessed against the property for the cost of erecting a fire hydrant at the intersection of Nineteenth and Maple streets. On the 1st day of October, 1901, a judgment was entered by default, subjecting the lot described in the mortgage to Garr to the payment of all these claims, it being recited in the judgment that it fronted on Maple street fifty-three feet six and three-fourths inches. On the 28th of October, 1901, R. W. Herr, as commissioner of the Jefferson Circuit Court, sold this lot under the judgment at public outcry to the highest bidder, and S. A. Garr's executor became the purchaser thereof for \$1,519.79, no one bidding more, after having been appraised as required by law. Garr's executor assigned their bid to the appellee, George Schoeffler, agreeing to pay one-half of the taxes assessed against the land. This sale was confirmed on the 12th of December, 1901, and Schoeffler paid the purchase money into court. Subsequently the appellants, F. M. McNichols and Ida McNichols, prayed and moved the court to set aside the judgment confirming the commissioner's report upon the ground that the property did not sell for one-half its value, and that they were prevented from giving any attention to the sale or suit by reason of the sickness of Mrs. F. M. McNichols; and that the property was susceptible of division without materially impairing its value.

A number of affidavits were filed in support of this motion, which were in the main to the effect that the property was worth largely in excess of the amount bid, but there was no tender into court of any greater sum than it had sold for, and on the 23d day of January the appellant, Ida McNichols, who had in the meantime married a Mr. Booker, filed her affidavit, in which she says that she is the owner of the two lots, and that the true size of both lots is sixty-two feet by seventy-seven feet; that there is a frontage of sixty-two feet on Maple street, instead of fifty-three feet and three-quarters inches, as recited in the mortgage of Garr's executor and shown by the appraisal.

The chancellor overruled the motion to set aside the order of appraisal, and Ida Booker, etc., appeals. The testimony in the case conduces to show that the property had run down very much in value and was in very bad physical condition. Witnesses place its value all the way from \$1,850 to \$4,000, but the fact that it only brought \$1,519 at public outcry, and that the purchaser transferred the benefit of his bid to the appellee, Schoeffler, agreeing to pay one-half of the county and State taxes due, would seem to be conclusive proof that the property was not undervalued. Besides, the rule is too well established to be seriously questioned that this court will not set aside a judicial sale upon the ground of mere inadequacy of price.

Nor is the alleged illness of Mrs. F. M. McNichols sufficient grounds for so doing, as long before this suit was instituted she had transferred the title to the lot to her daughter, Mrs. Booker, and no reason is shown why she, who was made a party to the suit, could not have given the matter her attention. The contention that the lot could have been divided without ma-

terially impairing its value is not available as it is alleged both in the original and cross petition of Garr, etc., that the land was indivisible without impairing its value, and these allegations were not denied. In this state of the record a judgment for a sale of the whole property was properly entered. (*Jarbo v. Colvin*, 67 Ky., 75; *Kefer v. Miller*, 70 Ky., 546.)

The last ground relied on for a reversal, and the one most seriously urged in brief of counsel, is that appellant in sixty days after the judgment of confirmation tendered a motion to set aside the judgment on the ground that the appraisers had failed to appraise the entire lot, as it in fact fronted Maple street sixty-two feet, instead of fifty-three feet six and three-quarters inches, and in support of this contention refer us to *Pollard v. Lucas*, 37 Ky., 454. In that case a tract of land sold under execution was described as containing 235 acres, and was valued for redemption at \$3 per acre, and it sold for more than two-thirds of what that quantity would amount to at that rate. But it was afterwards ascertained that there were two hundred and fifty-seven acres of the tract, and the gross sum for which it was sold was not two-thirds of what two hundred and fifty-seven acres amounted to at a valuation of \$3 per acre. The defendant in the execution offered to redeem the land, and in pursuance of the statute tendered the amount paid and 10 per cent. in addition, and it being refused paid it into the clerk's office, and instituted a suit in equity to enforce the redemption, and his contention was sustained. In this case the commissioner sold exactly the quantity of land described in the judgment, and the judgment followed the description set out in the boundary in the mortgage, and no tender of the amount due on the various debts which the land was sold to pay accompanied appellant's motion. In our opinion this motion comes too late, and upon the whole case we perceive no error prejudicial to the rights of appellant.

Judgment affirmed.

ILLINOIS CENTRAL R. R. CO. v. LANGAN.

(Filed September 29, 1903.)

1. Master and servant—Duty of master to render adequate assistance—It is the duty of a railroad company to furnish to its employe engaged in the handling of heavy steel shafts adequate assistance to enable him to handle such freight with safety to himself, and it is liable in damages for injuries resulting from a failure to provide such assistance.

2. Same—Knowledge of danger of servant—The servant does not assume the risk and danger incident to the task where he asked for additional help, but proceeded in the performance of his task without such help when told by the fellow servant, under whose direction he was working, to go on, and where it was not so obvious that the force employed was inadequate for the task that a prudent man would have refused under the circumstances, he having the right under such state of case to rely upon the master's presumed superior knowledge.

Pirtle & Trabue and J. M. Dickinson for appellant.

Matt O'Doherty for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 3.

Opinion of the court by Judge O'Rear.

Appellee was a freight handler at appellant's depot in Louisville. Freight was handled by gangs of four men. When more were needed additional ones were detached from one gang and added to the other. Appellee and three others were called upon to move steel shafts, weighing from 200 to 460 pounds, from the cars to the freight platform. They were under the direction of a freight clerk. The gang, including appellee, had moved several shafts, weighing about 200 pounds, and requested the freight clerk to obtain assistance for the removal of the larger shafts, which weighed 460 pounds each. They stated to him that they could not in safety, or that it would be dangerous for them to attempt to move these larger shafts, which were about twenty feet long, and from four to six inches in diameter, were round, and had been oiled or greased, making it difficult for them to be handled. The freight clerk having failed to get the additional men after an apparent effort, exclaimed to appellee and the others of his gang, "O, go on," or something to that effect. In attempting the handling of one of these larger shafts it slipped, or was dropped, from the hands of the carriers, and fell on appellee's foot, severely injuring it.

This suit for resulting damages was based upon the neglect of appellant in failing to provide a sufficient number of workmen to assist appellee in this work. The instruction of the court upon this point was that it was the duty of the defendant, the railroad company, to furnish a sufficient number of hands to handle in a reasonably safe manner the shafting which injured appellee, and that if it failed to do so, and knew, or by the exercise of ordinary care could have known, that the force furnished for the handling of the shafts in a reasonably safe manner was insufficient, and the same was not known by appellee, and could not have been known by him in the exercise of ordinary care, and that appellee did not have equal means of knowing the same with appellant, or its agents superior in authority to him, and that appellee was injured by such failure of appellant, then the law was for the appellee. For the appellant it is objected that this instruction was erroneous in that it failed to tell the jury that they could find for the injured servant only in the event that his superior, through gross negligence, failed to provide a sufficient number of men to assist in doing the work. (I. C. R. R. Co. v. Coleman, 22 Ky. Law Rep., 878.)

There are certain risks which a laborer assumes as an incident of his employment. Among these is that of the ordinary negligence of his fellow servants. Although each servant in the common employment is a representative of the master to the extent that he is acting within the scope of his duties, yet for many kinds of ordinary neglect towards his fellow servants the master may not be liable for resulting injuries. However, there are certain duties which the master owes to his servants that are primary and personal in their nature, and which he may not delegate to another so as to escape liability for their nonperformance. Among these he owes to his servants to furnish them a reasonably safe place in which to do their work, and must furnish them reasonably safe tools and appliances with which to do it. Alongside of these he must furnish them adequate assistance, or a sufficient number of workmen. So where the master assigns or imposes upon one of his servants the duty of representing him in providing these means, the servant's acts are deemed to be those of the master, and for a simple neglect by

such servant the master is responsible as though he acted in person. As said in *N. P. R. R. Co. v. Hervert*, 116 U. S., 642: "The servant does not undertake the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery. His contract implies that in regard to these matters his employer shall make adequate provision that no danger shall ensue to him." (*Lasch v. Stratton*, 19 Ky. Law Rep., 901; *Thorpe v. Missouri Pac. Ry. Co.*, 2 S. W., 3.)

Appellant's next point is that appellee was aware of the danger in his employment, resulting in his injury at the time he undertook it, and that his continuing in this employment, with knowledge of the inadequate force, was equivalent to his own assumption of the danger incident to the task. This would be true if the danger was such an obvious one as that the injury was reasonably certain to result, so that none but a reckless man would have undertaken it under the circumstances. We understand the rule on this subject to be that if the danger or risk is such that a prudent man would have refused to do the work under the circumstances because of the danger, then the servant will act at his peril in undertaking it. But where the probability of injury is such that the minds and judgments of prudent men might well differ upon the certainty of its happening, or with regard to whether the force or appliances are reasonably safe or adequate to the performance of the task, and where the master insists, after objection, that the servant proceed with the work, or assures him that the force is adequate, or the machinery safe, then the servant has a right to rely upon the master's presumed superior knowledge. The risk is thereby assumed entirely by the master, and he impliedly assures the servant, who relies upon his statement, or who obeys his positive direction, that if he, the master, is in error as to the safety, he would indemnify the obedient servant against the consequences. (*Sherman & Red. Neg.*, 126; *Clark v. Holmes*, 7 Hurl. & N., 937; *Snow v. Housatonic R. R. Co.*, 8 Allen, 450; *Conroy v. Vulcan Iron Works, Mo.*, 39.)

Concerning appellant's criticism of the instruction governing contributory negligence, we deem it sufficient to say that there was no evidence of contributory negligence in this case apart from such as may have been included in the act of appellee in handling the shafting with an inadequate force, with such knowledge as he may have had of the dangers of the situation, and that feature was submitted to the jury in other instructions.

Perceiving no error in the record prejudicial to appellant the judgment is affirmed, with damages.

HAZEN, &c. v. COLOSSAL CAVERN CO., &c.

(Filed September 29, 1903—Not to be reported.)

1. Contracts—Sufficiency of consideration—The payment of a sum of money in cash, in lieu of stock which a party undertook to deliver by the terms of an original contract, is a sufficient consideration to uphold a modified and supplemental contract, whereby the vendor of certain cave property obligated himself not to acquire or hold other cave property in the vicinity of that which he had conveyed.

2. Specific enforcement of contract—A contract whereby vendors of cave property undertook that they would not acquire and hold other cave prop-

erty in the vicinity of that conveyed, and that any property which they might acquire in the vicinity under which caves might be found should be held in trust for their vendee of the original cave, is a contract which equity will specifically enforce where it appears that the vendors are expert cave explorers, and it is necessary for the protection of the vendees' property that there should be no competition in the cave business in that locality on the part of the vendors.

3. Married women—Enforcement of contract—Such a contract is enforceable against a married woman under the provisions of section 2128 of the Kentucky Statutes, where her husband joins with her in the contract.

B. F. Proctor, Proctor & Herdman and John W. Ray for appellants.

Edward W. Hines, Mitchell & DuBose and Thos. B. Harrison, Jr., for appellees.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Hobson.

On January 8, 1896, a written contract was entered into between L. W. Hazen and Sophronia Hazen, his wife, of the first part, and M. H. Smith, trustee of the second part, whereby, in consideration of \$5,000, \$550 of which, as was cited in the contract, had been paid in cash and the other, \$4,450, to be paid in stock of the corporation thereafter to be organized, the first parties conveyed to the second parties all of their right or title in all of the land owned by them in the counties of Edmonson and Barren on which was located any cave or entrance thereto, and especially the new cave recently discovered by L. W. Hazen; also all cave rights and privileges owned by them in two other tracts of land. It was stipulated in the contract that Smith was to organize a corporation to operate the cave property, and when the corporation was organized the stock referred to was to be delivered to Hazen, and Smith was to convey to the company the property conveyed to him, the land owned by Hazen and wife being described in the deed as the Jordan Blair tract of thirty-five acres and an undivided one-third interest in the Daniel Isenberg tract. Smith also agreed to furnish Hazen a purchaser for his stock at par in one and two years from that date if he wished to sell. As copied in the record only Sophronia Hazen's name is signed to this deed, but her husband's name as well as hers is used in the body of the deed in the statement of the parties, and it was acknowledged by him as well as by her. On January 21, 1896, another contract was made between Hazen and wife, of the first part, and M. H. Smith, trustee, of the second part, in which it is recited that it is a modification of and a supplement to the agreement of January 8. In this contract it is recited that it is made in consideration of the agreements and stipulations thereafter made, and it is stated that the first parties have purchased with money furnished to them by Smith, trustee, certain tracts of land and interests therein, and they thereby convey the same to him. Then follows a description of ten tracts of land by metes and bounds. Then follows a conveyance of all the right and title of the first parties to all the caves and caverns lying in or under some eighteen tracts of land described by metes and bounds. It is then stipulated that instead of the \$4,450 being paid to Hazen in the capital stock of the corporation Smith has heretofore paid \$2,000 in money, and is to pay \$1,000 in thirty days and \$1,000 in sixty days. It was further stipulated that the cor-

poration should give Hazen and wife the exclusive right to take pictures in the caves on the land conveyed to Smith on January 8, or by this deed, for a period of five years from that date, the privilege to be personal and not assignable. The further privilege was also given them for five years of taking such specimens from the cave as the corporation saw fit to allow, but this privilege was to be personal, and they were not to send any one else into the cave. The contract then concludes with these words: "It is further agreed by the parties that the first parties shall not, nor shall either of them, purchase any cave property or cave rights in either the county of Hart, Edmonson, or Barren, except for the second party, and all such property and rights purchased by said first party, or either of them, shall be conveyed to Daniel Breck, who will hold the titles in trust for the second party, and convey the same to him or to said corporation as said second party may direct. If the first parties, or either of them, buy any tract of land for a residence or for any other purpose, and said tract of land have on it any cave or caves that may be capable of being made profitable by being opened to visitors, said cave or caves shall be held by them, or either of them, as the case may be, in trust for the use and benefit of the said second party and his assigns. The protographing and specimen privileges hereinbefore stipulated for, with reference to other caves, shall extend to the cave or caves on said land mentioned in this article. Any violation of this contract, or any part of it on the part of the first parties, or either of them, shall work a forfeiture of said privileges for taking pictures and specimens stipulated for herein."

At the time these contracts were entered into, and for some time afterwards, Hazen was in the employ of Smith or of the Colossal Cavern Co., the corporation organized by him, working under Daniel Breck, who was the chief agent in charge of the property and the company's business.

Shortly before the contracts were made Hazen had discovered Colossal Cavern, which was said to be larger and more beautiful than Mammoth Cave, and it was this that Smith aimed to purchase from Hazen. The land that Hazen afterwards bought for Smith, as set out in the supplemental contract, was bought to give him control over Colossal Cavern, or to protect it. After that contract was made Breck and Hazen went on buying other land for the Colossal Cavern Co. They finally differed in judgment and Hazen and wife bought for themselves certain tracts in Edmonson county, which Breck declined to buy for the company. On these tracts Hazen and wife made openings, one leading into what is known as Salt Cave, and one into a new cave hitherto undiscovered. After they had done considerable work in exploring their caves preparatory to making them available for visitors, these suits were filed by Smith, trustee, and the Colossal Cavern Co. for the specific enforcement of the contract of January 24, 1896. Hazen and wife defended; denied that they executed the contract with the words above quoted in it, and they also relied on the defense that the contract was not such as equity would specifically enforce. On final hearing the court adjudged in favor of the plaintiffs the relief sought, and Hazen and wife have appealed.

The evidence sustains the chancellor's conclusion as to the execution of the contract by the defendants. But what effect should be given to the contract is a question of more difficulty. It is supported by sufficient considera-

tion. By it Smith paid \$4,000 in cash in lieu of stock in the company, which he undertook to deliver by the original contract. And while he was ultimately bound to furnish a purchaser for the stock at par, this was a material change, giving Hazen the money then, and was a sufficient consideration to uphold the contract outside of the privilege of taking pictures and specimens in the cave, which was also granted. It is true the adequacy of the consideration may be considered on the question of whether the contract was fairly made, but as we have said we can not disturb the chancellor's finding on the facts as to the integrity of the contract.

There is great force in the defendant's position that there being no mutuality in the contract and little consideration to support it, it should not be enforced against them so as to take from them for nothing their cave property on which they have spent both money and time. But the judgment does not affect their rights to the surface of the land or to anything but the caves under it. The sum of the contract seems to be that the Hazens being expert cave explorers, and Smith having bought the Colossal Cavern from them for \$5,000, and having spent a large amount of money in perfecting the property, aimed to avoid having the Hazens as competitors in business. In other words, the value of his property might have been greatly depreciated if the Hazens, both husband and wife being expert cave explorers, had gone on and discovered and opened up other caverns near by in competition with Colossal Cavern, or opened up some entrance into it from land which he did not own. Hazen was in his employ at \$75 per month, and while so employed would necessarily learn the secrets of the property. These secrets he might turn to great advantage to himself if he bought property near by under which he had learned that some cave or any of its branches ran. To protect the vendees of the property in their purchase from Hazen and wife they were, therefore, required, in substance, to get out of the cave business in that vicinity. In view of the facts of the case and the circumstances of the parties the court concludes that the contract was not unreasonable or oppressive, but is one that equity will enforce, as being in effect only a covenant against competition by Hazen in the cave business in that locality.

The contract is enforceable against the wife as well as the husband. By section 2128, Kentucky Statutes, a married woman may make contracts and sue and be sued as a single woman, with the proviso that she may not make any executory contracts to sell or convey her real estate unless her husband joins in the contract. Her husband joined with her in the contract of January 24, 1896, and, therefore, the contract of the wife is made as provided in the statute. The purpose of the statute is to remove entirely the common law restriction on the power of married women to make contracts subject to the exceptions contained in the act; and outside of these exceptions married women now have the same power to make contracts as single persons.

The circuit court has a wide discretion in the appointment of a receiver, and we do not think this discretion was abused here. The Vials case was settled and it is unnecessary, therefore, for us to consider any questions there involved.

Judgment affirmed.

Whole court sitting except Judge Settle.

RAGSDALE, COOPER & CO. v. WATKINS.

(Filed September 29, 1903—Not to be reported.)

Homestead exemption—Abandonment thereof.—One who has a dependent daughter-in-law and grandchild living with him is entitled to the homestead exemption provided by law. The fact that he temporarily moves away from his homestead to a place some miles distant and leaves it, with his bed room furniture, in charge of another, he retaining a room in the house and frequently returning to the homestead for the purpose of cultivating it in partnership with another, does not operate as an abandonment of such homestead so as to subject it to the claims of creditors.

R. A. Burnett for appellants.

G. B. Bingham for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Chief Justice Burnam.

The only question to be decided upon this appeal is whether appellee, H. T. Watkins, is entitled to a homestead exemption as against the claims of his creditors. It is insisted that he has lost all right to the exemption because he had abandoned the homestead and was permanently located and living elsewhere. They also deny that he is a housekeeper with a family. Appellee testified that he had a daughter-in-law and a grandchild living with him, who were dependent upon him for support; that he resided upon the land in controversy, and occupied it as a homestead from 1874 until 1898, at which time he moved temporarily to a station on the Illinois Central R. R., about three and one-half miles distant from his farm for the purpose of buying tobacco as agent for other parties; that he left his farm, with his bed room furniture, in charge of J. F. Wade; that he retained a room in the house, and frequently went back to it; that he and Wade cultivated the place in partnership; that he had no intention of permanently abandoning his home. Wade testifies that he and Watkins worked the farm in partnership; that Watkins kept his room, and frequently returned to the place and assisted in plowing, putting up tobacco and other farm work. The testimony of Gip Watkins, a son of appellee, is to the same effect. While it is necessary that a homesteader should have persons dependent upon him for support and residing with him in order to constitute a family, it is not necessary that this should be true in order to retain an existing right to a homestead. In this case the testimony is uncontradicted that a dependent daughter-in-law and grandchild resided with him. And we are of the opinion that appellee did not lose his right to a homestead because he took up a temporary residence in another place for the purpose of more conveniently conducting his business.

Judgment affirmed.

CRENSHAW v. GARDNER.

(Filed September 29, 1903—Not to be reported.)

1. Trespass—Damages—Where the plaintiff testified that he went around his entire fence and put up the rails which he found down, and that the fence was 4½ feet high, and was corroborated in these statements by three

witnesses, it can not be contended that there was absolutely no evidence to show that he had a lawful fence at the time the cattle of his neighbor broke through.

2. Witnesses—Introduction—When put under rule—Where the witnesses for both sides were put under the rule to remain out of the court room during the trial, each side furnishing a list of its witnesses to the other, the court did not abuse its discretion in refusing to permit a witness to testify who had not been subpoenaed, and whose name had not been placed on the list of witnesses at the beginning of the trial, in the absence of any reason why he had not been subpoenaed or called as a witness until the morning his testimony was offered, and in the absence of any pretense that his testimony had just been discovered.

J. F. Combs and Fairleigh, Straus & Fairleigh for appellant.

Chapeze & Halstead for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Nunn.

Appellee filed his petition in the Bullitt Circuit Court, claiming that the appellant's cattle had unlawfully trespassed on his nursery (which he claimed was enclosed by a lawful fence), and damaged him in the sum of \$5,000 by the destruction of his nursery. The single question presented in the court below was whether or not the appellee had a lawful fence, and whether or not appellant's cattle broke over the fence and destroyed the nursery of appellee. This question was submitted to the jury, and the jury returned a verdict in favor of appellee for \$500 damages. From this judgment appellant appeals, and insists upon three propositions for a reversal:

1st. That there was absolutely no evidence to show that appellee had a lawful fence at the time the cattle broke into the nursery.

2d. That the court erred to his prejudice in failing to allow him to introduce one Davidson as a witness in his behalf.

3d. In refusing to allow him to cross-examine appellee's witness, John Mooney, and show by him the price he had been selling like fruit trees from another of appellee's nurseries adjacent to the one injured. These were all the complaints made. There was no objection whatever to the instructions given by the court.

We will take up the propositions relied on in the order stated. The appellant's counsel are mistaken in the statement that there was no evidence that appellee had a lawful fence around the nursery at the time of the trespasses complained of. We quote from the record excerpts from the evidence of appellee:

"A. Yes, sir, Mr. Bemus and I went around the entire fence, and where we found any rails down we put them up before I rented the place. I satisfied myself that the fence around it was all right before I rented the land."

"Q. At the time these cattle were getting into your nursery what was the condition of the fence around it?"

"A. It was a good, lawful fence."

"Q. Now what do you mean by its being a lawful fence?"

"A. I mean it was four and a half feet high."

His witnesses, Bemus, Taylor and Osborne, corroborate him in this statement.

As to appellant's contention that the court erred in refusing to allow him to introduce William Davidson in his behalf, the record shows that the reason the court sustained the objection to his testimony was that the witnesses for both sides at the beginning of the trial were put under rules to remain out of the court room during the trial, and under the usual rules for a separate examination of witnesses, each side furnishing a list of its witnesses to the other, and that Davidson's name was not upon the list furnished to appellee's counsel, nor was Davidson sworn, or offered to be sworn, as a witness until the trial had progressed for two or three days and near the close of the evidence. Counsel for appellant made this avowal: "That William Davidson had not been subpoenaed in this case, and had not been called as a witness in this case until this morning, and that he had not been in Shepherdsville or at any court until this morning, and that defendant expected to prove, and can prove, by said witness that he was a mail carrier between Deatsville and Cane Spring during the year 1899, and that he passed this nursery daily and observed the condition of the fences around it; and that he saw numerous gaps down in said fence, and saw stock of various kinds in the nursery in the fall of 1899, and that the fence was low and weak in many places, even after numerous efforts to repair it."

It will be observed that there was not any reason given why Davidson was not subpoenaed and called as a witness in the case until the morning he was offered, nor any reason or excuse offered why his name was not placed on the list of witnesses at the beginning of the trial. There was no pretense that the appellant had just discovered what he could prove by the witness. It is important in the just administration of the law in the conduct of a trial that such rules be observed and obeyed for the reason that frequently it is important to know in the beginning of a trial the names of the witnesses for the other side for divers reasons which will suggest themselves to the mind. A litigant has the right to attack the character of any witness offered against him, or to refute his testimony in many other ways, but he would be precluded from this if the rules and order of the court with reference to a separation of witnesses be not observed, and with reference to such matters they must be left to the sound discretion of the trial court, and its action thereon will not be disturbed unless it be made to appear that this discretion has been abused. Considering the circumstances of this matter and the further fact that appellant introduced seventeen witnesses in his behalf, many of them testifying in substance the same facts offered to be proven by Davidson, we can not say that the lower court abused its discretion in this matter.

As to the third proposition we have been unable to find anything in the record showing that the court refused to allow appellant to prove by John Mooney the price for which he had been selling trees from an adjacent nursery, and even if we had it would not have been prejudicial to the appellant in this case.

In view of the fact that appellant and appellee introduced many witnesses to sustain their contentions, there was much conflict in the testimony and the jury was authorized to find a verdict either way, and having found such verdict, this court will not disturb it.

Wherefore, the judgment of the lower court is affirmed.

LOUISVILLE, HENDERSON & ST. LOUIS RY. CO. v. COONS.

(Filed September 29, 1903—Not to be reported.)

1. Railroads—Duty to passengers—Where a passenger on a crowded excursion train allows the conductor to pass her by without taking her ticket and fails to apprise him of the fact that she wishes to leave the train at a certain station, the conductor is not negligent of any duty to her in not learning of her destination.

2. Same—Where the train is brought to a standstill, and remains so for a time reasonably long enough for the passenger thereon to alight, although such passenger has failed to apprise the conductor or other proper person in charge of the train of her desire to get off at that station, and the trainmen are unaware of such desire, then the company is not negligent in starting the train before she actually alights.

3. Same—If the train is not brought to a standstill for a sufficient length of time to enable her to alight in safety, and she is compelled to choose between leaving the train while moving slowly or submitting to the inconvenience of being carried past the station, the company is liable for her injuries sustained by her choice in getting off the moving train, provided she did not act, when a reasonably prudent person, in the exercise of ordinary care and caution, would have refrained from alighting under the circumstances.

4. Same—Erroneous instruction—It is error to instruct the jury to find indemnities against the company in such state of case unless the passenger shows a want or absence of all care in alighting from the moving train.

Chapeze Wathen and Helm, Bruce & Helm for appellant.

Little & Slack and Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee was a passenger on one of appellant's trains from Owensboro to Holt's station. On that occasion appellant had an excursion and was hauling two extra coaches in addition to its regular ones. The train was crowded. Appellee purchased her ticket at Owensboro, where she boarded the train. She got on the train and allowed the conductor to pass by her without giving up her ticket. She says she was not asked for it, and, therefore, did not give it up. It is clearly shown that the conductor did not know that she was to get off at Holt's, and in view of the long and crowded train, and that appellee failed either to give up her ticket or apprise the conductor of the fact that she wished to leave the train at Holt's, we are not prepared to say that the conductor was negligent of any duty to her in not learning of her destination. Holt's is a station at which presumably there is not much travel. There are two or three houses immediately thereabout. The train usually stopped there for a minute or a minute and a half. On this occasion there were no passengers for Holt's except appellee. There were but one or two passengers to get on at this place. Appellee insists that the train did not stop long enough to allow her to alight from it in safety after it stopped, and that as the train started, before she could alight, she attempted to leave it, and was thrown to the ground, and severely sprained her ankle. Eight or ten witnesses seem to contradict her statement as to the length of time the train was stopped at the station. However, the jury found for appellee.

The only error that we deem it necessary to notice upon this appeal is the instruction of the court defining the duty of appellant under the circumstances. That instruction is the third one given to the jury, and is as follows: "The court further instructs the jury that if they believe from the evidence that on the arrival of defendant's train at Holt's said train was brought to a standstill and remained so for a time reasonably long enough for the plaintiff to alight from said train, and she negligently delayed getting off until the train was in motion, and got off while said train was so in motion, and was injured, and her injuries were the result of her own negligence contributing, without which she would not have been injured, they should find for the defendant."

In *L. & N. R. R. Co. v. Eakin's Adm'r*, 108 Ky., 465, it was held that it was not negligence per se for a passenger to leave a moving train when it had not stopped long enough for him to alight in safety at his destination. It was there said that where a passenger by the wrongful act of the company is compelled to choose between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desired to stop, the company is liable for the consequence of the choice, provided it is not exercised negligently or unreasonably. It was held that the matter was one for the jury.

The court told the jury further in this case that the meaning of negligence, as used in the instructions, is the want or absence of care. Then the court told the jury: "'Reasonable care,' as used, means such care as ordinarily prudent persons would usually observe under the same or similar circumstances."

Therefore, the jury were told in this case that unless appellee showed a want or absence of care, that is, an absence of all care, in alighting from the moving train, they should find for her. This is beyond what was said by this court in the *Eakin* case, *supra*, and is far beyond what we are willing to now approve. The jury should have been told that if the train was brought to a standstill, and remained so for a time reasonably long enough for the plaintiff to alight therefrom, and that if she had failed to apprise the conductor, or other proper person in charge of the train, of her desire to get off at that station, and that the trainmen were unaware of such desire, then the company was not negligent in starting the train when it did; but that if the company failed to bring the train to a standstill for a sufficient length of time to enable plaintiff to alight therefrom in safety, and that she was thereby compelled to choose between leaving the cars while they were moving slowly or submit to the inconvenience of being carried by the station where she desired to stop, the company is liable for her injuries sustained by her choice of getting off the moving train, provided she did not act when a reasonably prudent person, in the exercise of ordinary care and caution, would have refrained from alighting under the circumstances.

For the reasons indicated the judgment is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

NISBET v. WELLS.

(Filed September 29, 1903—Not to be reported.)

1. Liverymen—Duties of—It is the duty of a liveryman who hires to another a horse to be used in driving to furnish one reasonably safe for that purpose, and if the horse furnished is not reasonably safe, and that fact is known to the liveryman at the time of the hiring, or could have been known to him at such time, by the use of ordinary care, and if the person who hires the horse is injured as a result from the fact that the horse is not reasonably safe, then the liveryman is liable for the injury.

2. Same—Contributory negligence—Where a horse hired from a liveryman runs away and the driver jumps from the vehicle in which he is driving the horse, and is thereby injured, the question of contributory negligence is properly limited to the management of the horse by the driver.

3. Same—The driver is not required, after the horse shows the first symptoms that it is dangerous and would run away, to abandon it, the circumstances merely bringing to his knowledge the dangerous disposition of the horse and requiring extra care and precaution on his part in managing it from that time on.

4. Evidence—It was competent for the party injured to prove by a witness who had driven the horse a month before the accident sued for that the horse had run away with him, although he had not communicated the fact to the liveryman, for the purpose of showing that the horse was actually a dangerous animal, and that the liveryman might have learned the real disposition of the horse by the exercise of ordinary care.

5. New trial—Newly-discovered testimony—Where a case has been on the docket for several terms, has had one mistrial, and the grounds fail to show why the evidence alleged to have been newly-discovered was not presented earlier, it is not error for the court to refuse a new trial on the ground of newly-discovered evidence.

W. S. Pryor and Cox & Gordon for appellant.

C. J. Waddill for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant, a liveryman, hired to appellee a horse and buggy to be driven some miles into the country. Appellee informed appellant's servant in charge of the stable of the purpose for which he wanted the team, and that he was to be accompanied by a young lady. The horse furnished was a high-spirited, mettlesome animal that had previously run away and damaged the vehicle. Appellee was not informed of that fact. On this occasion the horse, without apparent cause, ran away, and injured appellee, for which he sued to recover his damage.

The court correctly instructed the jury that it was the duty of appellant to furnish appellee a reasonably safe horse for the drive, and if the horse furnished was not reasonably safe for the purpose, and the fact was known to appellant at the time of the hiring, or could have been known to him at such time by ordinary care, and if the injury resulted from the fact that the horse was not reasonably safe for the purpose for which he was hired, then the jury should find for the plaintiff (appellee) unless his injuries were the result of his own fault or neglect in the management of the horse. The only criticism of this instruction seems to be that the court limited the matter of

appellee's contributory negligence to his management of the horse. As a matter of fact we do not find where there was any evidence to submit any other theory of contributory negligence, for after appellee was put in danger by the runaway he had the right to jump from the vehicle as he did, although if he had not jumped he need not have been injured. Being put in a perilous position and required to act immediately, he had the right to act as he did. Nor was appellee required after the horse showed the first symptoms that it was dangerous and would run away to abandon it and walk back to the town, some miles distant. This circumstance merely brought to his knowledge the dangerous disposition of the horse, requiring extra care and precaution on his part in managing it from that time on.

It is further objected that incompetent evidence was admitted to the jury in this. The court suffered appellee to prove by witnesses who had driven the horse a month or so before the accident sued for that this horse had run away with them, but that they had not communicated the fact to appellant. We are of opinion that this was relevant to show that the horse was actually a dangerous animal, and that as it was a circumstance tending to show that this was not the first time that it had so acted, that, therefore, appellant might have learned by the exercise of ordinary care of the real disposition of the horse.

Another objection is that the court refused to grant a new trial because of newly-discovered evidence. The case had been on the docket for several terms, had been once tried, resulting in a mistrial, and the grounds do not show why the evidence alleged to have been newly discovered was not presented earlier, nor indeed is it shown that the facts were not known before the trial.

There appearing no error in the record the judgment is affirmed, with damages.

Judge Nunn not sitting.

MITCHELL v. BOURBON COUNTY, &c.

(Filed September 30, 1903—Not to be reported.)

1. Conveyances—Easements—A conveyance by the terms of which certain property was "relinquished" to the president and directors of a turnpike company "for the use of said company" for turnpike purposes did not pass a fee-simple title to the land, but conveyed an easement only.

2. Same—Reversion—The land on which the turnpike company had an easement reverts, if at all, to the vendee of the grantor of the easement who had purchased the tract of land adjoining and surrounding the easement from such grantor.

3. Abandonment of easement by turnpike company—The fact that the county had acquired the property of the turnpike company by condemnation proceedings and had made a free turnpike of it did not necessarily indicate an abandonment of the land for a toll site and turnpike purposes. Neither does the mere fact that the county has made no use of the land since the condemnation constitute an abandonment, an intention, if any, on the part of the county to use it in the future in conjunction with the operation and maintenance of the turnpike being sufficient to negative the abandonment.

4. Breach of covenant—The acquisition of the turnpike road by the county

and the conversion of it into a free turnpike is not a breach of a covenant with the grantor of certain lands for toll site purposes that he should have free toll over the road.

5. Same—A covenant with the grantor of lands for toll site purposes that he should have free toll over the road was a personal covenant which did not run with the land, and did not pass with the title to a vendee.

McMillan & Talbott for appellant.

E. M. Dickson and Denis Dundon for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Barker.

Appellant, Bettie B. Mitchell, instituted this action in the Bourbon Circuit Court against the county of Bourbon and the Paris, Winchester and Kentucky River Turnpike Road Co. to recover a small triangle of land situated on the northeast side of the turnpike, containing from one-quarter to one-half an acre. In her petition she states that in the year 1818 A. V. Bedford, who then owned the land in question, executed and delivered to the directors of the turnpike company a writing, which, among other things, contains the following: "I also relinquish to the said president and directors all my ground on the northeast side of said sticks for the use of said company, with the understanding that the said president and directors are to cause my fence to be removed and reset at the expense of the company, where the road is to be changed, and for the further consideration that my family and myself are to be exempt from the payment of toll at any gate which may be erected between the mouth of Holder's road and the town of Paris;" that the conveyance of this triangular piece of land was made for the purpose of building and maintaining thereon a tollgate, to be used in connection with the turnpike road; that it constituted a part of the farm of A. V. Bedford; that afterwards, on October 6, 1865, A. V. Bedford then being dead, his heirs at law conveyed the farm, including the land relinquished to the turnpike company, to Joseph Mitchell; that Joseph Mitchell died, domiciled in Bourbon county, Kentucky, leaving a last will and testament; that by virtue of this will, and of the deeds of partition executed in pursuance thereto, the farm formerly owned by Bedford was conveyed to appellant, including the parcel of land on the northeast side of the turnpike which is involved in this litigation; that by virtue of the conveyances set out in the petition the fee-simple title of the land involved herein, subject to the use of the turnpike company, vested in her, and that she is now the owner thereof; that the turnpike company took possession of the land, erected thereon a toll house, and used the same in connection with its turnpike road up to the year 1896, at which time the appellee, by and through its fiscal court, instituted proceedings under article 6, chapter 129, Kentucky Statutes (being section 4748B thereof), for the purpose of condemning the turnpike road, and in the proceedings did condemn the same, and acquired all the property owned by it; that it took possession of the parcel of ground involved in this litigation, and still holds it, claiming to be its owner.

By an amended petition filed by leave of court it is alleged, among other things, that the turnpike company ceased to use the parcel of land in question after December, 1896, and has abandoned the use thereof, and that Bour-

bon county has never used the property for tollgate or turnpike purposes, and the use thereof for turnpike and tollgate purposes has, since December, 1896, been discontinued and abandoned; wherefore, it is prayed that appellant be adjudged the owner in fee of the property, and that she recover the same from the county.

A general demurrer to the petition, as amended, having been sustained by the court, and appellant declining to amend her petition, it was dismissed absolutely; from which judgment she has appealed.

The first question that arises is whether or not the turnpike company acquired the fee, or only an easement, in the land by the writing executed by A. V. Bedford in 1848. We do not think that the turnpike company acquired the fee in the land; the instrument by which it was conveyed is most informally and loosely drawn; it lacks all of those apt and technical words which are used in conveying the fee-simple title to real estate. The word "relinquish" does not import a conveyance of the fee, but rather the use of the land.

This very question arose in the case of *Harrison and Wife v. The Lexington and Frankfort R. R. Co.*, 9 B. Mon., 470. In that case the grantor had relinquished the right of way to a railroad company. An action to recover the land because of its abandonment by the railroad company was instituted. On the subject of whether the land reverted after abandonment the court said: "The condition or provision annexed to the relinquishment, that 'if said road should hereafter abandon said ground it be reverted to me or my heirs again,' was in fact no more than the law implied, without any express condition or stipulation on the subject."

In the case cited, as in the case at bar, the word of conveyance used by the grantor was "relinquished," and while in the conveyance in the former case there was an express provision for a reversion after abandonment, the court said that this express provision imported no more than the law implied, without such stipulation on the subject, thus establishing the doctrine that where land is relinquished for the use of a public highway, an easement, alone, is conveyed; for where the fee is conveyed, the doctrine of reverter does not apply.

The second question for adjudication is whether or not, if the land reverts, it goes to appellant, as remote vendee of A. V. Bedford, or to his heirs at law. This question was settled in favor of the appellant in the case of *Green's Adm'r v. Irvine*, 23 Ky. Law Rep., 1702. W. R. Green had conveyed two plots of land, containing one-half an acre each, to certain toll companies, to be used by them so long as they conducted a toll-road business; upon these lots were two tollhouses; about 1895 the toll companies ceased to operate the turnpike, and under the terms of the agreement the land reverted. J. Stone Walker had acquired the boundary surrounding the tollhouses from the original grantor, and the question arose as to whether or not the land upon which the tollhouses were situated reverted to him or to Green's heirs; the court held that it passed by reversion to Walker. This is conclusive of the question of appellant's right to the land, provided it reverts.

The third question which arises upon the record is whether or not the allegations of the petition, as amended, show the abandonment of the land

for turnpike purposes. It does not follow, because the county of Bourbon has acquired the property of the turnpike company by condemnation and made a free turnpike of it, that, therefore, the land formerly used as a site for a tollhouse is abandoned. The property may be used by the county in any other mode it sees fit, provided it is in furtherance of the operation and management of the turnpike. That the acquisition by the county of the property of the turnpike company did not constitute an abandonment of the road was expressly decided in the case already cited of *Harrison and Wife v. Lexington & Frankfort R. R. Co.*, where the facts were very much the same as those occurring in the case at bar. But the allegation of the petition, as amended, is that the land has been abandoned for turnpike purposes since 1896, and, as the demurrer admits, for the purpose of its consideration, all of the well-pleaded allegations of the petition, the statement that the land has been abandoned must be assumed to be true, and, if so, it reverts to the appellant, as above shown. It does not even follow, because the county of Bourbon has made no use of the land since the condemnation, that it has abandoned it. If it is proposed by the county in the future to make use of it in conjunction with the operation and maintenance of the turnpike, the fact that it has not actually used it will not constitute an abandonment.

The question as to whether or not the land has been abandoned is one of fact, and with the allegation in the petition, as amended, that both the county and the turnpike road company have abandoned the land since 1896, we think the demurrer should have been overruled, and the county required to plead and to show the facts.

We do not think that the change in the mode of conducting the turnpike road, occurring from its acquisition by the county, constitutes a breach of the covenant, that the grantor, A. V. Bedford, and his family should have free toll between the points mentioned in the conveyance.

The fact that the county has converted the road into a free turnpike, thereby giving all others the same privilege as Bedford and his family would have had, in no wise affects the covenant that the grantor and his family should have free toll; that covenant is fully complied with by the county making the road a free turnpike; besides, this was a personal covenant for the benefit of Bedford and his family, which did not run with the land, and, consequently, did not pass with the title of the property to appellant.

For the foregoing reasons the judgment is reversed for proceedings consistent with this opinion.

BOHANNON V. TARBIN, &c.

(Filed September 30, 1903—Not to be reported.)

1. Probate of wills—Appeal from county court—Validity of judgment—A judgment of the circuit court on appeal from the order of a county court admitting a will to probate is not void as to the parties properly before the circuit court because some of the infant beneficiaries under the will were not brought before that court on appeal. (4859-61-62, Kentucky Statutes.)

2. Fraud and collusion—In the absence of cause to question the honesty and competency of the trial judge and the fidelity and honesty of the guardian of infants who had instituted an equitable action to impeach a judg-

ment rejecting a will, the charge that the action was collusive and fraudulent can not be upheld.

8. Impeachment of judgment—Collateral proceeding—The judgment of a circuit court in a case appealed from an order of the county court probating a will can not be impeached in a collateral proceeding, it appearing that the court had jurisdiction of the subject-matter and of the parties, and that no appeal had been taken within the time allowed by law.

4. Transfer of case—Power of court—Although the chancellor of the Jefferson Circuit Court may have exceeded his jurisdiction in designating a special judge to try a case transferred to another division of the court, the action of the special judge was not invalid where the parties to the suit agreed upon him to try the case; neither can the action of the chancellor in transferring the case to the law and equity division be grounds for impeaching the judgment, even conceding such action to be erroneous, as section 1028 of the Kentucky Statutes provides that "no proceeding in such courts shall be invalid because prosecuted in the wrong branch thereof."

5. Special judge—Jurisdiction—A special judge, chosen in the absence of the regular judge, to try an issue submitted to him is not deprived of his jurisdiction to try the case because of the return of the regular judge before the determination of the case. The rule of law that a special judge has no further authority to try causes after the expiration of the term for which he is elected is not applicable to the case at bar, which was pending in a court of continuous session.

6. Questions for court and jury—The court has the power to try the issue of will or no will in an equitable action instituted under section 4861 of the Kentucky Statutes, by infants who were not before the court on appeal from an order of probate in a will case, where the jury is waived and the law and facts are submitted to the court.

7. Infants—While infants, who were not parties, are allowed by section 4861 of the Kentucky Statutes until twelve months after attaining their majority to institute an equitable action to impeach a judgment in a will case, they also have the right to institute it at any time within that period; and after having once exercised the right they are precluded from again doing so after reaching majority.

8. Appeal—Expiration of time—The time within which either the judgment of the circuit court on appeal from the order of probate in the county court or the judgment of the circuit court in the equitable action might have been appealed having expired at the time property, which passed from the decedent to her heirs, was sold under judicial sale, the purchaser stood in no danger of the consequences of a retrial of either case.

C. H. Shield for appellant.

H. H. Nettleroth, E. J. Bacon, Burnett & Burnett and J. T. A. Baker for appellees.

Appeal from Jefferson Circuit Court, Chancery division, No. 1.

Opinion of the court by Judge Barker.

This case involves the validity of the title to certain real estate situated in Louisville, Ky., and arises upon the following statement of facts:

Mary Schwartz died, domiciled in Louisville, Ky., in 1898, leaving an instrument in writing purporting to be her last will and testament, which was probated by order of the Jefferson County Court. By this will the decedent devised the land involved in this action to her three daughters for life, with remainder to their children.

From the order of the county court admitting the will to probate an appeal was prosecuted to the Jefferson Circuit Court within the time authorized by the statute, under the style of Schwartz v. Tritten, Ex'tx, No. 19,742.

A trial of this action was had, and resulted in a verdict declaring the paper in question not to be the last will and testament of Mary Schwartz. No appeal was ever prayed from the verdict and judgment thereon. Subsequently it was discovered that some of the infant grandchildren of Mary Schwartz, who were beneficiaries under her will, had not been properly brought before the court in the case of Schwartz v. Tritten, No. 19,742, and that, as to them, the judgment was a nullity. Whereupon J. D. Loughbridge qualified as their guardian, and instituted an action in equity, in order to impeach and set aside the judgment nullifying the will of their grandmother, and for a retrial of the question settled adversely to them. Upon the filing of the petition the defendants, who were all of age, entered their appearance to the action, and agreed in writing that John S. Jackman, special judge of the law and equity court, should try the case without the intervention of a jury, and upon a transcript of the evidence taken in case No. 19,742. Afterwards, upon allotment of the clerk, as by law required in the Jefferson Circuit Court, the case fell in the chancery division of the court, presided over by Judge Shackelford Miller. In order to carry out the written agreement of the parties, to try the case before Special Judge Jackman, Judge Miller transferred the case to the Louisville Law and Equity Court, where a trial was had under the terms of the agreement between the parties, which resulted in a judgment by the court adverse to the will.

There being no will, the property of the decedent descended by law to her three daughters and a son, who were her only heirs at law. These parties partitioned the real estate of their mother among themselves by agreement, the land involved in this action falling to the three daughters, the son being satisfied by property with which we have no concern. One of the daughters, Mrs. Neidringhaus, borrowed from the appellee \$3,000, and to secure the payment thereof a mortgage was given on all the property involved in this action, all the daughters of the decedent joining in the mortgage. This debt falling due, and being unpaid, this action was instituted to enforce the mortgage lien of appellee. There were other liens and mortgages on the land in question, but as their proper rank and priority were settled by the judgment rendered by the chancellor, from which there was no appeal, it will not be necessary to encumber this opinion by their recitation or discussion. The judgment ordered the mortgaged land to be sold, and it was sold by the commissioner, and a part of it purchased by the appellant, Thomas Bohannon. The purchaser declined to consummate the purchase of the property bid in by him, and filed exceptions to the sale, which, being overruled, he prayed an appeal to this court.

Upon the hearing of the exceptions there were filed the transcript of the evidence, pleadings and orders in the two cases involving the validity of the will of Mary Schwartz, and certain affidavits, which constitute all the testimony heard on the question.

By his exceptions appellant Bohannon seeks to impeach the validity of the two judgments had as to the validity of Mary Schwartz's will. These exceptions may be arranged in two classes: First, those that seek to impeach

the validity of the judgment in case No. 19,742, because all of the parties in interest were not properly brought before the court; second, those that seek to impeach the judgment in the equitable action instituted by those infants who were not properly before the court in action No. 19,742, for various reasons, which, it is claimed, deprived the judge who presided of jurisdiction to try the cause. We will discuss all these in their order.

The judgment rendered in action No. 19,742 was not void because some of the infant beneficiaries under the will were not properly before the court on appeal from the order of probate of the county court. This matter is regulated by the statute, and the sections having application to the subject are as follows:

"Section 4850. An appeal may be taken from the county court to the circuit court of the same county, and thence to the Court of Appeals, from every judgment admitting a will to record or rejecting it. The circuit court shall try both law and fact unless a jury be required. The Court of Appeals shall not hear any matter of fact pertaining thereto other than such as may be certified from the circuit court; and the same effect shall be given to the verdict of a jury in a will case as is given to the verdict of a jury in other civil cases. The appeal to the circuit court shall be within five years after rendering the judgment of probate or rejection in the county court, and prosecuted to the Court of Appeals within one year after the final decision in the circuit court. The propounder of the will shall have the right to conclude the argument in the circuit court, and the Court of Appeals shall prescribe the course of argument in that court.

"Section 4859. When the proceeding is taken to the circuit court all necessary parties shall be brought before the court by the appellant; and upon the demand of any of the parties a jury shall be impaneled to try whether or how much of any testamentary paper produced is, or is not, the last will of the testator. If no jury be demanded, the court shall determine the question, and the final decision given shall be a bar to any other proceeding to call the probate or rejection of the will in question, subject to the right of appeal to the Court of Appeals as hereinbefore named; but nothing in this section shall preclude a court of equity from its jurisdiction to impeach such final decision for such reason as would give it jurisdiction over any other judgment at law.

"Section 4861. Any person interested, who at the time of the final decision in the circuit court resided out of the State, and was proceeded against by warning order only, without actual appearance, or being personally served with process, and any other person interested who was not a party to the proceeding by actual appearance or being personally served with process, may, within three years after such final decision in the circuit court, by petition in equity, impeach the decision and have a retrial of the question of probate; and either party shall be entitled to a jury for the trial thereof. An infant, not a party, shall not be barred of such proceeding in equity until twelve months after attaining full age.

"Section 4862. But no such proceeding in equity for establishing or avoiding a will shall operate further than is necessary to the rights of such infant, nonresident, or other party, or otherwise affect the rights of any other person interested in the probate."

It will thus be seen that the statute especially provides for the contingency relied on by the purchaser. It was foreseen by the legislature that the very mistake urged here, to impeach the validity of the judgment in action No. 19,742, might happen in any case, and to guard against the hardship and confusion incident to nullifying the whole judgment, because some of the beneficiaries were not properly served with process, and yet to give these absent beneficiaries their day in court, section 4861 of the statute, provided for their benefit the right to institute an equitable action, by which the case, as to them, could be retried; and section 4863 provided that the equitable action should operate no further than to preserve the rights of the parties entitled to institute it. The language of the statute is plain and simple, and needs no elucidation; it fully meets and answers the exceptions, seeking to impeach the judgment in action No. 19,742.

There is no evidence in this record tending to substantiate the charge that the equitable action instituted to impeach the judgment in case No. 19,742 was either collusive or fraudulent; that it was agreed to try the case before the same judge who presided in the jury trial had in the first action is certainly not collusive. It seems to us that, granting him to be an honest and competent judge, it was but natural that he should be selected to try the equitable action; especially since, for purposes of economy and expedition, it was proposed to use the transcript of the evidence given in the first case upon the trial of the latter. He having heard the witnesses depose on the jury trial, could better understand and appreciate the transcript than a judge who had not the benefit of having seen the manner and behavior of the witnesses on the stand. It was natural and proper that all parties in interest should desire to settle the question of title to the property as speedily and economically as possible, and to this end agree to the procedure as far as might be. It was a small estate, and should not have been flittered away in unnecessary litigation. There is no reason to question the fidelity or honesty of J. D. Loughbridge, the guardian of the infants, who instituted the equitable action; and the name of the special judge who presided is a sufficient guaranty that the proceedings were fair, and the judgment impartial.

The purchaser also seeks, by his exceptions, to impeach the judgment in case No. 19,742, because the jury were erroneously instructed, and the verdict contrary to the evidence. This can not be done in a collateral proceeding; the principle is elementary, and too well settled to need citation of authority or argument that where the court has jurisdiction of the subject-matter and of the parties, its judgment is conclusive as to the latter, and can not be questioned except by appeal. The court, in the case involving the validity of Mary Schwartz's will, had jurisdiction of the subject matter and of the parties, and it is immaterial in this case whether the judgment was erroneous or not. It concluded the rights of the parties litigant, and as they have never appealed, and the judgment stands unvacated and unmodified, it is conclusive upon appellant as to his title to the property purchased by him.

It is further urged that the chancellor had no right to transfer the equitable action from his division, where it had fallen by allotment to the law and equity division, for the purpose of having it tried under the agreement before Special Judge Jackman. It may be conceded that the chancellor's

jurisdiction was limited merely to the transfer of the case to the law and equity division, and that so much of his order as designated Judge Jackman as the special judge to try the action after it was transferred is invalid. After the action was transferred by the chancellor, the parties litigant had the right to agree to submit the litigation to Judge Jackman, and as they did this, he had jurisdiction to try the case, both because he was special judge and was presiding in that division, and also because the parties litigant agreed that he should try it, and submitted the matter for adjudication to him under that agreement. It may also be conceded, for the purpose of argument, that the order of the chancellor, transferring the case to the law and equity division, was erroneous. The statute regulating procedure in courts having four judges (section 1038) provides: "No proceeding in such courts shall be invalid because prosecuted in the wrong branch thereof." The statute is conclusive of the question, and disposes of the exceptions of appellant seeking to impeach the judgment in the equitable action because of the fact that it was erroneously transferred to the law and equity division for adjudication.

Appellant further urges that the special judge lost his jurisdiction to try the case transferred by the chancellor because, before he had determined the issue submitted to him, the regular judge of that division returned and resumed his duties on the bench. To this we can not agree. Judge Jackman was elected special judge because of the absence of Judge Toney, the regular judge. While presiding as special judge the equitable action was transferred, as before stated, by the chancellor to the law and equity division, and there submitted, by agreement, to the special judge for trial. The fact that the regular judge returned before the case was finally disposed of by the special judge in nowise nullified the jurisdiction of the latter. It would create inextricable confusion if, after a special judge, elected because of the absence of the regular judge, had commenced the trial of a case, his jurisdiction to further try it should be ousted by the return of the regular judge. It needs no argument to demonstrate the hardship and expense to litigants which would arise upon the adoption of such a principle. This question, however, has been settled by this court in the case of the Paducah Land, Coal and Iron Co. v. Cochran, Ass'ee, 18 Ky. Law Rep., 465, in which it is said: "It is further objected that the motion for judgment in accordance with the mandate was heard and decided by the special judge while the regular judge was engaged in holding the regular term of the circuit court, and the term which, by rule of the court, had been set apart for the trial of criminal cases, except that the rule permitted default judgments to be taken at that term in cases where no good defense was interposed. It is a sufficient answer to this objection that the special judge had all the powers of the regular judge, and the regular judge could undoubtedly have set aside or suspended this rule. Notice was given of the motion, and the appellant was represented by counsel. That the special judge sat at the same time as the regular judge is no objection to the correctness of the judgment. Having the same powers, they could select the same time for their sessions, and the orders of one were as valid as those of the other."

The cases of Childers v. Little, 96 Ky., 376, and Small v. Reeves, 20 Ky. Law Rep., 504, cited by counsel for appellant on this question, do not sup-

port his contention; they merely determine that, after the expiration of the term for which a special judge is elected, he has no further authority to try causes, which is not the point in issue here. In the case at bar the court was one of continuous session, and there was no expiration of the term for which the special judge was elected.

It is also contended that the special judge had no authority to try the issue of will or no will in the equitable action, but should have submitted that question to the determination of a jury. The statute regulating this matter will not support this view. Section 4850 of the Kentucky Statutes, upon the question of the trial of will cases in the circuit court on appeal from the county court, provides: "The circuit court shall try both law and fact unless a jury be required;" and section 4861, which authorizes the institution of an equitable action to impeach a judgment rendered by the circuit court in a will case, provide "that either party shall be entitled to a jury for the trial thereof." These two provisions of the statute must be read together, and, so read, section 4861 clearly means that either party may have a jury by demanding it, but that a failure to do so authorizes a trial of the question by the court; and especially is this true in a case where the jury was waived and the law and facts submitted to the court, as was done in the equitable action under consideration.

The time in which an appeal could have been prosecuted from the judgment of the circuit court to the Court of Appeals in case No. 19,742 had expired before the sale by the commissioner to Bohannon, and under the statute there is no saving in favor of infants. (*Arterburn v. Young*, 14 Bush, 509.)

Section 4861 of the Kentucky Statutes provides that infants shall not be barred of their rights to institute an equitable action impeaching a judgment in a will case under the conditions authorized thereby for twelve months after attaining their majority. Now while the infants in the equitable action under consideration in this case had a year after reaching their majority in which to institute it, yet they also had the right to institute it at any time within the period allowed them; and having exercised this right once, they are precluded from again exercising it after reaching their majority. (*Moss v. Hall*, 79 Ky., 40; *Newland v. Gentry*, 18 B. Mon., 670.)

The time in which an equitable action might have been appealed to this court had also expired at the time of the judicial sale, and, therefore, the purchaser stood in no danger of the consequences of a retrial of either of the cases involving the will through which he derives title to the property purchased by him.

The paper purporting to be the last will and testament of Mary Schwartz having been fully adjudicated adversely to the instrument in the two cases instituted for the purpose of trying that issue, the property in question, along with the rest of the decedent's estate, descended by operation of law to her heirs. They having partitioned the property among themselves by agreement, and thus conveyed the title of all the property involved on this appeal to the three daughters who mortgaged it to appellee, their rights were concluded by the judgment rendered by the chancellor in this action to foreclose the mortgage, and a good title passed to the purchaser at the judicial sale ordered by the final judgment.

We are of the opinion that the exceptions of the purchaser were properly overruled by the chancellor, and the judgment is, therefore, affirmed.

COMMONWEALTH v. LEMON.

(Filed September 30, 1903—Not to be reported.)

1. Local option—Repeal—An act of the general assembly, incorporating a town within the limits of a precinct in which the provisions of the local option act had been put in operation by a vote of the precinct, and providing that the trustees of said town should have the power "to regulate the sale of any and all spirituous, vinous or malt liquors," relieved from the penalties imposed by the local option law one who sold liquor within the town under a license granted by the trustees.

2. Same—Constitutional provisions—The local option law having been voted into effect and the incorporation of the town within the local option precinct having been passed previous to the adoption of the present Constitution, the provisions of section 61 of the Constitution, relating to the sale of liquors does not apply.

C. J. Pratt and M. R. Todd for appellant.

L. H. & O. M. James for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Chief Justice Burnam.

At an election regularly called on the second day of August, 1875, the voters of Piney Precinct, No. 7, in Crittenden county, put in operation in that precinct the local option law. Subsequently, by an act approved April 22, 1884 in (volume 2 of the Acts of 1883-84), the general assembly incorporated the town of Shady Grove within the boundaries of Piney Precinct, the 22d section of which reads as follows: "The trustees may, and shall, have the power to regulate the sale of any and all spirituous, vinous or malt liquors, or any other intoxicating agent, whether it be a proprietary medicine or beer, inside of the incorporation, inflicting such fines and penalties as they may deem necessary, and hereafter may be fixed."

The trustees were duly elected, and from that time forward administered the affairs of the municipality. On the 18th of October, 1902, the appellee, Fred Lemon, was granted a license by the town trustees to sell whisky by drink, and paid a license therefor to the municipality of \$300. The county judge of Crittenden county also granted him a license as required by law. On the 25th of November thereafter appellee was indicted by the grand jury of Crittenden county for selling liquor in violation of the local option law in Piney Precinct. The circuit judge upon this state of fact directed the jury to find a verdict for the defendant, and the Commonwealth has appealed, insisting that the section of the charter of Shady Grove quoted *supra* does not authorize the trustees to license the sale of liquor in Piney Precinct, but that the local option law voted in 1875 remains in full force and effect until it shall have been repealed by a vote of the electors residing in the town of Shady Grove, and to support this contention refer to section 61 of the Constitution, which provides: "The general assembly shall, by general law, provide a means whereby the sense of the people of any county, city, town, district or precinct may be taken as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated, but nothing herein shall be construed to interfere with or repeal any law in force relating to the sale or gift of such liquor," and to

the interpretation of this constitutional provision in *Stamber v. Commonwealth*, 102 Ky., 88, and *Thompson v. Commonwealth*, 108 Ky., 685.

As the charter of Shady Grove was enacted by the general assembly long prior to the adoption of our present Constitution, we do not see how the provisions or cases cited have any bearing upon the question involved. There is no doubt that prior to the adoption of our present Constitution the general assembly had the power to enact local laws regulating the sale of liquors, and this court in a number of cases has declared that provisions in charters similar to that in the charter of the town of Shady Grove had the effect to vest in the trustees the exclusive power to grant licenses to sell liquor, and repealed the local option law which had previously been voted into operation in a civil district of which the city formed a part. (*Gifford v. Commonwealth*, 2 Ky. Law Rep., 437.) And the rule in this case was followed in *Tabor v. Lambdel, &c.*, 94 Ky., 237. In that case the district vote was taken in August, 1884, and in April, 1888, the amendment of the charter of the city of Hawesville was adopted for the first time, conferring authority on the city council to license taverns, etc. In the opinion in that case, the court said: "The legislature has complete control of the subject. It may say that liquors shall not be sold in a given territory, or that the question of its sale shall be left to all the voters therein; or that liquors may be sold in a given locality; or that the question may be left to the council of a city or board of trustees."

It is unnecessary for us to consider how far the provisions of our present Constitution prohibiting special legislation would apply if the facts presented the question.

Judgment affirmed.

HARRISON LAND AND MINING CO. v. NASHVILLE, CHATTA-NOOGA & ST. LOUIS RY. CO.

(Filed October 2, 1903—Not to be reported.)

Action to recover real property—Where a manufacturing corporation, nearly 90 per cent. of whose capital stock was owned by three stockholders, who controlled the affairs of the company, sold to a railroad company for a valuable consideration certain of its tracks and rights of way, including tracks running over lots owned by the three stockholders individually, the deed containing a provision that the title to the tracks and rights of way should pass when the three stockholders should make a conveyance to the company of the right of way over their lots, equity will not permit the vendee of the lots owned by those stockholders to recover the right of way from the railroad company, such stockholders being in effect the corporation, and it being their duty to see that a conveyance of the right of way should be made; consequently it would be inequitable to permit their vendee, who stands in their shoes, and who had notice by reason of the railroad's possession and the language of the deed, to divest it of its title and possession.

J. D. Mocquot for appellant.

Greer & Reed for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hobson.

The Paducah Iron Co. established an iron furnace near the Tennessee river, and for the better operation of its furnace constructed upon its ground certain railroad tracks and spurs. Thomas Howard was the president of the company, a large stockholder and one of the directors. It was found that for the proper operation of cars on the company's tracks it was necessary to extend a track over two adjoining lots, and so Howard bought the lots himself, the company not being able to buy them at the time, and had the track constructed across them. He had made arrangement with R. J. Lackland and John W. Harrison, who were also large stockholders in the company, and two of its directors, that he would hold the title to these lots in trust for the three, Lackland and Harrison paying him for the cost of the lots in the proportion of their stock in the company to his. In this condition of affairs the Paducah Iron Co., on November 11, 1890, by its president and board of directors, in consideration of the sum of \$30,000, sold and conveyed to the Paducah, Tennessee & Alabama R. R. Co. the tracks referred to, and from this company the property passed by other conveyances to appellee the Nashville, Chattanooga & St. Louis R. R. Co. On May 19, 1899, the heirs of Thomas Howard, he having in the meantime died, J. W. Harrison and R. J. Lackland conveyed the two lots to appellant, the Harrison Land and Mining Co., who instituted this action to recover the strip occupied by the railroad track.

The proof shows that Howard bought the lots because they were needed by the Paducah Iron Co. to extend its track, and that after he bought them he allowed the track built over the lots by the iron company. The track, when built, did not extend beyond the lots, but after it was bought by the railroad company it was extended by it some distance beyond these lots to reach other manufactories which the railroad company wished to connect with. The railroad company made the purchase for the purpose of making this extension and reaching the other factories. The deed described the property conveyed with minuteness. Amongst other descriptions is the following: "Also the right of way, including the rails and ties thereon, along the certain line of railroad, beginning at the east side of Third street and on the west side of the furnace lot aforesaid, and being the extension of said Norton street track; running thence in a curved line and in a southeasterly direction to the south line of said furnace lot and through the next adjoining land of Thomas Howard, if and when said first party shall receive a conveyance thereof from said Howard."

The ground upon which the action is based is that the furnace company did not receive a conveyance to the adjoining land from Thomas Howard, it never having paid him for the lots; that, therefore, the title remained in him and in Harrison and Lackland, for whom, as well as himself, he held the title, and passed from them to the Harrison Land and Mining Co. by the conveyance of May 19, 1899, above referred to.

But when the deed of November 11, 1890, was made by the iron company to the railroad company and the \$30,000 paid to it by the railroad company Howard, Lackland and Harrison owned 1,767 shares out of 3,000 shares, the total capital stock of the iron company, Howard owning 868 shares, Lackland 764 and Harrison 605. They were, therefore, in substance, the company, for they owned nearly 90 per cent. of the stock and could control its

policy, and, besides, Howard, as the president, was in actual control of its affairs. Howard had paid for the lots, including interest, something over \$4,000. When they got \$30,000 in money from the railroad company and undertook, as they did, by the deed that it should operate, without further consideration as a conveyance to the railroad company of the right of way over the Howard lots, if and when it should receive a conveyance thereof from Howard, it was their duty to see to it that such a conveyance was made; and they can not be allowed to put the \$30,000 in the treasury of the iron company and use it for other purposes to suit themselves, leaving this title unperfected, and then obtaining the chancellor's assistance to take the property from the railroad company. The Harrison Land and Mining Co. stands only in their shoes, for the possession of the railroad company, coupled with the language of the deed, put it upon notice. Howard, Lackland and Harrison being the president of the iron company and three of its directors, owning as stockholders nearly 90 per cent of its stock, and as such having the power to control the affairs of the iron company, can not be allowed in equity to neglect what was obviously in their power after they had received from the railroad company the full consideration for the property, and covenanted that the title should pass to the railroad company as soon as the deed from themselves to the iron company was made. When they neglected to make this deed, which would have operated of itself to vest the title in the railroad company under the deed above referred to, they can not be heard in equity to demand the property for themselves from the railroad company. Their long acquiescence in the possession of the property by the railroad company shows that they themselves recognized the right of way as the property of the railroad.

Judgment affirmed.

CHICAGO, ST. LOUIS & NEW ORLEANS R. R. CO., &c. v. WILSON, &c.

(Filed October 2, 1908—Not to be reported.)

1. Breach of contract—Demand—Waiver—In an action by a vendor of a right of way to a railroad company for damages for the breach of a covenant contained in the conveyance requiring the railroad company to put down a sidetrack for the exclusive use of the vendor at a point on his land, which he might indicate, the answer of the railroad company denying plaintiff's right of action against it constitutes a waiver of the right of demand or notice from the vendor.

2. Pleading and proof—Variance—A variance between pleading and proof, to be fatal, must be such as will mislead a party to his prejudice in maintaining his action or defense upon the merits of the case. The omission of the word "Branch" from the name of the grantee railroad company, Owensboro, Falls of Rough and Green River Branch R. R. Co., as set out in the petition, was not a material variance between the allegation and the proof, especially where the exhibit filed with the petition contained the correct name of the company.

3. Same—Where no effort is made to have the variance complained of corrected in the court below it can not avail the appellant on appeal.

4. Covenants real—While it is true that a covenant executed in consideration of the conveyance of the right of way over land is a covenant real, which runs with the land and passes by conveyance to the grantees, it can

not avail the defendants in an action for damages for breach of the covenant, where the grantor of the right of way had retained a strip of land running along the entire right of way, and the grantees of the remainder of the land were made parties plaintiff to the suit, thus making any judgments rendered binding upon them all and protecting the railroad company from any additional suit upon the covenant.

5. Innocent purchaser—A railroad company which purchases a right of way from the grantee company can not be considered an innocent purchaser without notice as to a covenant contained in the grant, where the deed containing the covenant was recorded in the proper office.

6. Judgment supported by evidence—The evidence as a whole abundantly supports the finding of the chancellor.

H. P. Taylor and Pirtle & Trabue for appellants.

H. L. Heaverin and Sweeney, Ellis & Sweeney for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Barker.

On the 29th day of April, 1892, the appellant, Dan T. Wilson, and his wife, Sarah E. Wilson, by their deed, properly executed, acknowledged and delivered, conveyed to the Owensboro, Falls of Rough & Green River Branch Railroad, and its successors and assigns, a right of way sixty-six feet wide and about two miles long, running through their tract of land in Ohio county. As a part of the consideration for this conveyance it was covenanted by the grantee that it would fence the entire line through the land, and put in the necessary farm crossings which the grantor might require, and put in a side track for his exclusive use, at a point which he might designate, and to move it twice for his convenience, if required, and to leave it permanently at any point on the line he might wish, for his use.

Subsequently this right of way was assigned, conveyed and transferred to the appellant, the Chicago, St. Louis & New Orleans R. R. Co., and is now operated by the Illinois Central R. R. Co., under some form of contract or arrangement with the former corporation.

Since the date of the deed mentioned appellee, Dan T. Wilson, has been constantly seeking to have the covenant, which constituted the consideration for the conveyance of the right of way, carried out; and in this he has partially succeeded. Some time prior to the institution of this action the right of way was fenced, but he seems never to have been able to obtain the switch stipulated for in the deed. Becoming weary, at last, of importuning those who were using and enjoying the fruits of the conveyance from him and his wife, he instituted this action against the Chicago, St. Louis & New Orleans R. R. Co. and the Illinois Central R. R. Co., as the joint owners and occupiers of the right of way, claiming damages in the sum of \$1,000, for breach of the contract to put in the switch mentioned in the deed. He alleges in his petition that since the Chicago, St. Louis & New Orleans R. R. Co. purchased the property in question from the Owensboro, Falls of Rough and Green River Branch Railroad "the plaintiff has on divers and sundry times notified it of his contract with its assignor, and demanded of it to put in the switch mentioned in the deed for the land, but that it has failed and refused to comply with his request in this regard;" further, that he has likewise notified the company where farm crossings were necessary, and

demanded that they should be made; that after this demand and notification on his part appellant company failed and refused to perform the covenant under which it held the right of way in question; and he alleges that, by the breach of contract of appellant, he has been damaged in the sum of \$1,999.

The appellants filed an answer to this petition, denying all its allegation, and pleading in the second paragraph that since the execution of the deed the appellees had conveyed away all of the property through which the right of way in question ran. Subsequently the appellees filed an amended petition, claiming a lien upon the right of way in question, for such sum as they might be entitled to, for breach of the contract set up in the original petition. By an amended answer it was denied that appellees had a lien upon the right of way involved in this litigation, and it was again alleged, affirmatively, that the appellees, Dan T. Wilson, and his wife, Sarah E. Wilson, had conveyed all the property, through which the right of way ran, to certain persons named therein, who were the children of the vendors. Afterwards these vendees of Dan T. and Sarah E. Wilson filed their joint petition, asking to be made party plaintiffs, and joined in the prayer of the original petition.

We have not undertaken to set out with any minute particularity all of the allegations of the pleadings in this case; it is sufficient to say that they properly raise the following questions: First, whether or not the appellees, prior to the institution of this action, made demand of appellants for the performance of the covenant which constituted the consideration for the conveyance of the right of way; second, whether or not there is a fatal variance between the allegations of the petition and the proof; third, whether or not the right of action upon the covenant sued on passed from appellees, Dan T. Wilson, and Sarah E. Wilson, to their subsequent vendees of the land through which the right of way ran; fourth, whether or not the evidence is sufficient to support the judgment.

A careful reading of the evidence in this case convinces us that the appellee, Wilson, had, for a long time prior to the institution of this action, been seeking at the hands of those who had obtained from him the right of way involved in this litigation, and who were enjoying its use, the fulfillment of the covenant which constituted the consideration for the conveyance by him to them, or their vendor. He shows, uncontradictedly, that he had interviewed, and corresponded with, the officers and agents of the corporations in question; that they considered the proposition, and sent men out to examine the land, but afterwards failed to comply with his request on the subject. But if this were not true, we do not think it would avail the appellants in this case. They, by their pleading, deny entirely his right of action against them; and this, in our opinion, constitutes a waiver of the right of demand or notice from him. The object of a demand for the fulfillment of a covenant such as is involved here is to afford the covenanter the opportunity to fulfill his covenant without litigation; but the demand is entirely futile and unavailing when the very basis of the claim is denied. In the American and English Ency. of Law, 3d edition, 9th volume, page 209, it is said on this subject: "Thus, since the legitimate object of a demand is to enable the party upon whom it is made to reform his contract, or discharge his liabil-

ity, agreeable to the nature of it, without a suit at law, whenever such party wholly denies the right of the other, asserts title in himself, or unqualifiedly refuses to perform his obligation, a demand must be useless, and, therefore, unnecessary, since the law does not require a useless thing." To the same effect is the opinion in the case of *Heard v. Lodge*, 32 Am. Dec., 32, volume 197.

The variance insisted upon as fatal to appellee consists in a difference of one word in the name of the railroad company to which the right of way was originally conveyed. The appellees, in their petition, allege that the conveyance was made to the Owensboro, Falls of Rough and Green River R. R. Co., whereas the conveyance itself, which was filed as an exhibit with the petition, shows that the name of the grantee was Owensboro, Falls of Rough and Green River Branch R. R. Co.

We do not think that this constitutes a material variance between the allegation and the proof, or that the appellants could have been misled by the mistake made in the name of the grantee. Section 129 of the Code is as follows: "No variance between pleadings and proof is material which does not mislead a party to his prejudice in maintaining his action or defense upon the merits. A party who claims to have been so misled must show that fact to the satisfaction of the court, and thereupon the court may order the pleadings to be amended upon such terms as may be just." (*Gaines v. Deposit Bank*, 19 Ky. Law Rep., 171.)

Section 130 is as follows: "If such variance be not material, the court may direct the facts to be found according to the evidence, and may order an immediate amendment."

In the case of *Woodcock, &c. v. Farrell*, 1 Met., 437, the court, in discussing the question of variance under the light of sections of the old Code of Practice, which were identical with those of the Civil Code of Practice, said: "It is by no means clear, as already intimated, that there is any real variance between the facts alleged in the answer and the proof. But conceding that such variance does exist, will it be pretended that it is such as was calculated to mislead the plaintiffs in maintaining their substantial rights? Can it be doubted that if the variance now complained of had been suggested at any time during the trial the court below would have corrected the immaterial error by so amending the pleading as to make it conform to the state of fact made out by the evidence? It is the obvious policy and spirit of the provisions of the Code referred to, and of numerous other similar provisions, that errors of this class should not constitute a ground of reversal here, unless an unavailing effort had been made for their correction in the court below. The wisdom of this policy none will question."

No effort was made to have the variance complained of corrected in the court below, and we do not think it can avail the appellants here. Moreover, the exhibit which was filed by the appellees with their petition, and made a part of it, corrects the error of the omission of the word "branch" from the name of the original grantee, and fully informed the appellants of the real name. On this subject it is said, in *Newman on Pleading and Practice*, page 252, that "exhibits referred to in the pleadings and filed become part of the record, it seems, in a suit in equity; not, however, as allegations or averments in the pleadings, but merely as evidence or proof of

record in the cause. As such it may aid a defective allegation, or even control or destroy a positive one in contradiction of it. For if an exhibit referred to and filed contradicts an allegation of the pleading the exhibit will control the allegation unless the exhibit be expressly impeached or explained by the facts stated in the pleading." (*Bush v. Madeira's Heirs*, 14 B. Mon., 172.) It is inconceivable that appellants could have been misled to their injury by the variance of which they complain.

It is true, as is maintained by appellants, that the basis of appellees' right of recovery is a covenant real that runs with the land (*Kentucky Central R. R. Co. v. Kenney*, 82 Ky., 154); and it may be conceded, as an abstract proposition of law, that covenants running with the land pass by the conveyance and vest in the grantee; but this can not avail appellants under the evidence shown in this case. In order to avoid the very question raised by appellants the appellees seem to have retained a strip of land thirty feet wide, extending along the full length of the right of way; and the most that can be said in favor of appellants' position is that the grantors and their grantees (who are their children) are jointly entitled to the benefit of the covenant. All of the owners of the land, through which the right of way passes, are before the court as joint plaintiffs, and the judgment rendered is binding upon them all, and fully protects appellants from any additional suit upon the covenant.

The position of the appellants, that they were innocent purchasers without notice, is untenable; the deed containing the covenant was recorded in the proper office, and was constructive notice to all the world; they took this land with the unsatisfied covenant written plainly on the face of the deed, of which they had, at least, constructive notice; this was sufficient to make them liable.

On the motion of appellants this action was transferred to the equity side of the docket and tried by the chancellor, who rendered a verdict in favor of appellees for the amount claimed in the petition, \$1,999, for which sum a lien was awarded on the right of way. Appellants now claim that the evidence does not support this judgment. To this, we can not agree. It seems to us that the testimony, as a whole, abundantly supports the finding of the chancellor; and even if we were less certain on this point we would not feel warranted in overruling his finding on the facts. He was on the ground and probably knew the witnesses, or their standing in the community, and could better accord the proper weight to their testimony than we.

Wherefore, the judgment is affirmed.

THOMPSON v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed October 2, 1903—Not to be reported.)

1. Railroad crossing—One who owns a lot of ground abutting upon the right of way of a railroad company is not entitled to require the railroad company to put down a crossing for her over its tracks in front of her lot where it appears no grant of a right of way over the tracks existed, and that such a crossing would not give to her an outlet to a public road or passway, and such a crossing would, more or less, inconvenience the railroad company, and would not be free from danger to the user.

2. Same—The fact that the railroad company's section man had put down a crossing for the accommodation of the tenant of a remote vendor of the present owner of the property, and the crossing had remained and been used only during his occupancy of the property as a tenant, is not sufficient to show an implied grant on the part of the company.

3. Same—While under the law the owner of the property, on both sides of the railroad, at the time the road was constructed could have required the company to put down proper wagonways across the road for his use in going from one part of his land to another, such provision of the law does not apply to a small lot sold from the original tract nearly fifty years after the building of the road, and where the owner owned land on one side of the railroad only.

J. P. Thompson for appellant.

W. C. McChord for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Mary E. Thompson, instituted this suit to compel appellee, the Louisville & Nashville R. R. Co., to put down a crossing for her over its tracks in front of her house and lot near the town of St. Mary's, in Marion county. She alleges in her petition that she owns and occupies a house and lot on the southwest side of the tracks of the defendant road, by purchase from F. P. Browning, who inherited it from his father, F. P. Browning; and that during his occupancy there was a crossing at the point which was taken up by the defendant for the purpose of repairing the track, with the promise to restore it, which has not been done. In an amended petition, which she was not permitted to file, she alleges that there is an open passway over defendant's right of way on the northeast side of the track from their depot down past her lot, which the public have used in going from the depot to the stock pens of defendant for many years.

The railroad company for answer say that neither the appellant nor any of the persons under whom she holds title ever owned land on both sides of defendant's right of way, and denies that it ever constructed or provided a crossing over its tracks at the place named in the petition, or that it was removed with a promise that it should be restored, and further allege that their stock yard pens, etc., are located immediately opposite plaintiff's property; and that the main and two switch tracks lie between them; and that a crossing at the point indicated would not land on any public road or passway; and that connection could only be had therewith by passing over their right of way and through their stock yards; and that plaintiff can obtain a right of way to the public road over the lands of persons on the same side of the railroad track on which her house is located.

The pleadings being made up and proof taken the circuit judge dismissed plaintiff's petition, and she had appealed. Dr. C. T. Blanford testifies that about twenty-five years previous to giving his deposition, he occupied the premises now belonging to the plaintiff as a tenant of one of her remote vendors for two years; and that while he lived there, at his suggestion and for his accommodation, one of the section men of the defendant made him a crossing over the track of the railway company, which he used during his occupancy of the property; that this was a mere accommodation on the part

of the section man. The testimony shows that it was soon taken up. After this time the additional switches for the use and conveniences of shippers of live stock from the stock pens were put in at this point, and it is perfectly apparent that a crossing at the point desired would more or less inconvenience the railroad company and would not be free from danger to the user. There is no claim of a grant from appellee or contention that the crossing at that point has existed for such length of time as the law will imply a grant. It is true that defendant's charter required that when they shall construct their road through the land of another person that it shall be their duty to provide for such person proper wagonways across their road from one part of the land to another. It appears that this road was constructed in 1866 and 1867, and that at the time John K. Miles owned a considerable boundary of land on both sides of the railroad, of which the lot of plaintiff formed a part, which he afterwards subdivided and sold into lots. At the time the road was constructed Miles would have had the right under the charter of the company to have required wagon crossings to be established at suitable places to enable him to get from one part of his place to another, and no doubt such crossings were established when the road was built. But this section of the charter would not apply to a lot of one acre sold from the Miles tract nearly fifty years after the building of the road, and where the owner and occupant only owned land on one side of the railroad. We think the trial court properly refused to grant the relief prayed.

Judgment affirmed.

RICE v. OMBERG.

(Filed October 1, 1903—Not to be reported.)

1. Contract—Breach of covenant—Real estate agent—Commission—Where a real estate agent and the purchaser of real estate covenanted that the purchaser should pay to the agent a certain commission, provided the property should be acquired at a stipulated price free of taxes, and entered into a writing which provided that if there was a failure to comply with any of the considerations named the agent would forfeit his commission, the failure of the seller to pay the taxes entitled the purchaser to recover the commission which had been paid to the agent.

2. Same—The fact that the purchaser paid the taxes did not operate as a waiver of the condition, on the ground that he, having a general warranty deed, was not compelled to pay the taxes.

M. A., D. A. & J. G. Sachs for appellant.

Bodley, Baskin & Flexner for appellee.

Appeal from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Judge O'Rear.

Appellee was a real estate agent. Appellant was trying to buy certain property in Louisville. The owner declined to sell it for less than "\$19,000 net." Appellant was unwilling to give more. The owner refused to pay the agent's commission. He also expressly refused to pay the taxes which had been assessed for the current year, but which were not due. Appellant finally contracted with the real estate agent concerning his commission for

this transaction. The contract was in writing. The agent was to receive \$200 for his services provided the property was acquired by appellant free of taxes. It was stipulated: "If there is a failure to comply with any of the considerations above named I agree to forfeit my commission, which is named before." The trade was finally consummated between the owner of the land and appellant, but the owner declined to pay the taxes for the current year, and did not pay them. Appellant was required to, and did, pay them. The real estate agent has brought this suit to recover his commission, claiming that as appellant was not bound to pay these taxes, inasmuch as the vendor had made him a general warranty deed, his paying them amounted to a waiver of that condition of the contract above quoted. We think not. Appellee failed to make good the condition upon which his commission depended. The circuit court should have peremptorily directed a verdict for appellant.

The judgment is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

CITY OF LOUISVILLE v. KOHNHORST'S ADM'R, &c.

(Filed October 1, 1903—Not to be reported.)

1. Collection of taxes—Limitation—Life tenant—Remaindermen—The statute of limitation may properly be pleaded to a proceeding by a city to recover taxes by the holders of the remainder interest in real estate, notwithstanding the city had previously instituted action against the life tenant alone before the expiration of the limitation period, the remaindermen being necessary parties to the action before they could be deprived of their property.

2. Same—The fact that the city was made a party to a proceeding by some of the remaindermen to divide and settle the estate between themselves for the purpose of requiring it to set up such claim as it might have for taxes against the estate did not stop the running of the statute of limitation as against the remaindermen, as there were no mutual and subsisting demands between them and the city, which is necessary in order that a suit by one shall stop the running of limitation against the claim which the defendant holds against him.

H. L. Stone for appellant.

O. A. Wehle for appellees.

Appeal from Jefferson Circuit Court, Chancery division, No. 1.

Opinion of the court by Judge Nunn.

Henry Kohnhorst, who resided in the city of Louisville, departed this life in December, 1870. He left a will, which was duly probated, by which he devised his property to his wife, Christina, for the joint use of herself and their children during the life of his wife, and at her death the property was to go to their children in equal proportions. Construing the will as a whole, it gave the wife an estate for life and the children took the fee subject only to her use and control. It appears from the record that she defaulted in the payment of taxes to the city from and including the year 1891 to her death, which occurred May 27, 1901.

On the 16th of March, 1896, the appellant filed an action against Christina Kohnhorst, the then owner of the present estate, for the unpaid taxes due for the years 1891, 1892, 1893 and 1894. On the 14th of January, 1899, and during the lifetime of Christina Kohnhorst, the appellant filed an amended petition against the children of Henry Kohnhorst, who were the owners of the fee in the property sought to be sold for taxes above mentioned. The children answered by pleading the five years' statute of limitation in such cases made and provided.

On the 4th day of April, 1900, the appellant filed another action against Christina Kohnhorst for unpaid taxes, attempting to enforce a lien upon the land devised by Henry Kohnhorst, for the years 1895, 1896, 1897 and 1898. This suit only made the life tenant, Christina Kohnhorst, defendant. On November 30, 1901, the appellant filed an amended petition making the children of Henry Kohnhorst parties defendant, and sought to sell their interest in the land for the taxes. The children answered this by again pleading the five years' statute of limitation.

On the 31st of July, 1901, the children, some of them being plaintiffs and some defendants, instituted an action for the purpose of a division of the estate between them and to satisfy mortgages and other liens which some of the children had placed on their interests. On the 8th of August the children filed an amendment to their petition making the city of Louisville a party defendant, in substance stating that they had been informed that the city claimed that it had a lien upon their property for unpaid taxes, and asked that it be required to set forth its claim if it had any. The city answered and presented its claim for taxes as set forth in its two previous petitions before referred to. The children again pleaded the five years' statute of limitation. The court upon a trial of the cause adjudged in favor of the city for the taxes due it for all of the years sued for except for the years 1891, 1892, 1893, 1895 and 1896, from which judgment in disallowing the claim for taxes for these years the city has appealed.

We are of opinion that the judgment of the lower court was proper. To deprive the children of their interest in this real estate it was necessary that they should have been made parties to the action. Under the proceedings by the city when Christina Kohnhorst was the only defendant her interest alone could have been subjected to the payment of the taxes. Before these children could have been deprived of their property they were entitled to their day in court. (Section 3005, Kentucky Statutes; *Payne, &c. v. Arthur, Trustee*, 16 Ky. Law Rep., 785; *Commonwealth v. Hamilton's Trustee, &c.*, 24 Ky. Law Rep., 1944.)

The appellant contends that even if the plea of the statute of limitation is applicable, that the court erred in applying it to the taxes for the year 1896 for the reason, as it claims, the children by their amended petition of August 8, 1901, made a party defendant to the action to settle the estate and asked it to set forth its claim for taxes if it had any, and for that reason and at that moment the statute of limitation ceased to run on its claim against them. It cites 5 Ky. Law Rep., 608, and 4 Met., 82, as authority to support its contention. The principle enunciated in these cases are unlike the case before us. The cases referred to state that where there are mutual and subsisting demands existing between parties, one of which can be

pleaded as a set-off or counterclaim against the other. the institution of an action by one against the other on such claim operates to suspend the statute from running on the claim of each at the moment of filing of the action. There were no mutual and subsisting demands between the children of Henry Kohnhorst and the city of Louisville. The city did not owe them anything, nor did they not sue the city for anything, but in an attempt to settle and divide their estate between themselves they only made the appellant a party for the purpose of having it set up its claim, if it had any.

Wherefore, the judgment of the lower court is affirmed.

COMMONWEALTH v. LOWE.

(Filed October 1, 1903.)

1. Indictment for rape—Sufficiency of—An indictment which charges one with having willfully and feloniously had carnal intercourse with a female above the age of twelve years against her will and consent whilst she was insensible in consequence of a drug having been administered to her, is not defective because it does not charge the accused with having knowledge that she was insensible, the crime being one of a class of felonies where the statement of the act necessarily implies a knowledge of its illegality, and in which no averment of knowledge is necessary.

2. Same—Allegation in alternative—The fact that the indictment, which charges the accused with only the one offense of rape, set forth in the disjunctive, by use of the word "or," the several modes by which the crime might have been committed does not render it defective, it being provided by section 126 of the Criminal Code that, except in certain excepted cases, the indictment "may allege the modes and means in the alternative" where the offense may have been committed in different modes or by different means.

Clifton J. Pratt and M. R. Todd for appellant.

W. F. Cantrill for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Chief Justice Burnam.

The question for decision by this court upon this appeal is the sufficiency of the indictment wherein the appellee, Eddie Lowe, is charged with a violation of section 1154 of the Kentucky Statutes, which reads as follows: "Whoever shall unlawfully carnally know a female, of and above twelve years of age, against her will or consent, or by force, or whilst she is insensible, shall be guilty of rape, and punished by confinement in the penitentiary not less than ten nor more than twenty years, or by death, in the discretion of the jury."

The indictment reads as follows: "The grand jury of the county of Green, in the name and by the authority of the Commonwealth of Kentucky, accuse Eddie Lowe of the crime of carnally knowing a female against her will or consent, committed in manner and form as follows, to wit: The said Eddie Lowe, in the said county of Green, on the 8th day of June, A. D., 1902, and before the finding of the indictment herein, did unlawfully, willfully and feloniously carnally know a female, to wit, Miss Ethel Paxton, of and

above twelve years of age, against her will or consent, or whilst she was insensible or incapable of exercising her will, some drug to the grand jury unknown having been administered to her, and she being incapable of exercising her will power at the time and having no self-control, contrary to form of the statute in such cases made and provided, and against the peace and dignity of the Commonwealth of Kentucky."

The trial court sustained a demurrer to this indictment and the Commonwealth prosecutes this appeal. It is insisted for appellee upon this appeal that the indictment is fatally defective for two reasons: First, because it does not charge that the defendant knew that the prosecuting witness was insensible in consequence of a drug having been administered to her; second, that the offense with which he is charged is not stated with sufficient certainty to apprise him of the specific crime for which he is to be prosecuted, in consequence of the use of the disjunctive or instead of the conjunctive and in the indictment. The certainty required by section 124 of the Criminal Code must be such as will apprise the defendant of the nature of the accusation and enable him to plead the indictment and the judgment thereon in bar of any subsequent prosecution for the same offense. (8 B. M., 493; 3 Met., 5.)

The complaint that the indictment does not charge that the accused knew that Miss Paxton was incapable of giving consent by reason of the administration to her of some drug is not well taken. The gist of the charge against the defendant is that he had willfully and feloniously had intercourse with Miss Paxton against her will or without her consent, in other words, that he was guilty of the common law crime of rape. This crime belongs to that class of felonies where the statement of the act necessarily implies a knowledge of its illegality, and where no averment of knowledge or bad intent is necessary. In discussing this question Mr. Wharton, in his *Criminal Pleading and Practice* (8th edition), says: "Where guilty knowledge is not an essential ingredient of the offense, or where a statement of the act itself necessarily includes a knowledge of the illegality of the act, no averment of knowledge is necessary."

To the same effect is 1 Hale, P. C., 561; 2 East, P. C., 51; 1 Chitty Criminal Law, 242, and *Commonwealth v. Stout, &c.*, 46 Ky., 249. It is otherwise, however, in that class of cases where guilty knowledge is not implied and is a substantive ingredient of the offense. Thus in an indictment for selling an obscene book, a scienter is necessary; so an indictment for selling unwholesome water. (Wharton's *Criminal Pleading and Practice*, section 164; 10 A. & E. Ency. of P. & P., 491.)

The enumeration in the indictment disjunctively of several different means which may have been resorted to by the accused in the commission of the offense seems to be expressly authorized by section 126 of the Criminal Code, which reads as follows: "An indictment, except in cases mentioned in the next section, must charge but one offense; but if it may have been committed in different modes or by different means, the indictment may allege the modes and means in the alternative."

This provision of the Code changes the common law rule as to alternative allegations in an indictment as to the different modes and means which the accused may have resorted to in the commission of the offense charged.

The indictment only charges the defendant with one offense, that of willfully and feloniously carnally knowing a female above the age of twelve years against her will and consent. The alternative statements complained of only refer to the modes or means by which he may have accomplished the crime. It would certainly have been competent to have shown that the woman was incapable of giving consent by reason of the fact that she had been previously drugged, if the indictment had only charged defendant with having carnally known her against her consent. It follows, therefore, that the indictment under this provision of the Code is not objectionable for duplicity, and that the trial court erred in sustaining the demurrer.

For reasons indicated the judgment is reversed and the cause remanded for proceedings consistent with this opinion.

Whole court sitting.

LYKINS v. STEELE.

(Filed October 1, 1903—Not to be reported.)

1. Contested election—School trustee—Under the provision of the act of October 24, 1900, that "where there shall be a contest of the election of any officer elected by the voters of the county, or any district therein, * * * the contest shall be made by the filing of a petition in the circuit court of the county where the contestee resides," the circuit court is the tribunal before which a contested election of school trustee shall be tried.

2. Appeal—Time of filing—Dismissal—The judgment in a case contesting the election for school trustee having been entered on March 28, the filing of the transcript of record in the Court of Appeals on the following April 28 was not within the thirty days required by the statute in contested election cases, and the court has no jurisdiction of the appeal.

3. Same—Execution of appeal bond—In the absence of the appeal bond from the transcript of the record the court can not determine that a bond was executed, notwithstanding a memorandum of the clerk of the circuit court to that effect; and without such a bond the court can not take jurisdiction.

W. W. McGuire for appellant.

S. H. Nickell and Finley E. Fogg for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant and appellee were voted for for the office of school trustee of district No. 9, Morgan county, at an election held October 12, 1901. The certificate of election was awarded to appellant. Appellee filed this suit in the Morgan Circuit Court contesting appellant's election. The circuit court adjudged the office to appellee.

The steps taken in the preparation of the case before it reached this court are not deemed material here in view of the conclusion at which we have arrived upon another and controlling point. The judgment was rendered in the circuit court on the 28th day of March, 1902. The transcript of the record was not filed in this court until April 28, 1902, more than thirty days from the rendition of the judgment. By section 12 of chapter 5, Acts of 1900, amending the laws relating to contested elections, it is provided that:

"Either party may appeal from the judgment of the circuit court to the Court of Appeals by giving bond to the clerk of the circuit court, with good surety, conditioned for the payment of all costs and damages the other party may sustain by reason of the appeal and by filing the record in the clerk's office of the Court of Appeals within thirty days after final judgment in the circuit court."

In *Edwards v. Logan*, 24 Ky. Law Rep., 678, it was held that a transcript not filed within the thirty days would deprive this court of jurisdiction unless the failure to file was waived. Instead of being waived in this case it is insisted upon by a plea of limitation filed. Nor does it sufficiently appear that the bond required by the section of the act quoted above was executed. The only information furnished by the record on this subject is the following memorandum by the clerk of the circuit court:

"Supersedeas bond executed according to law, April 28, 1902.

"H. M. COX, Clerk."

The bond should have been made a part of the record. In its absence we can not determine that the bond was executed. Both of these requirements are conditions upon the fulfillment of which depend the jurisdiction of this court upon the appeal.

It is very earnestly contended for appellant that the statute quoted above does not apply to a contested election between candidates for school trustee. It is argued that the Constitution provides a different method and time for holding these school elections from those for holding elections generally, and that there is no provision of the statutes expressly giving to any court or tribunal the right to try a contest between rival candidates for the office of school trustee.

By sections 1584 and 1535, Kentucky Statutes, which are the provisions made by the legislature governing the trial of such contests prior to the act of 1900 (being a portion of the act of 1892) it was provided: "The judge of the county court and two justices of the peace residing nearest to the court house in each county shall be a board * * * for determining the contested election of any officer elective by the voters of the county, or any district therein, except members of the general assembly."

The act of March 11, 1898, "to further regulate elections," amending sections 1584 and 1535, substituted the county board of election commissioners for determining "the contested election of any officer elective by the voters of the county, or any district therein, excepting members of the general assembly."

The act of October 24, 1900, the present law, provides: "Where there shall be a contest of the election of * * * any officer elected by the voters of the county, or any district therein, * * * the contest shall be made by the filing of a petition in the circuit court of the county where the contestee resides," etc.

The language of this statute seems to us broad enough to include elections for school trustees, which necessarily occur in districts within the several counties. This precise question seems to have been considered by this court in *Hopkins v. Swift*, 100 Ky., 14, where it was held that the only method of contesting such elections at that time (1895) was that provided by sections 1584 and 1535, Kentucky Statutes. It was there held that the same tribunal

that had jurisdiction of other contested elections had jurisdiction in respect to common school districts as well as other districts in the county. We have deemed it necessary to decide this point in response to appellant's brief, because the particular practice applicable to contested election cases provided by the act of 1900 would be availing only in event the provisions of the act applied to the case at bar.

The appeal not having been perfected within the thirty days required by the act, is dismissed.

ANDERSON v. KEMPER, &c.

(Filed October 1, 1903.)

1. Express trust—Construction of written instruments—Where the owner of real estate conveyed his property to his father for a recited valuable consideration, which was in fact not paid, and simultaneously with the execution of the conveyance the grantee executed a bond with surety, obligating himself to pay to the grantor an annuity in a stipulated sum during his natural life, and at his death to pay to his heirs a further stipulated sum of money, the deed and the bond considered together created an express trust in favor of the grantor.

2. Setting aside trust—A trust will not be set aside at the instance of the cestui que trust on the ground that the reason for its creation no longer exists, viz., his dissipated habits, where it does not appear from the instruments creating the trust, or from other source, what was the moving cause for its creation, the court being, therefore, unable to say whether or not the reason for its creation no longer exists.

3. Same—Mistake in execution of papers—The contention of the cestui que trust that he did not understand the instruments by which the trust was created can not avail as ground for setting aside the trust, where it appears that he had sufficient mind to comprehend the probable workings and general effect of the transaction.

4. Power of revocation of trust—There being no reservation in the instruments creating the trust for the revocation of it, the cestui que trust has no right to disturb it.

5. Ability to control estate—The fact that the cestui que trust has the ability to now control and manage the estate is not ground for setting aside the trust.

6. Absence of legal advice—Interest of trustee—The fact that the person who signed the instruments creating a trust in his favor did not have independent legal advice is not ground for revoking the trust, where the trustee in the first instance derived no benefit from the trust and the substituted trustees under a subsequent transaction took no greater interest than they had before, their interest in any event being contingent and inchoate.

7. Revocation without consent—A trust not revocable by its terms, understandingly entered into by the parties, and free from fraud, can not be revoked at the caprice or whim of any of the parties, without the consent of all.

8. Alteration of trust as to beneficiaries—While it was competent for one, who had executed instruments creating a trust providing for the payment of a certain annuity to himself and a sum certain to his heirs upon his death, to consent to a change in the terms of the trust whereby he should receive the entire profits from certain real estate conveyed by the deed of trust instead of the annuity, the attempted change by the subsequent in-

strument of the ultimate beneficiaries from the heirs of the settler to those of another was invalid.

D. M. Rodman, John Roberts and Samuel Cleaver for appellant.

Wilkins G. Anderson for appellees.

Appeal from Jefferson Circuit Court, Chancery division, No. 1.

Opinion of the court by Judge O'Rear.

Appellant had the title to certain unimproved city and rural property in Jefferson county prior to 1872, which has descended from his maternal grandfather. It was supposed to be worth about \$9,000. In addition, he had about \$5,000 of personal estate, similarly derived, which went into the hands of his father, James Anderson, Jr., as his guardian. The guardian settled with appellant and paid him in full, indeed overpaid him, as shown by the settlement made after appellant's manhood.

James Anderson, Jr., had six children, five daughters and the appellant. He died July 1, 1883. He had been a successful business man. By reason of certain intemperate habits, and disinclination to work or to engage in business, appellant soon squandered the personalty above mentioned, and was taking steps looking to the sale of his realty. According to appellant's own statement he was not only a wild, reckless young fellow then, but had neither the taste nor aptitude for business. He seems to have been almost oblivious of the serious affairs of life. It does not appear that this was because of deficient mind, but was rather a disinclination, and a refusal to take interest in them.

Probably with these characteristics in mind, as well as a remembrance of his recent experience, and an acknowledgment of his disqualification for managing with safety such an estate, appellant executed a deed conveying the above named real estate to his father July 9, 1872. Certain it is, whatever may have been the moving consideration, that such conveyance, by ordinary deed, conveying apparently the fee-simple title, was then executed by appellant. The recited consideration was \$9,000 cash. It is now admitted that in fact the \$9,000 recited as the consideration was not paid. Instead, James Anderson, Jr., with his daughter, Edmonia P. Anderson, as his surety executed to George W. Anderson, as trustee for appellant, an annuity bond, binding the obligors to pay to appellant \$500 annually, and at his death to pay \$7,000 to his heirs. This agreement continued till July, 1877. From July, 1872, to July, 1877, the \$500 provided for by the bond had been promptly paid to Brown Anderson. James Anderson, Jr., had in 1877 come to quite advanced age. He then prepared to make a will. As the result of a conference with certain members of the family, including appellant, James Anderson, Jr., conveyed the identical property which had been conveyed to him by appellant to three trustees, to wit: George W. Anderson, Edmonia P. Anderson, and Wilkins G. Anderson (the latter a son-in-law and nephew to the grantor), to hold and manage in trust for appellant. The terms and conditions of the trust were, first, that the trustees or the survivors of them might sell and convey the property and reinvest the proceeds; second, that they should pay to Brown Anderson (appellant) during his natural life so much of the net rents, issues and profits of the said lands or proceeds as might be necessary for his support; the payment to be yearly, half yearly,

quarterly or monthly as his needs might require; third, if Brown Anderson should die without issue then such land should go to them in fee simple; fourth, if he should die without issue then the property should go to the lawful heirs of James Anderson, Jr. Appellant, Brown Anderson, was named in this last deed as the party of third part, and signed and acknowledged it. The trustees named accepted the trust, and have been ever since executing it. At the same time when this deed was made the bond executed July 9, 1872, was cancelled in consideration of this settlement.

By his will, prepared at or about the same time, James Anderson, Jr., directed his estate divided into six equal parts. After satisfying certain specific bequests, he gave to the same trustees a one-sixth part, the income only of which was to be applied as far as necessary to the support of appellant. Touching this the will provided: "In no event or contingency shall said Brown have right in or control over the principal of said one-sixth, or more of the income than is necessary for his support."

At Brown's death this principal was to be disposed of exactly as was done in the deed of 1877.

One of the trustees, Geo. W. Anderson, died some years ago. This suit was brought by appellant, Brown Anderson, against the surviving trustees, who are also the surviving executors of James Anderson, Jr.'s, will, and against the devisees and heirs of James Anderson, Jr. A number of amendments were filed, somewhat obscuring the purpose of the original suit, but from all of them we think its scope was to, first, have the trust created by the deed of July 9, 1872, and of July, 1877, set aside and annulled, and to have the property described in the last-named deed conveyed to appellant in fee simple; or, second, if that could not be done, then to have the fourth clause of the trust deed of July, 1877, set aside and held for naught; third, to require appellees, Edmonia P. Anderson and Wilkins G. Anderson, to settle their accounts as trustees, and to pay over to appellant any balance income on the trust property; fourth, to have the trustees removed, and another appointed in their stead; fifth, to have certain settlements theretofore made by the trustees surcharged. "Such further and other relief as to equity belongs" was also prayed for.

Appellees took the position that no trust was created until the transaction of July, 1877. It is true the deed of July 9, 1872, was in form a conveyance of the fee-simple title. But it did not contain the whole of the agreement between the parties. The bond executed simultaneously is as much a part of the transaction as if set out in terms in the body of the deed. The true effect and intent of that proceeding as between the parties to it was to divest Brown Anderson of the legal title to, but reserve to him the beneficial use of, that property. Its fixed value was to be accounted for by the grantee, to a named trustee of the grantor, and so paid that the full enjoyment of its use was insured to him during life, and that the value should go to his heirs at his death. This construction was undoubtedly the one in the minds of the parties, for when the deed of 1877 came to be made, at a time when James Anderson, Jr., was preparing to fix up his own affairs finally, we find him ridding his estate of the burden of providing the annuity required by the bond of 1872, and of binding Brown's property alone with its payment. So the transaction of July, 1877, confessedly creating a trust upon this

identical property for the benefit of this identical beneficiary, was made to continue, although in somewhat altered form, the original purpose of the parties. Furthermore, if James Anderson, Jr., had failed prior to 1877 to comply with the terms of the bond, the chancellor, upon an application of Brown Anderson, would have subjected that property to the execution of the trust stipulated in the bond. We are of opinion that an express trust was created by the deed and bond of July 9, 1872, in behalf of appellant, and according to the terms of the bond. (*Howard v. Howard*, 60 Vt., 362; *Sargent v. Baldwin*, 60 Vt., 17.)

Appellant seeks to have the trust effected by these several instruments set aside on the principal ground that the purpose of the trust, or the reason for creating it, no longer exists, and that, therefore, he should be reinvested with the title to his own property. He says that the reason for creating the trust was because he was then dissipated, an inebriate; and that to prevent his squandering his property it was conveyed, to be held in trust for his benefit. And while it appears that appellant was then an inebriate, and that now for twenty years or more he has been strictly sober, yet it does not appear anywhere that appellant's bibulous habits were the cause or consideration for creating the trust. If the instruments creating it had recited the reason it would be clear that if that reason no longer existed the property should be conveyed to the beneficial owner. (*Weakly*, *Trustee v. Buckner*, 91 Ky., 457; *Brannin v. Sherley*, 91 Ky., 450.) But neither do the instruments say what was the moving cause for creating the trust, nor is that fact otherwise established in the record. Two of the principal actors, James Anderson, Jr., and Geo. W. Anderson, the original trustee, are dead, as is the distinguished attorney who prepared the papers of the 1877 transaction. We are not authorized by the state of the record to say that the reason or necessity which moved the creation of the trust no longer exists.

Other grounds adverted to in argument, though not very clearly or specifically set forth in the pleadings, are fraud or mistake in the execution of the papers. Of fraud there is no evidence.

The evidence of mistake is too meagre to entitle it to any great consideration. At best it is the statement of appellant that he did not then understand the instruments; that he may not have foreseen everything that has come to pass relating to his support from this property, is likely enough. But that he had sufficient mind to comprehend the probable workings, as well as the general effect, of the transaction there can be but little doubt.

It was not provided in any of these papers for the revocation of the trust either by the settler or by the cestui que trust. It is not claimed by appellant that such power of revocation was to exist, and that by oversight or mistake, or otherwise, it was omitted from the instruments as drafted. Indeed the terms of the instruments themselves seem to contemplate that the arrangement would exist in whatever event during the lifetime of the settler. "The party who makes a voluntary deed, whether of real or personal estate, without reserving the power of altering or revoking it, has no right to disturb it, and as against himself it is valid and binding, both in equity and at law." (*Stone v. King*, 7 R. I., 358, 84 Am. Dec., 557; *Bunn v. Winthrop*, 1 Johns. Ch., N. Y., 229; *Sargent v. Baldwin*, 60 Vt., 17; *Sallsbury v. Bigelow*, 20 Pick., Mass., 174.)

Appellant introduced evidence tending to show that he was now competent to manage and control his own estate, and testified that he was specially desirous of doing so. In *Falk v. Turner*, 101 Mass., 494, a married woman brought suit to set aside a deed of trust, by which, before her marriage, she had conveyed all her property to a trustee, for her exclusive benefit during her life, reserving the power of appointment by will, or in default of such appointment the proceeds of the estate to be paid to her children living at her death and the issue of any deceased children in equal shares. It was said by the court: "The bill avers that she now desires to regain the possession and management of the property, and has the ability to manage it. Nothing appears in the case to raise doubt as to her ability, either at present or when she made the deed. But the ability of the cestui que trust to manage the property, or his desire to do so, has never been recognized as a ground for setting aside a trust." (1 *Perry on Trusts*, section 104; *Ingram v. Kirkpatrick*, 6 Ired. Eq., N. C., 463, 51 Am. Dec., 428.)

Although appellant testifies that he did not have the benefit of legal advice in the preparation of the papers creating this trust, he admits that he did talk to Hon. James Speed about it, and it is pretty clearly shown that Mr. Speed was present in the capacity of an attorney when the papers of 1877 were prepared, and acted in their preparation. But it was held in *Riddle v. Cutter*, 49 Iowa, 547, that the fact that the person making a voluntary settlement did not have independent legal advice, did not warrant the setting aside of the trust, unless the beneficiary stood in some fiduciary capacity to the donor, or the trustee was benefited thereby. This was held in the case of a conveyance by a drunkard in trust for the support of his family. In this case the settler was himself the chief beneficiary. In the trust as originally created the trustee derived no benefit from it. By the alteration of the terms in 1877 the substituted trustees took no greater interest than they had before (under the construction and correction herein given that instrument), and their interest in any event was contingent and inchoate.

We are of opinion, upon authority, that a trust not revocable by its terms, understandingly entered into by the parties, and free from fraud, can not be revoked at the caprice or whim of any of the parties without the consent of all.

The authorities are equally clear and uniform that where such a trust has been once created it is beyond the power of the settler to alter its terms or beneficiaries save by the consent of the cestui que trust. Therefore, the attempted change by the deed of 1877 of the ultimate beneficiaries, who were to take the remainder of the estate created by the first instrument of 1873 from the heirs of Brown Anderson to those of James Anderson, Jr., was invalid. (*Perry on Trusts*, section 104; *Ingram v. Kirkpatrick*, supra; *Ewing v. Warner*, 47 Minn., 446; *Ewing v. Jones*, 130 Ind., 247; *Rife's Appeal*, 110 Pa. St., 232; *Howard v. Howard*, supra; *Hildreth v. Elliot*, 8 Pick., 293; *Hellman v. McWilliams*, 70 Col., 449.) The cestui que trust who was entitled to the whole of the net income of the trust estate during his life may consent, where he is not under legal disability, to a change of the terms of the trust, but not so as to affect the other beneficiaries. Therefore, it was competent for appellant to have consented to change the annuity of \$500 to one providing for the whole of the income of the estate necessary for his

support. Whether the change of the investment from personalty to realty made by the instrument of 1877 will be approved on a final settlement of the trust will depend upon the conditions existing when that event shall occur.

In view of these conclusions it is not necessary to notice certain pleas of limitation in the record. In so far as this action sought a surcharging of the settlement of the trustees' accounts there was no averment of any error, or omission of the trustees to charge themselves properly in any of the settlements previously made, nor is there evidence of such error or omission. In the settlement made in this case by the trustees the transactions seem to have been particularly careful and clearly proper. The settlement is full and explicit, and no specific charge is made of any irregularity therein.

Appellant complains at the treatment received at the hands of his trustees, and charges that their relations are so strained that it is improper that they should be continued. So far as his treatment at the hands of his trustees is concerned the record discloses that they have managed his estate with strict fidelity and with unusual ability. It has increased in value and in earning capacity. It has been changed under the power of the deed from an unproductive estate to one that has yielded a support sufficient to have maintained appellant despite the fact that he has been unable to do anything toward his own support. This has entailed upon the trustees considerable labor, great vigilance, and on numerous occasions the advancement of their private means to the accomodation of appellant's wants. In this way, as well as by reason of certain needed improvements made upon the property so as to make it productive, the income of the estate has been anticipated, and by the judgment of the court these excessive expenditures have been adjudged to appellee trustees as a charge against the income, but subordinate to the support of the appellant. The relations between the trustees and appellant do not appear to be at all cordial. Yet it does not appear that the trustees have failed in any instance to provide appellant with every necessity that the estate would afford, even more. They have kept him strictly within his income, as they should have done, save when for some reason the income was abnormally reduced for the time being, as by the property being without tenants, etc. More than a punctual, scrupulous administration of the trust is not required. It does not matter so much what was the state of feeling between the parties so long as it did not interfere with a just and proper discharge of the fiducial duties. Appellant's own conduct and misjudgment of the trustees is doubtless responsible for much that he feels towards them.

It is complained that by the judgment the net income is so reduced as that it is insufficient to support appellant with even the bare necessities of life. We do not so read the judgment. While it authorizes the appropriation of one-half of the net income to the repayment to appellees of the several sums adjudged them in the action in the way of advancements, yet it is expressly adjudged that this is subject to the original trust, that is, the support of appellant.

This means, of course, that if one-half of the net income should not be sufficient for his support, then he must be supported out of the income as far as it is possible, even to the postponement of appellees' judgment debts.

The judgment of the circuit court having been in accord with these views, it is affirmed.

COMMONWEALTH v. PHILLIPS.

(Filed October 1, 1903.)

Warrant charging felony—Power of police judge to endorse bail—Under the provisions of section 27 of the Criminal Code, and the next succeeding sections, a police judge has no legal authority to endorse bail on a warrant issued by him for the arrest of a person charged with a felony; and his endorsement of bail thereon does not authorize a sheriff who makes the arrest to accept the bond. Such a bond being void, a surety who executes it is not bound thereby.

Clifton J. Pratt and M. R. Todd for appellant.

L. T. Everett for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Nunn.

It appears from the record that on the 28th of July, 1902, J. H. McConnell was police judge of the city of Catlettsburg, Boyd county, Kentucky; that on that day he issued a warrant of arrest, directed to the sheriff of Pike county, Kentucky, charging Phillips with a felony, to wit, obtaining money by false pretenses and representations; that the offense was committed in the city of Catlettsburg, and directing the sheriff to arrest him and bring him to his office in Catlettsburg to answer the charge. The police judge made this endorsement on the warrant:

"Defendant may give bond for his appearance to answer the within charge in the sum of \$300.

"J. H. McCONNELL, P. J. C. C."

The sheriff of Pike county arrested Phillips and took his bond, with James Hatcher as surety. The bond is as follows:

"We acknowledge ourselves bound to the Commonwealth of Kentucky in the sum of \$300 that Zachariah Phillips will appear in the Catlettsburg Police Court on the 1st day of September, 1902, to answer the charge in the within warrant, this the 8th day of August, 1902.

"Z. W. PHILLIPS,

"JAMES HATCHER."

Phillips failed to appear at the time stated in the bond, and the police judge endorsed the word "forfeited" thereon and returned the bond to the circuit court clerk's office. The circuit court directed a summons to be issued thereon against James Hatcher, who appeared and demurred to the proceeding against him. The court sustained his demurrer and dismissed the proceeding against him, and the Commonwealth has appealed.

The only question to discuss is whether or not the police judge had the legal right to endorse bail on this warrant, and whether or not the sheriff had the right to accept bail by virtue of such an endorsement.

Under section 27 of the Criminal Code a magistrate in issuing a warrant of arrest shall in brief describe the offense, state the county in which it was committed, and command the officer to whom it was directed to arrest the person named therein, and bring him before some magistrate of the county in which the offense was committed, to be dealt with according to the law. This section requires that the person arrested be brought before the court,

but as modified by the next section, it is left applicable alone to felonies. The next section, number 28, declares that if the offense charged be a misdemeanor, the magistrate issuing the warrant shall endorse thereon the amount of bail to be given by the person charged, and that the bail may be taken by the sheriff of the county where the arrest is made, or where the offense was committed. This bond may also be taken by a deputy sheriff or by any constable making the arrest.

By the next succeeding section it is stated if the defendant give bail for his appearance before the magistrate for an examination of the charge, as provided in the last section, the officer taking the bail shall fix the day of the defendant's appearance, etc. This section confines bail given for the appearance before the magistrate for an examination to one charged with a misdemeanor, and excludes the idea that one charged with a felony can give bail for his appearance before a magistrate. By section 33 it is provided that the officer who has executed the warrant of arrest, and shall make return on the warrant of the time and manner of executing it and deliver the warrant to the magistrate before whom the defendant is brought or if bail be given, as provided by section 28, shall deliver the warrant and bail bond to the officer before whom the defendant is bound by the bail bond to appear for an examination of the charge. By the foregoing sections it is made clear that a person charged with a felony can not be admitted to bail before being brought before a magistrate.

In further support of this conclusion reference is made to section 74 of the Criminal Code, which provides: "Before conviction the defendant may be admitted to bail, first, for his appearance before a magistrate for an examination of the charge, if the offense charged be a misdemeanor; or, second, for his appearance in the court to which he is sent for trial (meaning after the magistrate has held the examining trial), or, etc." * * *

From these provisions of the Code we are of the opinion that the police judge had no legal authority to endorse bail on the warrant of arrest, and the endorsement of bail did not authorize the sheriff to accept the bond. Their acts in this matter being unauthorized and illegal, therefore, the bond was void, and the surety, Hatcher, was not bound thereon, and the lower court was right in sustaining the demurrer.

Wherefore, the judgment is affirmed.

ASHCRAFT, &c. v. COX.

(Filed October 1, 1903.)

Location of boundary—Parol evidence—Instruction—The trial court can not be said to have disregarded, on the second trial of a case, the directions of the opinion of this court to instruct the jury on the second trial to consider parol evidence along with certain deeds in ascertaining whether the land in controversy was embraced within certain conveyances, where an instruction was given directing the jury to find for the plaintiff if they believed "from the evidence" that certain deeds referred to covered and included the lands in controversy, as such instruction did not limit the consideration of the jury to the deeds.

J. B. White for appellants.

O. H. Pollard, H. L. Wheeler and Sutton & Harris for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is the second appeal which has been prosecuted to this court in this case by the appellants from judgments rendered pursuant to verdicts of juries in the circuit court. The opinion upon the former appeal, which is reported in 21 Ky. Law Rep., 81, contains a very full statement of the facts out of which the litigation grew. Upon that appeal the judgment of the trial court was reversed on two grounds: First, because, in the opinion of this court, the verdict was flagrantly against the weight of the evidence; second, because, under the instructions of the trial court, the jury were not authorized to consider the parol evidence which had been admitted for the purpose of identifying the true location of the respective boundaries claimed by the parties. The opinion upon the former appeal in discussing this question says: "To say the least, the language in the deed of Crawford to Crabtree, and of the commissioner to Cox, is ambiguous, and the jury should have been instructed to ascertain from the parol evidence and from the deeds whether the boundary of land which Crawford sold to Crabtree embraced the land in dispute."

The second trial was had upon the return of the case to the lower court before a jury, and again resulted in a verdict in favor of the contention of the appellee, E. R. W. Cox, and the defendants have again appealed and ask a reversal, both because the verdict of the jury was palpably against the weight of the evidence and for the additional reason that the circuit judge did not in his instructions to the jury conform to the requirements of the opinion delivered upon the former appeal. While in the main the testimony in the second trial was substantially the same as upon the first, yet from a careful examination we think that appellee has materially strengthened his case in the parol testimony introduced by him, and, so far as we are able to discover, the instructions of the circuit judge are in strict conformity with the suggestions in the opinion upon the former appeal. The instruction complained of is as follows:

"1st. The court instructs the jury that if they believe from the evidence that the deed from Oliver to Jacob Crawford, dated October 26, 1875, and the deed executed by C. B. Hill, commissioner of the Lee Circuit Court, to E. R. W. Cox, dated October 17, 1885, cover and include the land in controversy, and further believe from the evidence that the defendant, J. B. Ashcraft, by himself or agent or employes, entered upon the boundary or land described in the deed from C. B. Hill, commissioner, to plaintiff, and cut and removed timber therefrom, dug roads, or quarried stone on said land, and carried it away, they will find for the plaintiff the value of the timber and stone taken, if any was so taken, not exceeding \$200, and unless they so believe they will find for the defendant."

This instruction did not limit the jury to the consideration of the deeds in determining the question of boundary, but leaves this question to be determined from the whole evidence in the case, whether parol or written. It is the peculiar province of juries to determine questions of fact like this, and, however much we may be inclined to differ from their conclusion, we are not authorized under our system to disregard their findings unless flagrantly erroneous. After a careful reading of the testimony we are not pre-

pared to again reverse the judgment rendered pursuant to the verdict on this ground.

Judgment affirmed.

HAMILTON, &c. v. PERRY.

(Filed October 1, 1908—Not to be reported.)

Execution sale—Inadequacy of price—It appearing that the purchaser at execution sale had determined previous to the sale to buy the property and had been appointed one of the appraisers, and that the appraisement was many times less than the actual value of the property, and that the sale for less than the appraised value was a great sacrifice of the property, the action of the lower court in setting aside the sale will not be disturbed. Neither will the order of the court adjudging that the judgment on which the execution was issued had been satisfied previous to the issue of the execution be disturbed in view of the conflict in the testimony.

B. F. Day and W. C. Hamilton for appellant.

Robt. H. Winn for appellee.

Appeal from Menifee Circuit Court.

Opinion of the court by Judge Nunn.

In the year 1890 one J. A. Stamper executed a note to the New Farmers Bank of Mt. Sterling, Ky., for \$464.11, with three or four sureties, the appellee, T. N. Perry, being one of them, and at the same time J. A. Stamper, the principal in the note, executed a mortgage on a tract of land to secure the note to the bank and also as indemnity to the sureties. In 1891 the bank brought suit on this note in the Montgomery Circuit Court and sought to enforce its mortgage lien on the land and obtained a personal judgment against J. A. Stamper and all of his sureties. In the latter part of 1893 the New Farmers Bank, the payee in the note, became involved and made an assignment of its property to a Louisville trust company for the benefit of its creditors. The Mutual Life Ins. Co. of Kentucky and one Clay each held a mortgage upon the tract of land before mentioned, which liens were prior in date to the mortgage executed by him to the sureties and the bank, and in 1891 they instituted actions to enforce their mortgage liens on this land. To these actions the sureties of J. A. Stamper, the appellee being one of them, were not made parties. At the instance of the insurance company and Clay this tract of land was sold to satisfy their liens, which sale was made about the latter part of 1891, and the New Farmers Bank became the purchaser thereof at something over the price of \$700, a few dollars under the amount due the insurance company and Clay. The bank on that day agreed with J. A. Stamper, the principal in the note, that if he would find a purchaser for the land he might have all that it would bring over and above the debts of the insurance company and Clay. He sold the land for \$1,100 and the bank gave him credit of \$278.10 on its judgment, the amount it claimed was due him under this agreement. At the time this private sale was made by Stamper the agent of the bank entered a release upon the mortgage book of the lien by virtue of the mortgage executed by Stamper to his sureties and the bank. After the assignment of the bank its assignee caused an execu-

tion to be issued against J. A. Stamper and his sureties on the \$464.11 judgment, and the agent of the trust company, by an order in writing on the execution and before its return day, directed the sheriff to return it to the office from which it was issued. The trust company brought an action to settle the affairs of the bank and an order was made directing a sale of the uncollected and worthless notes, accounts and judgments due the bank which sale was made in the year 1898 and Anne E. Mitchell became the purchaser, this Stamper judgment being one of the claims. She immediately caused execution to be issued thereon directed to the sheriff of Menifee county, which, by the sheriff, was levied upon the property of appellee, T. N. Perry; that part of the property sold under this execution which was litigated in this action was a one-fourth interest in a coal mine, which was appraised at the sale at the price of \$20, and which was purchased by appellant Hamilton at the price of \$13.75. Appellee Perry filed his action in the Menifee Circuit Court in the month of November, 1898, against appellants, W. S. Hamilton and Anne E. Mitchell, alleging, in substance, that the judgment upon which the execution was issued had, before the issue thereof, been paid and settled by the principal, J. A. Stamper, but that if it had not been paid he was released by the action of the bank in entering a release of the mortgage, without his knowledge or consent, which had been executed to him and the other sureties as indemnity against loss; that by the act of the agent of the trust company in directing a return of the execution, without his knowledge or consent, which was in the hands of the sheriff, and which was a lien on the property of his principal; that his interest in the coal mine had been sold in his absence and without his knowledge or consent; that it was worth \$250, and that appellant Hamilton, with a view of buying the property, solicited and caused himself to be appointed one of the appraisers thereof, and fixed the low value of \$20.

The appellants, by their answer, traversed each and every allegation of the petition. The evidence, as it appears in the record on the question of payment of the judgment by Stamper, before the issue of the execution, is very conflicting, and it is hard to tell upon which side it preponderates. It is shown that appellant Hamilton, some days before his purchase of the property, had made up his mind to buy it, and he was appointed as one of the appraisers, and did value it at \$20. This of itself would not invalidate the sale, but the evidence shows that the property was at the time worth from \$150 to \$200, and the sale at the price of \$13.75 was a great sacrifice of appellee's property, and for these reasons we do not feel authorized to disturb the judgment of the lower court in setting aside this sale, and in adjudging that the judgment of \$464.11 and its interest had been paid before the issue of the execution. Having arrived at this conclusion, we do not deem it necessary to discuss the questions as to the effect upon the surety, the appellee, of the release of the mortgage by the bank and the direction of the return of the execution by the agent of the trust company.

Wherefore, the judgment is affirmed.

Judge O'Rear not sitting.

McCUTCHEON'S HEIRS v. RAWLEIGH.

(Filed October 1, 1908—Not to be reported.)

1. Specific enforcement of contract—If to enforce specifically an agreement would do one party great injury and the other but comparatively little good, so that the result would be more spiteful than just, the chancellor will not require its execution.

2. Conveyances—Boundary—Under the well-known rule of construction of conveyances of real estate, that a call must yield to the visible objects called for in the deed, a call of 110 feet to an alley, which was in terms reserved on the east side of a certain building, must give way where it appears that the distance from the corner from which the call runs to the alley is only 106 feet; and the vendee is not entitled to have the building removed and the alley moved back in order that he may have the full 110 feet called for in the deed.

3. Same—Deficiency in boundary—The vendee having failed to receive the entire boundary called for in his deed, he is entitled to an equivalent in money to the extent that he did not get it, and should recover from the vendor a sum computed by multiplying the number of front feet shortage by the average value per front foot of the lot on the street on which the deficiency occurred.

J. D. Mooquot for appellants.

Bloomfield & Crice and Greer & Marble for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge O'Rear.

V. A. McCutcheon owned a portion of the block in Paducah fronting on Sixth street and Clay street. Situated on this lot, and fronting on Clay street, was a three-story brick and frame tobacco factory. The east wall of this building was 115 feet west of the street line of Sixth street. McCutcheon believed it was 120 feet west. McCutcheon sold to appellee the lot at the corner of Sixth and Clay, being 50 feet fronting on Sixth, and extending back in the form of a parallelogram 110 feet on Clay. The consideration was \$1,000. The description in the deed was thus: "Beginning at the corner of North Sixth street and Clay street, and on the west side of North Sixth street; thence down North Sixth 50 feet to McCutcheon corner; thence at right angles and toward North Seventh street 110 feet to alley on east side of factory and corner to McCutcheon; thence at right angles to Clay street 50 feet with said alley; thence with a line of Clay street 110 feet to the beginning."

Contained in the deed was this further clause: "An alley of 10 feet is reserved on the east side of factory 115 feet to McCutcheon line, and from southeast corner of factory on Clay, and running with said street 10 feet, to Rawleigh's corner, said alley being west of and adjoining the lot herein conveyed, said lot as conveyed being 50 feet front on Sixth street by 110 feet in depth to said alley. To have and to hold the same, together with all the appurtenances thereunto belonging unto the party of the second part, his heirs and assigns, forever."

The covenant of the deed was one of general warranty. After laying off to appellee his lot of 110 feet in length there would be left but 5 feet between it and the wall of the tobacco factory. As 5 feet did not fulfill the condition

or reservation of 10 feet for an alley, nor was it sufficient for the purpose of an alley, something must give way.

Appellee insists by this suit for a specific execution of the contract that the vendor must remove his building so as to give a clear alleyway of 10 feet along the back of his lot, allowing appellee the full depth of 110 feet. It is manifest that to execute the contract as thus contended for, while giving comparatively little additional value to appellee's lot, would inflict upon the vendor's estate a loss or damage probably in excess of the whole value of the lot that he had sold to appellee. The action is brought in equity, and the conscience of the chancellor is appealed to to adjust the rights of the parties.

It is not every plain and certain contract that will be specifically enforced, whatever may be the legal rights of the parties in an action for damages for its breach. (*Cocanougher v. Green*, 93 Ky., 519; *Woolums v. Horseley*, 93 Ky., 582; *Simon v. Wildt*, 84 Ky., 157.) If to enforce specifically an agreement would do one party great injury and the other but comparatively little good, so that the result would be more spiteful than just, the chancellor will not require its execution. Where alternative relief is asked for, however, or where it appears proper that some other and appropriate relief can be given in the case, it may be done.

We will first determine what was bought by appellee, and what was reserved by his vendor, McCutcheon. It is manifest that the parties did not contemplate the removal of the brick tobacco factory, or any of its walls in order to effectuate this sale. It is equally clear that the vendor reserved to himself a 10 foot alley, lying immediately east of this building. That appellee had the right to use it as an appurtenant to his lot does not affect the fact that the vendor reserved this 10 foot strip for an alley, and that it was not to be included within the lot sold and conveyed to appellee. Appellee's lot, although described as having a depth of 110 feet, must stop at the point where the natural visible object, to wit, the 10 foot alley was adjoining the tobacco factory, was. This construction is made necessary by an old and familiar rule in construing such documents, that distance in a call must yield to the well known and visible objects called for in the deed. However, appellee was entitled to either have his lot of 110 feet depth, or to have an equivalent in money to the extent that he did not get it. It does not appear from the evidence that this particular part of the lot had any special value over and above any other 5 foot strip. It was complained by appellee that the failure to have an alleyway at the rear of his lot materially depreciated its value; and this may be so. But under the construction of the deed above indicated he will have the benefit of the alley. Therefore, his lot will have the same value as it would have had had the deed been literally complied with, excepting the loss of the 5 foot strip mentioned. For this deficit appellee should be compensated by appellants. Under the evidence, in every probability, the 5 feet off the rear of the lot, although it fronts on Clay street, would be worth less in proportion than the remainder. However, considering it for the purposes of this trial as being of an equal average value, we find that appellee paid about \$9.09 a front foot for the lot as it fronted on Clay street. We, therefore, think that his damages are not in excess of \$50.

The judgment of the circuit court awarding \$230 is reversed, as is the judgment adjudging to appellee the 110 feet depth to his lot instead of 105 feet. The judgment is affirmed on the cross appeal. The case is remanded, with directions to set aside the judgment and to direct the opening of an alleyway 10 feet wide immediately east of the tobacco factory and extending the distance called for in the deed, 115 feet, and for a judgment for appellee for \$50, with interest from the date of his deed, and for further necessary proceedings not inconsistent herewith.

CARPENTER, &c. v. STEPHENS, &c.

(Filed October 2, 1903—Not to be reported.)

1. Settlement of decedent's estate—Where the majority of the witnesses who testified stated that 300 acres of land given by the decedent to one of his sons was not worth exceeding \$1 per acre, this court is unable to say that the valuation of \$350 placed by the trial court on it was not fair and reasonable.

2. Same—Clerical error in commissioner's report—Where an error of several hundred dollars appeared in the report of the commissioner appointed in a suit to settle the accounts of an administrator as to one item, but was corrected in another item, the error being purely clerical and one which did not affect the gross sum charged to the administrator, no cause arose for refusing to confirm the commissioner's report on that ground.

Hazelrigg & Chenault for appellants.

John W. Rodman for appellees.

Appeal from Magoffin Circuit Court.

Opinion of the court by Chief Justice Burnam.

This suit was brought by the appellees, Rosanna Stephens, &c., against George Carpenter, administrator of Samuel Carpenter, deceased, and others, for a settlement of his accounts as administrator, an equalization of advancements to the heirs and for a distribution of the estate. The case was referred to the master commissioner for this purpose, who on the 7th day of February, 1902, filed his report accompanied by the depositions of witnesses which had been taken before him. The commissioner reported that \$4,546.90 of personalty went into the hands of George Carpenter as administrator, and he is credited with \$811.17, disbursements, allowances and attorneys' fees, leaving for distribution in his hands \$3,735.73. It appears from the record that decedent left surviving him as heirs at law ten children, issue of a first marriage, and some grandchildren, children of a deceased daughter, and also a wife and two children, issue of a second marriage, and a third child that was born to the second wife after the death of Samuel Carpenter, but which died in a short time. The report sets out in detail the various sums received by the heirs in money and property by way of advancements. Irvine Carpenter is charged with \$300 received in land. The appellant, George Carpenter, excepted to the commissioner's report because it failed to fix a valuation of \$1,000 upon the real estate given to his brother, Irvine, by his father, and also with \$365 in personalty. And appellees complain that George Carpenter in his report of settlement is only charged with \$17.50

collected from Morton Arnett, when he collected \$717.50; that he only accounts for \$140 of rents collected by him, when in fact he collected \$180.

The report of the master commissioner was confirmed by the trial court except as to the valuation placed upon the 800 acres of land received by Irvine, which he raised \$50, and a judgment was entered directing a distribution of the estate in the hands of the administrator upon the basis indicated by the report of the commissioner. Both parties have appealed. The appellant, George Carpenter, especially complains of the valuation placed upon the 800 acres conveyed to his brother Irvine. The testimony as to the value of this tract of land is quite conflicting. The majority of the witnesses who testify on the point say that it was not worth exceeding \$1 per acre at the time it was conveyed to Irvine Carpenter. Others put a higher valuation upon it, and the circuit judge raised the valuation to \$350. We are unable to say from the proof that this was not a fair and reasonable value of the land at the date of its reception by Irvine Carpenter. Whilst it is true that the commissioner's report, as copied into the record, only charges appellant, George Carpenter, as administrator, with \$17.50 collected from Mort Arnett on the 20th of November, 1901, when as a matter of fact the proof shows the amount collected at that time to be \$717.50. Yet in the item immediately preceding this charge in the commissioner's report he is charged with \$771.28, collected from J. W. Patrick, etc., on February 9, 1902, when the proof shows he in reality only collected \$71.28. It is perfectly manifest that the clerk in copying the report has placed the seven in front of the wrong item, but it in reality does not affect the gross sum charged to appellant. Whilst there seems to be a slight discrepancy in the report of settlement in the items rent collected, charged to the administrator and the proof, it is so small that we are not satisfied that the commissioner's report is not accurate.

Upon the whole case we have reached the conclusion that the judgment appealed from should be affirmed on both the original and cross appeals, and it is so ordered.

COMMONWEALTH v. McCONNELL.

(Filed October 2, 1903.)

1. Legislative act—Title—Constitutionality—An act of the general assembly requiring physicians, surgeons and midwives to keep and file with the county court clerk a registry of all births and deaths which they have professionally attended is not unconstitutional on the ground that the subject-matter is not indicated in the title, which is "An act to provide for the registry of marriages, births and deaths."

2. Same—The fact that the act requires physicians to keep such a registry without providing compensation therefor does not render it unconstitutional, such requirement being within the police power of the Commonwealth.

3. Indictment—Sufficiency of—An indictment charging a physician with a failure to keep and file a registry of the births and deaths which he had attended is substantially defective in failing to charge that he had attended professionally at any such births or deaths.

* Same—Such indictment was further defective in that it failed to charge that the accused was a practicing physician during the yearly period during

which it was charged that he failed to keep and return the registry required by the statute.

·Clifton J. Pratt and M. R. Todd for appellant.

·Gordon, Gordon & Cox, James & James and A. C. Moore for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Barker.

The following indictment was returned against the appellee by the grand jurors of the county of Crittenden, on the 1st day of April, 1902: "The grand jurors of the county of Crittenden, in the name and by the authority of the Commonwealth of Kentucky, accuse Dr. J. D. McConnell of the offense of failing to deposit in the county clerk's office of Crittenden county, Kentucky, a registry, or copy thereof, of the births and deaths he professionally attended in such county, committed in manner and form as follows, viz.: The said McConnell, in the said county of Crittenden, on the 1st day of March, 1902, and before the finding of this indictment, did fail to deposit in the county clerk's office of Crittenden county, Kentucky, on or before the 10th day of January, 1902, a registry, or copy thereof, of the births of persons and deaths of persons at which he professionally attended in Crittenden county, Kentucky, embracing a period of one year ending on the 31st day of December, 1901. The grand jury further find that Dr. J. D. McConnell is a regular practicing physician, he having exhibited and registered in the county clerk's office of Crittenden county, Kentucky, a certificate of authority to practice medicine from the State Board of Health of the State of Kentucky, against the peace and dignity of the Commonwealth of Kentucky."

This indictment is based upon the following provisions of the statute, being sections 2582 and 2583, chapter 83 of the Kentucky Statutes:

"Section 2582. It shall be the duty of all physicians, surgeons and midwives to keep a registry of all births and deaths at which they have professionally attended, showing, in cases of birth, the time and place of birth, name of the father, and the maiden name of the mother, and their residence, sex and color of the child, together with its name, if it shall receive one, and whether it was born alive or dead; and showing in cases of death, the time, place and cause of death, the name, age, sex, color and condition (whether single, married, or widowed), name and surname of parents, occupation, residence and place of birth of the deceased; Provided further, That when two or more physicians, surgeons or midwives may have attended professionally at any birth or death, that physician, surgeon or midwife who is oldest in attendance shall make the registry.

"Section 2583. It shall be the duty of the clergymen, physicians, etc., above named, to deposit in the county clerk's office of the counties in which such births, etc., occur, on or before the 10th day of January, in every year, the said registry, or a copy thereof, embracing the period of one year, ending on the 31st day of December last preceding the time of deposit; and the clerk shall deliver copies of the same to the assessor."

A general demurrer was filed to this indictment, which the court sustained, and dismissed it. From this judgment the Commonwealth has appealed.

Counsel for appellee insists that the act upon which the indictment is

predicated is unconstitutional, because the subject-matter is not indicated by its title. To this proposition we are unable to agree. The original act is to be found in volume 1 of the Acts of the General Assembly of the Commonwealth of Kentucky, for 1873-4, page 13, its title being "An act to provide for the registry of marriages, births and deaths." The subject-matter of the act is the registry of marriages, births and deaths, and is clearly germane to the title. The fact that there is no mention of physicians in the title, does not militate against this view. It is not possible to put the entire body of the act in the title; the constitutional requirement is fully met and complied with if the general scope and purpose of the act is germane to its title; and we think this condition exists in the statute under consideration.

It is also urged by appellee's counsel that the act is unconstitutional because it requires physicians to perform a service without compensation, and that the legislature had no power so to do. The public is deeply interested in the subject of the proper registry of marriages, births and deaths, and we have no doubt that under the police power of the Commonwealth the legislature has authority to require of the professional parties in charge of the performance of the duty of returning to the county clerk's office proper certificates in relation thereto.

There are, however, objections raised by appellee to the indictment which, we think, are substantial: First, it is nowhere charged that the appellee ever attended, as physician, at any birth or death; it is alleged that he failed to return to the county clerk's office, on or before the day required by the statute, the registry or copy thereof, which the law requires every physician to make; but there is an utter failure to charge upon appellee that he had attended, professionally, at any such birth or death; second, it is not alleged in the indictment that appellee was a practicing physician during the yearly period for which he should have kept and returned the registry required by the statute. The year for which it is charged the registry should have been kept and deposited extended from the 31st day of December, 1900, to the 31st day of December, 1901. The indictment charged that "the grand jury further find that Dr. J. D. McConnell is a regular practicing physician, he having exhibited and registered in the county clerk's office of Crittenden county, Kentucky, a certificate of authority to practice medicine from the State Board of Health of the State of Kentucky." This allegation, that appellee "is a regular practicing physician," being in the present tense, speaks from the time the indictment was returned, which was on the 1st day of April, 1902. It may be true that appellee was a regular practicing physician on the 1st day of April, 1902, but it does not, therefore, follow that he was a practicing physician during the year between the 31st day of December, 1900, and the 31st day of December, 1901.

For these reasons we think the indictment was clearly defective, and the demurrer thereto was properly sustained.

Wherefore, the judgment is affirmed.

HURST v. DAVIDSON, &c.

(Filed October 2, 1908.)

Decedent's estate—Will—Creditors—Where a testator, by his will, directed the sale of his real estate and charged the proceeds of such sale, first, with the burial expenses of himself and wife, and then with the payment of his debts, the children of the testator, who were made residuary legatees after the payment of debts and other charges, could not by a partition of the lands between themselves without a sale, the widow having died, defeat the right of creditors to subject the property to their debts.

W. L. Hurst and J. H. Hazelrigg for appellant.

J. J. C. Bach, W. H. Miller and L. H. N. Salyer for appellees.

•Appeal from Perry Circuit Court.

Opinion of the court by Judge Hobson.

Appellant Hurst, on November 19, 1898, filed his petition in equity in the Perry Circuit Court, alleging that in the year 1892 John A. Duff died a resident of Perry county, leaving surviving him Polly Duff, his widow (who has since died), also a number of children and grandchildren his heirs at law, who were made defendants to the action. He also alleged that the defendant left a will, which had been duly probated, by which he directed that all his property, real and personal, should be sold by his executor, and that out of the proceeds the executor should make certain provision for his widow and pay all his debts, and after this was done divide the remainder of the proceeds in a certain manner among his descendants. The executor was made a defendant to the petition, and it was charged that there was no personal estate, but that the decedent owned a large and valuable tract of land in Perry county, which was then in the possession of the children or those claiming under them. He alleged that he was a creditor of the decedent, setting out in detail his debt which had been duly proven up and demanded of the executor. He further alleged that the executor had made no settlement of his accounts, and that a sale of the land, or part of it, would be necessary to pay the debts. He prayed a settlement of the estate and for a sale of enough of the land for this purpose. A few days afterwards the personal representative filed a similar suit. The court sustained a demurrer to Hurst's petition, for what reason is not shown, but thereafter treating the case as still in court consolidated it with the suit brought by the personal representative and another suit which had been brought by a creditor of some of the children against them. The consolidated actions were referred to a commissioner, who reported the debts against the estate; also that the personal estate in the hands of the representative was exhausted and the court thereupon entered a judgment dismissing the petition of the representative and Hurst so far as they sought to subject the land to the debts of the decedent on the ground, as stated in the judgment, "that the will of John A. Duff, Sr., deceased, confers upon the plaintiff, E. C. Duff, Sr., as administrator of his estate, the mere naked power to sell or convey and distribute the proceeds of the sale of his realty among his devisees, and that the title to his realty vested in them and not in the administrator, and it appearing to the satisfaction of the court that the devisees and their vendees partitioned the land hereinafter described among themselves and made to each other conveyance

for their respective parts more than six months after the qualification of the administrator and before any suit was instituted to settle the estate, they thereby elected to take their interest in said estate in land instead of in money, the proceeds of the sale of same, and thereby become bona fide purchasers for a valuable consideration, and that the same is not liable for the debts of the creditors."

The propriety of this judgment is the only question we deem it necessary to determine on the appeal. The will of the testator, so far as material, is in these words: "After my death I will that all of my property and effects, both real and personal and mixed, that I own at my death be sold as hereinafter described, and the proceeds of the sale of all my property and all the debts be collected and disposed of and paid out as follows: I first desire and will that myself and wife be decently buried, all my just debts be paid; and, second, I desire that if my beloved wife, Polly Duff, if she should outlive me, I, in that event, will that my said wife, Polly Duff, have a sufficient amount of my effects set apart to her to amply support her during her life, and that she select who she will live with; then, after my just debts are paid and my said wife is amply provided for, I will that the remainder of the proceeds of all my effects be divided among my children, as follows: (Here follows directions for a distribution.) In order to carry out this my last will and testament, I appoint and make my son, Elijah C. Duff, my executor, to carry out my will, and my said executor is hereby directed and empowered to make sale of all the real and personal estate I have or own at my death, and is hereby empowered and directed to sell and make a deed or deeds to all of my real estate, to have the same force and effect as if I was to make deeds of conveyance in my lifetime to said land."

In *Duff's Ex'or v. Duff*, 21 Ky. Law Rep., 1911, it was held that under this will the land is to be treated as personalty in the hands of the executor for distribution, and that, therefore, he might protect it from trespass, but the court added: "The rule might be otherwise, if, as intimated by counsel, the appellee entered on the land as one of the heirs or devisees. In such event, under some circumstances, he might be regarded as having elected to take the land or his share of it instead of the proceeds."

But in that case no question of the rights of creditors was involved. It was simply a controversy between the executor and one of the heirs and devisees. The right of the devisees to agree among themselves on a division of the land, and to take the land instead of its proceeds, is subject to the rights of creditors; for under the will the entire estate or the proceeds of it are charged first with the burial expenses of the testator and his wife, and then with the payment of his debts. Only the remainder, after the payment of these charges and the support of the widow, should she survive the testator, is devised to the children. The children, under the will, take subject to the payment of the debts, and if they elected to take land instead of money, they would hold the land subject to the trust created by the will in favor of the creditors, who, by its terms, are to be first paid before anything goes to the devisees. The devisees could not by any arrangement among themselves defeat the prior rights of the creditors, nor could they do so by reason of any nonaction on the part of the executor who held the estate as trustee for the creditors. In *Drake v. Ellman*, 80 Ky., 434, it was held under

a similar will that the children were residuary devisees after the payment of the debts, and that the creditors had a prior lien upon the estate.

In entering the judgment appealed from the court seems to have based his action on section 2067, Kentucky Statutes: "When the heir or devisee shall alien, before suit brought the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation, to the creditors of the decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for valuable consideration unless action is instituted within six months after the estate is devised or descended to subject the same."

The mere partition of the land by the children among themselves did not constitute them bona fide purchasers. They held the land after that partition subject to the rights of creditors just as they held it before. Besides, this section had no application. The land did not descend to the children, for it was devised by the testator to be sold. The land was not devised to the children and they did not, therefore, take it as heirs of the testator, or as devisees. The children took nothing under the will except as residuary devisees of the proceeds of the sale of the property by the executor after the debts were paid. In so far as the children aliened anything more than the surplus remaining after the payment of the debts and the other preferred charges, they aliened that which was not devised to them and to which they had not the complete title. The statute is only intended to protect the devisee in the sale of what is devised to him. It was not intended to enable him after six months, without suit brought, to sell what was not his under the will. Section 2066, Kentucky Statutes, provides: "When any property shall be devised subject to or upon the payment of the devisee to another of a sum of money, or his doing some other thing, the latter shall have a lien upon the legacy for the sum so to be paid, or for the value of the thing to be done." By section 467, Kentucky Statutes, the word legacy includes either real or personal estate. The creditors, therefore, as the will was recorded, had a lien of record on the land for their debts. The children had no title from the executor. The rule that a purchaser of land charged generally with the payment of debts need not look to the application of the purchase money (*Grotenkemper v. Bryson, &c.*, 79 Ky., 353; *Drake v. Ellman*, 80 Ky., 434) has no relevancy to the case before us, as the will directed the land to be sold by the executor, and no purchase was made from him. If any one purchased from one of the heirs he did so with notice of the state of the title, and, therefore, stands in no better attitude than his vendor.

We are, therefore, of the opinion that on the facts shown the court should have directed a sale of enough of the land to pay the testator's debts.

Judgment reversed and cause remanded for further proceedings consistent herewith.

THOMPSON, JR. v. PAGE, CLERK.

(Filed October 7, 1908—Not to be reported.)

Appointment of receiver—Supersedeas—Under the provisions of section 298 of the Civil Code a judgment appointing a receiver can not be superseded, and the clerk of the circuit court has no power to issue a supersedeas of a judgment directing the executor of a decedent's estate to turn it over to another as receiver and trustee.

R. C. Kinkead, Humphrey, Burnett & Humphrey and H. H. Nettleroth for appellant.

Bernard Flexner and Barnett & Barnett for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 1.

Opinion of the court by Judge Hobson.

E. V. Thompson, Sr., died about ten years ago, a resident of Louisville, the owner of a large estate. E. V. Thompson, Jr., his son, qualified as his executor, and continued to act for some time, making four biennial settlements. In March, 1902, a proceeding was begun by the guardian ad litem of the infant beneficiaries of the estate, in which specific acts of misconduct and bad faith were charged against the executor, and it was sought to have the estate put in the hands of a receiver, it being alleged that the executor was insolvent; was acting without bond, and that there was danger of the estate's being wasted. There was a full hearing in this action before the chancellor, and it was adjudged that the motion should be sustained, and that the executor turn over to the National Trust Co., as receiver and trustee, all the estate in his hands. The executor excepted to this judgment, and prayed an appeal to this court, which was granted. He then went before the clerk and executed an appeal bond in proper form, and requested the clerk to issue a supersedeas of the judgment. This the clerk declined to do, on the ground that a judgment appointing a receiver can not, by the provisions of section 298 of the Code, be superseded. He thereupon filed this suit in the Jefferson Circuit Court against the clerk, praying a mandamus compelling him to issue the supersedeas. The court sustained a demurrer to this petition, and he appeals to this court.

The only question presented is whether the mandamus should have been granted, as only the common law action against the clerk is before us on the appeal. It is insisted for appellant that while the judgment designates the trust company as receiver and trustee, it really relieves appellant of his trust and appoints the trust company in his place. It is argued that it is not such an order, therefore, as the Code contemplates. We can not see that the order of the chancellor is not an order appointing a receiver, although it is also an order appointing a trustee, and discharging appellant from his trust. In so far as it is an order appointing a receiver, it can not be superseded under the Code. The fact that the other matter which may be superseded is included in the judgment can not change the rule so far as the receivership is concerned. Nor do we understand that the provision of the Code, that an order appointing a receiver shall not be superseded, does not apply to cases like this; on the contrary, we understand the Code to regulate the subject of the appointment of receivers, and that no order appointing a receiver can be superseded. The mandamus, therefore, which was sought against the clerk, compelling him to issue the supersedeas in question, was properly refused.

The possession of the receiver is the possession of the court. The effect of the order appointing him is that the court takes charge of the property and preserves it pending the action to protect the rights of the parties. There are weighty reasons why the order should not be superseded. Such orders are usually made when this action by the court is necessary to prevent the loss or waste of the property, and the same state of facts that make such a step

proper usually would render the remedy on an appeal bond illusory and inadequate if a supersedeas was allowed. The legislature has, therefore, provided that the order shall not be superseded, and fair effect must be given the legislative will thus expressed.

Judgment affirmed.

HARRIS, BY, &c. v. SOUTHERN RAILWAY CO. IN KENTUCKY.

(Filed October 7, 1908—Not to be reported.)

1. **Erroneous instruction—Waiver of exception**—Where the appellant objected and excepted to each instruction given by the trial court, but in his motion and grounds for a new trial complained of only one of them, he will be deemed by this court to have waived the exceptions to all the others.

2. **Failure to ask for instruction—Appeal**—The error of the court in failing to give an instruction embodying certain ideas brought out in the evidence can not avail the appellant as a ground for reversing the judgment where he failed to ask for such an instruction at the trial.

R. F. Peak and F. R. Feland for appellants.

Willis & Todd and Humphrey, Burnett & Humphrey for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Nunn.

It appears from the record that appellant, Willie Harris, was a boy about thirteen years of age when he lost his leg by being run over by one of appellee's trains in the town of Lawrenceburg, Ky.

Appellant's evidence, with four or five witnesses to sustain him, showed that he went upon the engine and tender of appellee at the direction and request of those in charge of it for the purpose of shoveling coal from the back end of the tender to the front for the convenience of the fireman in putting it into the engine; that he continued at this for fifteen or twenty minutes while the train was in the yards of appellee, switching and making up its train preparatory to its departure for Louisville. When the train was ready, and after it had started to Louisville, the engineer or fireman directed appellant to get off the engine. By the time he had left the place of his work on the tender and had gotten down to the steps of the engine the train was moving pretty fast, and in getting off he lost his leg by the wheels of the train running over it.

Five or six witnesses for appellee testified that appellant lost his leg by his own improper and unauthorized conduct in climbing a ladder and jumping off of it while the train was in motion; that this occurred three or four cars back from the engine, and that those in charge of the train did not know of his position on the train until after he was injured.

The court gave to the jury six instructions, to all of which the appellant objected and excepted at the time, and offered five instructions, which the court refused, to which he objected and excepted. The jury returned a verdict in favor of appellee. The appellant made a motion and filed grounds for a new trial, which the court overruled, and appellant has appealed.

The grounds for a new trial are as follows:

"1st. Because the verdict is not sustained by sufficient evidence.

"2d. Because the verdict is contrary to law.

"3d. Because incompetent evidence was permitted to go to the jury and excepted to at the time by the plaintiff.

"4th. Because competent evidence was excluded from the jury and excepted to at the time by the plaintiff.

"5th. Because the court erred in giving instruction No. 6 to the jury, to which the plaintiff excepted at the time and still excepts.

"6th. Because of error of the court in refusing to give instructions A, B, C, D and E, and each of them offered by plaintiff, to which ruling of the court plaintiff excepted at the time and still excepts."

The court did not err in permitting incompetent evidence to go to the jury, nor in excluding competent evidence. If the jury believed the theory of the defense as deposed by its witnesses, they had sufficient evidence upon which to base their verdict.

As to appellant's fifth reason assigned for a new trial, that the court erred in giving instruction No. 6, we are of the opinion that the court did not err, for the reason that this instruction was given upon the hypothesis of appellant, and was proper. For if appellant did get upon the train of appellee without the knowledge or consent of those in charge of it, they owed him no duty until they discovered his peril, and if they did not discover his peril in time to have prevented his injury by the exercise of ordinary care, then the appellee was not responsible for appellant's injury.

But we are of the opinion that the court did err in giving instructions on his theory of the case, for if appellant was directed or invited by the engineer and fireman, or either of them, to go upon the tender and shovel coal for their convenience, and they started the train to Louisville, and after it was moving they directed him to get off the train while it was in motion, and under such circumstances he attempted to alight from the train, and as a result thereof he received his injury, the appellee was responsible, unless at the time he attempted to alight the speed of the train made the danger to him so imminent and obvious that an ordinarily prudent person of his age and discretion would not have incurred the risk. This idea should have been embraced in the instructions.

But we are not authorized to reverse this case because of this defect in the instructions for the reason that the appellant did not offer any instructions on this point. The instructions offered by the appellant were in substance and effect the same as those given by the court. And for the further reason that appellant in his grounds filed for a new trial only complains of the court's action in the giving of instruction No. 6, and, therefore, he must be deemed to have waived the errors of the court in giving all instructions except No. 6.

In 3 Bush, 481, this court said: "The Code requires all the grounds relied on for a new trial to be specified in writing, consequently no error not so stated could be noticed by the circuit court, but all such premitted objections must be treated as waived in that court, and is, necessarily, beyond the sphere of this court's revisory jurisdiction, which is only to decide whether, on the grounds properly before it, the circuit court erred in its judgment."

Also in 18 Bush, 298, the court said: "The ground for a new trial must be specified, otherwise the party excepting will be regarded as having waived the supposed error." (5 Bush, 206; 7 Bush, 235; Civil Code section 343.)

The record shows that at the time the court gave its instructions the appellant objected and excepted to the giving of each and all of them, but, as stated, when he filed his grounds for a new trial he only complained of the giving of No. 6, and, therefore, under the authorities referred to, he must be deemed to have waived his objections and exceptions to all except No. 6, which, as before stated, was a proper instruction.

Wherefore, the judgment is affirmed.

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[Reported by Walter G. Chapman, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

COLUMBIA FINANCE AND TRUST CO. v. FIRST NATIONAL BANK.

(Filed October 7, 1903.)

1. Partial assignments of choses in action—Prior equity—Where a member of a firm of attorneys at law, with the consent of his partner, assigned to a trust company to secure a loan a portion of his share of the firm's fee due by a particular client, and subsequently, without the consent of his partner, assigned to a bank a portion of the same fee to secure a pre-existing debt, and afterwards, a dispute arising between the attorneys and their client as to the amount of the fee, a sum of money, including the attorneys' fees, was deposited in the bank to the credit of the president of the client, and the two attorneys, with the understanding that no part of it was to be paid out except on checks signed by the three, the act of the bank in applying a part of the deposit to the debt due by it by the attorney, with his consent, did not deprive the trust company of its older equity and its right to have the fee first applied to the payment of its debt, when consented to by the debtor client.

2. Joint deposit in bank—Withdrawal of funds—The money, including the fee of the attorneys, having been deposited with the bank to the credit of the president of the client and the two attorneys, and on the agreement that it was not to be paid out except on their joint checks, the bank acquired no title to the money which it thus held in trust by applying it to the payment of its debt against one of the attorneys at his direction.

3. Notice to debtor of assignment—The rights of the trust company were not affected by reason of the fact that the bank first gave notice to the debtor of its assignment, the rule being that among successive assignments the order of time controls. Besides, the notice to the debtor adds nothing to the assignee's title as between himself and the assignor, but is for the purpose of protecting the debtor in such defenses as he may have against the claim.

4. Same—Where the failure of the assignee to give notice prejudices no right of the debtor it is immaterial.

5. Prior lien—Application of fund not encumbered by junior lien—The fact that the trust company also had an assignment of the other partner's share in the same fee and of his share in a fee in another case does not furnish ground for requiring the trust company to first exhaust the latter fee,

in which the first partner also has a share, before resorting to the fund in bank, for the reason that the bank is not a creditor of that partner and can not impose terms on the trust company as his creditor.

Pirtle, Trabue & Cox, Henry L. Stone and Albert S. Brandies for appellant.

Matt O'Doherty for appellee.

Appeal from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Judge Hobson.

Henry L. Stone and Watson A. Sudduth, two members of the Louisville bar, formed a partnership in the year 1889 for the practice of their profession under the firm name of Stone & Sudduth. The partnership continued for about ten years. The firm was employed by the Richmond & Irvine Construction Co. in the case of the Central Trust Co. v. The Richmond, Nicholasville, Irvine & Beattyville R. R. Co. in the United States Circuit Court of the district of Kentucky. While the suit was undetermined, on November 1, 1895, Sudduth borrowed of appellant, the Columbia Finance and Trust Co., \$3,000, for which he executed to it his note, and to secure the note assigned to it in writing enough of his portion of his fee in that case to pay the note. Stone consented in writing to the assignment of one-half the fee to the trust company. On August 3, 1898, Sudduth, to secure his individual pre-existing debt and additional advances, assigned to appellee, the First National Bank, \$2,500 of the amount due him out of the firm fees in the case referred to, and on February 20, 1899, he, to secure his individual pre-existing debt and other advances, assigned to it the further sum of \$5,000 of the amount due him out of the firm fees in that case. These assignments were made without the knowledge or consent of Stone, but on April 8, 1899, notice thereof was given by the bank to the construction company. On April 18, 1899, Stone borrowed of the trust company \$4,000, executing his note therefor, and to secure it an assignment of his one-half interest in the fees of Stone & Sudduth, above referred to, also his half of their fees in behalf of L. F. Mann in that action, and to this arrangement Sudduth, in writing, consented. Notice was given by the trust company to the construction company on May 8, 1899, of the assignments to it by Sudduth & Stone of the fees referred to. The firm of Stone & Sudduth was dissolved on August 14, 1899. After this, on September 20, 1899, there was paid to the Richmond and Irvine Construction Co. and its attorneys, Stone & Sudduth, the sum of \$32,431.69, which sum included the fees of the attorneys in the action mentioned, and there being a disagreement between the attorneys and their client as to the amount of their fees, the money was deposited in the First National Bank to the credit of B. H. Young, president, W. A. Sudduth and H. L. Stone, with the understanding that the fees were embraced in the deposit, and that no part of the money was to be paid out except on checks signed by the three, Young, Stone and Sudduth, Young being the president of the construction company. After this, on October 9, 1899, Sudduth authorized the bank to appropriate \$7,500 of the amount to the satisfaction of the assignments he had made to the bank. Stone knew nothing of it, and Young, who was informed of it by the cashier, said that he had no right to do this; that the money was placed there subject to the order of Stone, Sud-

duth and himself. The cashier said that he had made a memorandum check, and had appropriated the money under the assignment with the agreement of Sudduth. Young replied that he could do what he pleased with Sudduth's money, but that he could not take the company's money, and it was then agreed between Young and the cashier that if the fees of the attorneys were fixed at less than \$7,500, the bank would refund to the construction company the amount so overdrawn. While matters thus stood Sudduth died in November, 1899, and in December the attorneys' fees were fixed at \$6,725.86, and thereupon the bank returned to the credit of the fund \$774.14, this being the amount of excess appropriated by it over and above the fees. The trust company did not know at that time anything of these proceedings between the bank and Sudduth, nor did Stone. On January 8, 1900, a check was delivered to the trust company on the bank for \$3,362.98, being Stone's one-half of the fees; also a check for \$3,286, to be paid out of Sudduth's portion of the fees. These checks were signed by Young as president, H. L. Stone and the executor of Sudduth. They were presented to the bank, and payment being refused, this action was brought to recover on them. After a voluminous preparation of the case the circuit court entered judgment in favor of the bank, and the trust company appeals.

The ground of the judgment, as stated by the learned circuit judge, seems to be as follows:

1st. The bank has possession and ownership of the money in controversy, having appropriated it by the direction of Sudduth, and with the consent of the construction company, and will not, therefore, be required to give way to the previous assignment made to the trust company, which were not assignments of the entire fund, but only of so much of it as was necessary to pay the notes.

2d. It was known that the bank would not pay the checks when they were drawn, and no action can be maintained upon them by the trust company.

It was held in *Weinstock v. Bellwood*, 75 Ky., 189, that an entire claim can not be severed without the consent of the debtor, and that an action can not be maintained at law by the assignee of a part of a debt against the debtor unless the assignment had been consented to by him. The general rule on this subject is thus stated in 4 Cyc., page 27: "Partial assignments of such choses in action as are assignable can be made so as to entitle the assignee to the rights of a co-owner against the assignor. In England, and under some of the decisions of the American courts, an order given by a creditor to his debtor to pay a third party so much money out of a specific fund or debt is a valid assignment of so much of the fund or debt. But the weight of authority in the United States seems to be that such assignments, unless made with the consent of the party liable on account of the chose, are not binding upon him, and he may discharge the liability by settlement with the assignor the same as if no assignment had been made. Courts of equity, however, have always recognized partial assignments of choses in action for many purposes, and will protect the assignees of such choses whenever they can do so without working a hardship upon the debtor." (2 Am. & Eng. Ency. of Law, 1069, 1070; 3 Pomeroy's Equity, section 1280.)

All the assignments in controversy were partial. After the payment of Sudduth's note to the trust company there would be left a balance of \$136.93

of his part of the fee. And after the payment of Stone's note to it there would also be a balance of his part of the fees, as the Mann fee of \$2,970.62, or his part of it, was included in the assignment to secure his note. The first assignment of Sudduth to the bank was of \$2,500 out of the amount of their fees, and the second assignment was \$5,000 out of the fees, the amount of the fees then claimed by Stone & Sudduth being between \$8,000 and \$9,000. All the assignments being partial, the assignment to the trust company having been made before those to the bank, must be adjudged superior to them, unless there is something in the case to take it out of the rule that the older equity must prevail over a junior equity, other things being equal. (*Miller v. Field*, 10 Ky., 108.)

The \$32,431.69 having been deposited in the bank to the credit of B. H. Young, president, W. A. Sudduth and H. L. Stone, and to be checked out only on checks signed by the three, Sudduth had no authority, without the consent of Stone and Young, to authorize the bank to appropriate any part of the money to the payment of his individual debt to it. The purpose of depositing the money as it was, to the credit of the three, was to prevent any one of them from appropriating it without the consent of the other two. The form of deposit showed this, outside of the parol agreement. The rule is that if several persons make a deposit to their joint credit, the bank must have the signatures of all of them appended to the check before paying it, or it takes the risk. (2 *Morse on Banking*, section 435-436.) The money having been deposited with the bank to the credit of Young, Stone & Sudduth, and on the agreement that it was not to be paid out except on their joint checks, the bank acquired no title to the money which it thus held in trust by applying it to the payment of its debt against Sudduth. The law does not permit one, who has acquired possession for one purpose, thus to gain an advantage; and the legal status of the bank, after the memorandum check was credited to it on the account by the direction of Sudduth, was not different from what it was before. Besides, so much of the deposit as represented the fee of Stone & Sudduth was the property of the firm, and Sudduth could not use it to pay his debt to the bank without the consent of Stone. The bank was charged with notice that one of the partners had no right to apply the partnership assets to the payment of his individual debt, and when it made the appropriation by the direction of Sudduth alone it acquired no greater rights than he had. (*Jackson v. Holloway*, 53 Ky., 112.) A partner in dealing with the firm property is a trustee for the firm. The authorities are uniform that if a depositor of trust funds appropriates them to the payment of his individual debt to the bank, the latter, having notice of the character of the fund, is affected with knowledge of the misappropriation, and will be compelled to refund. (1 *Morse on Banking*, section 317, 4th edition.)

On the other hand, each of the partners having consented to the assignment made by the other to the trust company, these assignments were, in effect, the assignments of the firm, or of as much force as if they had been made in the name of the firm. True, they were partial assignments, but they were afterwards assented to by the construction company when Young, as president, signed the checks sued on. Besides, the construction company is not complaining; no right of its is affected, and, as we have seen, equity

will protect, as far as it can do so without injury to the debtor, rights acquired by partial assignments.

The rights of the trust company are not affected by reason of the fact that the bank first gave notice to the debtor of its assignments. The rule in England is that as between successive assignees of the same chose, each being a bona fide purchaser for value, the one who first gives notice to the debtor will be entitled to preference, although his assignment is later in date. Some courts in this country have adopted the same rule, but the weight of authority in America is to the effect that among successive assignments the order of time controls. (2 Pomeroy's Equity, section 686; 4 Cyc., pages 33, 77.) The rule of caveat emptor applies to sales of choses in action as in other sales of personal property, and if the seller has sold the thing to one person, and, therefore, has no title to pass to a second, the latter takes nothing by his purchase. The assignee's right of action is without prejudice to any discount, set-off or defense the debtor has before notice of the assignment. (Kentucky Statutes, section 474; Civil Code, section 19.) The purpose of the notice is to protect the debtor in such defenses innocently acquired; it adds nothing to the assignee's title which is perfect as between him and the assignor or those claiming under him from the time of the assignment. While the precise question appears not to have been directly passed on heretofore by this court, the principles announced lead to the conclusion indicated. (Miller v. Field, 10 Ky., 108; Newby v. Hill, 59 Ky., 553; Garrott v. Jaffrey, 73 Ky., 415; Beard v. Sharp, 23 Ky. Law Rep., 1582.)

Here no right of the construction company was affected by reason of the failure of appellant to give notice of its assignments to the construction company for a month after appellee's notice was given. The situation of the parties when the notice was given was just as it was a month before, and the construction company had then no defense against the assignor. The failure of appellant to give the notice sooner, having prejudiced no right, was immaterial.

It was held in Lester v. Given, 71 Ky., 357, that the holder of an unaccepted check on a bank might maintain an action thereon. This case has frequently been followed since, and we regard the rule as settled. (Merchants National Bank v. Robinson, 97 Ky., 552; Weland's Adm'r v. State National Bank, 23 Ky. Law Rep., 1517, and cases cited.) The fact that the bank in this case claimed not to have the money on hand when the checks were drawn is not sufficient to take it out of the rule, for the checks completed the transaction and were the proper means for bringing to a decision the question in dispute.

Sudduth died insolvent. He was also considerably overdrawn with the firm of Stone & Sudduth. Whether there will be anything coming to him on the settlement of the firm, or what will be the rights of the bank in this event, can not be determined in this suit, for neither Stone nor Sudduth's representative, nor his other creditors are before the court.

It is insisted for the bank that the trust company should be required to exhaust the fund arising from the Mann fee before resorting to the bank fund, under the rule that a creditor having a lien on two funds, on one of which another creditor has a junior lien, will be required to exhaust first the fund not encumbered by the junior lien. But that rule has no applica-

tion, as the bank is not a creditor of Stone's, and as the creditor of Sudduth it can not impose terms on the trust company as the creditor of Stone. What may be the right of the bank to Sudduth's part of the Mann fee can not be determined here, as the necessary parties are not before the court.

Judgment reversed and cause remanded, with directions to enter a judgment in favor of appellant.

DOWNS v. WOODSON.

(Filed October 8, 1903—Not to be reported.)

1. Sale of business—Breach of contract—Damages—In an action instituted to recover damages for the breach of a contract, whereby a person, who sold his interest in a certain business, agreed not to engage in the same business in the same town, except in a particular building therein, the vendee was entitled to recover such a sum as would fairly compensate him for the loss of profits and good will of the business sold as naturally and necessarily resulted from the breach of the contract, if any; and the court properly gave an instruction embodying that idea. Such instruction is not subject to the criticism that under it the jury were permitted to find double as much in damages as would compensate for the injury done.

2. Instructions—In the absence of any contention that the vendor conducted his business in the house, which was expressly excepted from his obligation not to engage in business in the town, there was no occasion for submitting that question to the jury, nor for making any reference in the instructions to his engaging in business in a house other than the one excepted.

Willis & Willis and J. W. Reasor for appellant.

John S. Kelly for appellee.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Barker.

The appellant, James L. Downs, and the appellees, D. L. Woodson and Claude Downs, were partners, owning and conducting a saloon in Taylorsville, Ky.; the appellant owned one-half of the saloon and the appellees each owned one fourth interest therein. On the 10th day of August, 1901, the following contract was entered into between the parties litigant:

"This writing witnesseth: That, whereas, I, James L. Downs, have this day, for a valuable consideration, sold and conveyed to Claude Downs and D. L. Woodson my entire interest in the property situated in Taylorsville, Kentucky, in which we have been conducting a saloon business; now, it is fully agreed, and in consideration of the price this day paid me for the said property and business, I, said James L. Downs, hereby bind myself not to again, directly or indirectly, engage in the saloon business in Taylorsville while said Downs and Woodson are engaged in said business, except the said James L. Downs has the right to go into the saloon business in the house and room now occupied by J. W. Jones with his saloon, either as partner of said Jones, or in any manner he desires, so it be in the same room now occupied by said Jones, but at no other place in said town.

"Witness our hands this August 10, 1901.

"JAMES L. DOWNS,
"D. L. WOODSON,
"CLAUDE DOWNS."

On the 18th day of February, 1902, the appellees instituted this action in the Spencer Circuit Court against appellant, for a breach of his contract not to engage in the saloon business in Taylorsville.

Without setting forth the particular allegations of the petition, it is sufficient to say that a good cause of action is stated in that pleading, and that the issues were made up between the parties by an answer denying all of the material allegations of the petition.

A trial of the case resulted in a verdict in favor of appellees against appellant for the sum of \$1,800; from the judgment thereon this appeal was prosecuted.

We think the evidence in this case clearly establishes the breach by appellant of his contract not to engage in the saloon business in Taylorsville while appellees were so engaged, except in the house and room occupied by J. W. Jones with his saloon. It was established by a preponderance of the evidence that, within a few months after the contract between the parties hereto, appellant entered into a partnership with John Furman, and that the firm purchased real estate in Taylorsville, erected a house thereon, and established a saloon, which was conducted by them up to the time of the institution of this action. Appellant concealed his connection with the firm by putting his interest therein in the name of his mother-in-law, Mrs. Sallie A. Bridwell. The main reasons urged by appellant for a reversal of the case is, first, that the verdict is excessive; and, second, that the court erred in instructing the jury.

We do not think that, under the evidence in this case, a larger verdict than appellees were entitled to recover was rendered. We are of opinion that, considering the amount paid appellant for his property and the evidence adduced on the subject of the breach of the contract complained of, the verdict was fairly within the bounds of the injury which the jury had a right to believe had been inflicted upon appellees.

This court, in the case of Davis v. Brown, 17 Ky. Law Rep., 1428, held that upon a breach of a contract, such as that which constitutes the basis of this case, the whole cause of action of the injured party accrues at once, and he must recover all of his damages, past, present and future, in one action. Taking this principle as a criterion, and considering the value of the property involved, its nature, and the evidence as to the loss of profits, we think the verdict reasonable.

It is urged with great earnestness by appellant's counsel that the court erred in instructing the jury. The first instruction is as follows: "If the jury believe from the evidence that defendant, between the 10th of August, 1901, and the 18th of February, 1902, directly or indirectly, either in his own name, or in the name of Bridwell or Foreman & Bridwell, engaged in the saloon business in Taylorsville, they should find for plaintiff in damages, and in estimating such damages they should find such sum as will fairly compensate plaintiff for the loss of profits and good will of the business sold him as naturally and necessarily resulted from defendant's breach of his contract, if any proven; not to exceed, however, \$3,000."

We think this instruction fairly states the law, and that it is not subject to the criticism that, under it, the jury were permitted to "double up," as is contended by appellant's counsel, that is, as we understand it, that the jury were authorized to find double as much in damages as would compensate appellees for the injury done them by appellant's breach of his contract.

The jury were limited by the instructions to finding such damages as would fairly compensate the appellees for the loss in profits and good will of the business sold them, as naturally and necessarily resulted from appellant's breach of his contract. Certainly appellees were entitled to recover for the breach, compensatory damages for the whole injury sustained by them, whether that consisted of loss of profits or permanent depreciation of the business, or both, by reason of the establishment of a competing saloon by appellant. Nor do we think the instructions of the court should have contained, as urged by counsel, any reference to the fact of appellant's engaging in the saloon business in Taylorsville in a room other than that occupied by J. W. Jones; appellant's contract permitted him to engage in the saloon business in Taylorsville, provided he carried it on either as partner, or otherwise, in the room then occupied by J. W. Jones as a saloon. The reason of this permission to appellant to engage in the saloon business in the same house or room where J. W. Jones then conducted a saloon is obvious. Jones was already running a saloon in Taylorsville; that competition was established. What appellees feared, and desired to guard against, was the establishment of additional competition. They evidently calculated that there was business enough in the town of Taylorsville to support two saloons, but not three, and, therefore, to protect the property which they were purchasing from appellant, they bound him, in a covenant, not to establish a third saloon in the town while they were in the business.

There is not the slightest contention in this case that appellant had conducted his business in the room occupied by J. W. Jones, and, therefore, it was not necessary to submit that question to the jury, as there was nothing, either in the pleading or evidence, upon which it could be predicated. Taking the instructions as a whole, they fairly presented to the jury the principles of law applicable to the case to be tried, and, as before said, the verdict was, considering the evidence, reasonable and just.

Wherefore, the judgment is affirmed.

HESS v. SELVAGE.

(Filed October 8, 1903—Not to be reported.)

Mortgage bonds—Footing of—Mortgage bonds made payable to a title company, or bearer, in security of a loan, are not placed upon the footing of foreign bills of exchange, and are liable in the hands of third persons to such defenses as the payor may have, or may have had, against the original payee, before notice of the assignment.

Lane & Harrison for appellant.

B. H. Young, M. W. Ripy and E. C. Waide for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge O'Rear.

Appellee was the owner of certain real estate in the city of Louisville. He owed a balance of purchase money thereon of about \$6,400. He arranged with the German-American Title Company to carry this loan for him, agreeing that it should be paid out of sales of the lots. As part of this arrangement he executed a mortgage to the title company for \$4,000, securing eight mortgage bonds of \$500 each, payable in three years, to the German-American Title Co., or bearer. Some lots were sold and the proceeds paid to the German-American Title Co. Cash was also paid to that company by or on behalf of appellee. The cash and proceeds of sale amounted to about \$6,700. In the meantime the German-American Title Co. had sold five of these bonds to appellant. It is not shown, nor claimed, that appellee had notice of the assignment of any of the bonds by the German-American Title Co. After the failure of the German-American Title Co. as an insolvent this suit was brought by appellant to enforce the mortgage.

The plea of payment by appellee is met by the argument that appellant was an innocent holder of the notes for value, and that appellee should have been upon notice of the fact that, as the notes were payable to bearer, they were issued to be sold, and that he was not authorized to pay them to the mortgagee, the German-American Title Co.

It has heretofore been held by this court in a number of decisions that such notes are not placed upon the footing of foreign bills of exchange, and that they are, therefore, under the terms of our statutes, liable even in the hands of third persons, to such defenses as the payor may have, or may have had, against the original payee, before notice of the assignment. (*Wagoner v. German-American Title Co.*, 22 Ky. Law Rep., 216; *Richie v. Cralle*, 108 Ky., 483, 22 Ky. Law Rep., 180; *Hefferman v. Brierly*, 23 Ky. Law Rep., 304; Kentucky Statutes, section 474.)

Under these adjudications the judgment of the circuit court dismissing the petition and cancelling the mortgage is affirmed.

CONTINENTAL TOBACCO CO. v. CAMPBELL.

(Filed October 8, 1903—Not to be reported.)

1. Personal property—Apparent ownership—Innocent purchaser—Estoppel—Under the rule that the real owner of personal property will be estopped to claim ownership as against an innocent purchaser, where the real owner permits another person to take possession of it and appear to be the owner thereof and to dispose of it, the purchaser of a crop of tobacco is entitled to plead by way of defense to an action by the alleged owner to recover the purchase price that she permitted another to appear as the real owner thereof and to have complete authority over it, and that she ratified the sale after it was consummated and before the purchase money check was cashed.

2. Same—Proof of agency—It is competent, not only to prove the facts in connection with the particular transaction, but also to show the course of dealing between the owner and the person from whom the property was purchased which tend to establish a general agency on his part to represent her in similar transactions.

3. Same—Alleged instructions with reference to the tobacco given by the

owner to the person with whom the purchaser had the transaction, which were not communicated to the latter, are not competent in evidence.

Chas. W. Wood for appellant.

John I. Williamson for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Laura B. Campbell, brought this suit against the appellant, the Continental Tobacco Co., to recover \$312.80, the alleged price of one-half interest in a crop of tobacco, which contained ten thousand and ten pounds, raised upon her place by Henry Waldrige, and which she alleges she sold and delivered to the appellant. The tobacco company answered in three paragraphs. In the first they deny the alleged purchase by them from the plaintiff, but say that the tobacco sued for was purchased from one Henry Waldrige, who was the ostensible owner thereof, without knowledge on their part that plaintiff owned or claimed any interest therein; and that subsequently it was delivered to them by Waldrige, with the knowledge and consent of plaintiff; and that after the sale, and before Waldrige had cashed the check given in payment thereof, plaintiff ratified and confirmed the sale. They also defend on the ground that the plaintiff permitted Waldrige to appear as the owner of the property, and to exercise complete authority over it, and plead that she is estopped to deny such ownership or authority as against them. By amended answer defendant plead that Henry Waldrige was the agent of the plaintiff for the sale of the tobacco and the collection of the proceeds thereof. Upon motion of the plaintiff, the court struck from the defendant's answer so much thereof as relied upon the apparent authority of Waldrige to collect the purchase money for the tobacco and the subsequent ratification thereof by the plaintiff, and confined the defendants to the single issue as to whether Waldrige has actual authority from the plaintiff to collect the purchase price of the tobacco. The jury found a verdict for the plaintiff, and the defendant has appealed.

It appears from the evidence that in 1900 Henry Waldrige raised a crop of tobacco upon the land of the plaintiff, Laura B. Campbell, amounting to ten thousand and ten pounds on the shares. The tobacco was duly housed in a barn on the premises. A man by the name of Johnson also raised a small crop of tobacco on the same land, which was housed in the same barn. In the following January T. N. French, an agent of the appellant, went to this barn with a view of purchasing this tobacco. He found Waldrige and Jackson there, who priced it to him at 7 cents a pound. French only offered 6, and no trade was effected. About ten days afterwards Waldrige came to appellant's warehouse in Carlisle, Ky., in company with Jackson, and sold both crops of tobacco to it at 6½ cents per pound, under a contract that it was to be paid for upon delivery. The Jackson crop was delivered first, and Waldrige was present and took the weights. The check for this crop was made payable to Jackson, who cashed it, and paid over to Waldrige plaintiff's part of the money. Waldrige subsequently paid over the money to the plaintiff. About eight days after the delivery of the Jackson crop Waldrige delivered his crop, attended to the weighing, and took a check therefor payable to himself, which he collected. The plaintiff was not pres-

ent at either of these transactions, and had no communication with the defendant with reference to the tobacco at any time. Walldridge, before he cashed the check, went to seek the plaintiff, and had a conversation with her on the next morning with reference thereto. Upon the trial plaintiff admitted upon cross-examination that Walldridge had conferred with her about the sale of the tobacco to the defendant and the price offered therefor, and that she had authorized its sale and delivery to the defendant, but that she had given no direction as to how she desired the tobacco paid for.

There is no better settled rule of law than that where the owner of personal property permits another person to take possession of it and appear to be the owner thereof, and dispose of it, he will be estopped to deny such ownership against persons who rely upon the apparent or implied right of the party in possession. This question was carefully considered in *Davis v. Tingle*, 47 Ky., 537. In the opinion in that case this court said: "The principle is well settled that if the real owner of property knowingly permits it to be purchased by a third party without notice of his claim from the apparent owner who is in possession, he will not be permitted afterwards to assert his title as against an innocent purchaser."

We think the trial court erred in striking from the answer the defense of apparent authority in Walldridge to collect the money, and also that of subsequent ratification. And the jury should have been instructed that if it was within the apparent scope of Walldridge's authority to collect the sale money for plaintiff's part of the tobacco, or that she subsequently ratified such collection by him, that they should find for the defendant. It was competent not only to prove the facts in connection with this particular transaction, but also to show the course of dealing between the appellee and Walldridge, which tended to establish a general agency on his part to represent her in similar transactions. The court also erred in permitting appellee to prove by Marvin Wilson alleged instruction to Walldridge with reference to the tobacco, which were not communicated to the defendant.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

DOWNER, &c. v. PORTER, &c.

(Filed October 8, 1903.)

1. Preference of creditors—Recovery of property by assignee—An assignment for the benefit of creditors conveys to the assignee property previously conveyed away by the assignor in consideration of a pre-existing debt, and the assignee may maintain an action to have such property brought into the trust fund where no proceeding has been instituted attacking the preferential conveyance as an act of bankruptcy under the provisions of the national bankruptcy act, making the act of an insolvent debtor in preferring one creditor to others an act of bankruptcy.

2. Same—National bankruptcy act—The national bankruptcy act does not supersede the State statute with reference to the recovery, for the benefit of creditors, of property preferentially conveyed by an insolvent debtor, so as to defeat the right of the assignee to maintain an action for such purpose, where no bankruptcy proceedings have been instituted.

3. Change of possession—Preferential conveyance—The delivery of the

property within the meaning of the statute defining the time within which an action to recover it must be brought means a visible change of possession, and the mere fact that the tenant of the property paid rent to the vendee, the deed not being recorded, is not sufficient to set the statute in motion.

4. Attorney and client—Confidential relation—The attorneys for the assignee for the benefit of creditors are not required to disclose to their client knowledge of a preferential conveyance obtained by them from the assignor when they were acting as his attorney previous to employment by the assignee, and the assignee is not charged with their knowledge as to the existence of the conveyance.

W. B. Gaines for appellants.

Sims & Grider for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hobson.

L. R. Porter, who was at the time insolvent, conveyed on February 10, 1901, to appellant Downer a house and lot in consideration of a pre-existing debt. On March 4, 1901, Porter assigned to appellee for the benefit of his creditors, and he subsequently brought this suit on October 22, 1901, to have the property brought into the trust fund for the equal payment of all the creditors of Porter under section 84, Kentucky Statutes: "If the assignor before making the deed, shall have made a preferential or fraudulent transfer, conveyance or gift of any of his property, or a fraudulent purchase of any property in the name of another, the property so fraudulently transferred, conveyed or purchased shall vest in the assignee, and it shall be his duty to institute such proceedings as may be necessary to recover the property so conveyed or disposed of, and to this end he shall have the remedies which the creditors of any of them might exercise. If the assignee upon demand shall refuse to institute such proceedings, any creditor may do so, and property so recovered shall become a part of the estate, and be distributed as other assets."

Section 1910, Kentucky Statutes, commonly known as the act of 1886 further provides that every sale made by a debtor in contemplation of insolvency and with the design to prefer one or more creditors to others shall operate as an assignment of all of the property of the debtor and shall inure to the benefit of all his creditors. By section 1911 such transfers are subject to the control of courts of equity upon the petition of any person interested, filed within six months after the transfer is lodged for record or the delivery of the property. When the transaction in question took place the United States bankruptcy act was in effect. By that statute it is made an act of bankruptcy that the debtor has made an assignment for the benefit of his creditors, or has preferred one creditor to others. It is insisted for appellant that the United States' bankruptcy statute being in effect when the transaction took place and making it an act of bankruptcy, the State statute was superseded by the act of congress, and no action can now be maintained under the State statute. In support of this position we are referred to a number of decisions in other States to the effect that all State insolvency laws are suspended when the paramount jurisdiction of congress has once been exercised. (5 Cyc., 240.) But our act of 1886 is not an insolvency law within the meaning of this rule. The precise question was presented in

Eversole v. Adams, 78 Ky., 88, where the court, speaking of the act of 1856, said: "This act is not a bankrupt law nor an insolvent act. It has none of the characteristics of either, except that it provides for the appropriation of the property of the debtor to the payment pro tanto of all his creditors. An assignment or transfer made in contemplation of insolvency and to prefer creditors is an act of bankruptcy under the act of congress; but this fact does not deprive creditors of the right to apply to the State courts for relief in case they choose to do so. Notwithstanding the Federal Bankrupt Act, the State courts have full and complete power to relieve against all frauds, actual or constructive, except in cases in which a court of bankruptcy has first taken jurisdiction, or where the relief asked in the State courts is subversive of the rights of parties to a pending proceeding in bankruptcy subsequently instituted."

This was reiterated in *Linthicum v. Fenley*, 74 Ky., 181. In *Simonson v. Sinsheiner*, 95 Fed. Rep., 948, it was held by the United States Circuit Court of Appeals that an assignment for the benefit of creditors is valid under the present bankruptcy statute if not impeached by a petition in bankruptcy filed within four months after its execution, and in that case the validity of the proceedings of the State court under the deed of assignment which had not been impeached by a petition in bankruptcy was recognized. This was the rule under the former bankrupt act, and there is nothing in the new act to show that congress intended to change it. (*Mayer v. Hellman*, 91 U. S., 496.) The provision of the present statute, that "proceeding commenced under State insolvency laws before the passage of this act shall not be affected by it," has no application for the reason that it was only intended to take such pending proceedings out of the operation of that act, and, besides, the act of 1856, as shown, is not a State insolvency law. Any fraudulent conveyance of property is an act of bankruptcy under the Federal statute, no less than the making of a deed of assignment for the benefit of creditors, or the preferring of one creditor to others. And if the act of congress making these things acts of bankruptcy supersedes the State laws giving remedies therefor, then it would follow that since the passage of the bankruptcy act a creditor can not take out an execution in the State courts on a judgment and subject property thus fraudulently conveyed or subject it in an attachment proceeding or upon a return of no property, although no petition in bankruptcy had been filed in the Federal court impeaching the transactions as acts of bankruptcy. This was not the meaning of the act of congress, and the matters complained of having never been impeached as acts of bankruptcy, the State courts have jurisdiction to take charge of the property and distribute the proceeds ratably among all the creditors. It is fairly settled by the authorities that the State courts may do this in the case of a voluntary assignment for the benefit of creditors which has not been attacked as an act of bankruptcy. The statute quoted above vests in the assignee not only the property conveyed to him by the assignor, but also all the property conveyed away by the assignor by a preferential or fraudulent transfer. The circuit court in adjudging the property in contest to the assignee only carried out the statute. If the State courts may enforce voluntary assignments for the benefit of creditors, they may certainly enforce a statute like this, merely regulating what property shall vest in the assignee under the deed of assign-

ment. (Louisville Trust Co. v. Cominger, 184 U. S., 19; Boese v. King, 108 U. S., 379; In re Scholtz, 106 Fed., 884; In re Worcester County, 102 Fed., 808; In re Romanow, 92 Fed., 510; Patty-Joiner, &c., Co. v. Cummins, 93 Texas, 598; Armour Packing Co. v. Brown, 76 Minn., 465; Blinder v. McDonald, 106 Wis., 332.)

At the time the conveyance was made the house was rented out and the tenant attorned to appellant and thereafter paid her the rent; but there was no visible change of possession, and the deed was not recorded. The delivery of the property within the meaning of the statute defining the time within which the action must be brought means a visible change of possession, and the mere fact that the tenant paid rent to the vendee is not sufficient to set the statute in motion.

Sims & Grider were Porter's attorneys, and advised him not to make the conveyance. He, however, made it, contrary to their advice. After the assignment was made, they were employed by the assignee, but did not inform him of the deed to appellant, as they had acquired knowledge of this deed from Porter while he was their client. It is urged that the assignee must be charged with the knowledge of his attorneys as to the existence of the deed. This would be true if Sims & Grider had learned of the deed as his attorneys, but he is not chargeable with knowledge thereof which they acquired as the attorneys of Porter, and before their employment by him. An attorney is not required to disclose to one client the secrets of another entrusted to him professionally by the other client in the transaction of his business. Were the rule otherwise, a man could not safely advise with his attorneys because he could not foresee by whom they might be thereafter employed, or what use might be made of the facts communicated to them.

On the questions of fact involved we can not, under the evidence, disturb the chancellor's conclusion.

Judgment affirmed.

CHESAPEAKE & OHIO RY. CO. v. JORDAN.

(Filed October 8, 1903—Not to be reported.)

1. Railroad—Riding in baggage car—Negligence—While the baggage car of a train is essentially a place of greater danger than the passenger coach, where a passenger was under the necessity of going into the baggage car by reason of the inability to get an invalid chair, in which a person in his charge was being carried, into the passenger coach, his act in doing so, with at least the consent of the conductor, was not of itself negligence, nor did it relieve the railroad company of any responsibility to care for his safety.

2. Mixed train—A mixed train is more dangerous than a regular passenger train, and when one takes passage upon such a train he assumes the additional risk.

3. Questions for jury—The question whether or not the jar or jerk by which a passenger was thrown down and injured was an unusual or unnecessary one in the operation of such a train as that upon which he was riding was one peculiarly within the province of the jury.

W. H. Wadsworth for appellant.

H. C. Sullivan, A. O. Carter and John W. Woods for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Barker.

On the 28d day of May, 1900, the appellee, Marion F. Jordan, was assisting James Skeens, a constable, in conducting a female lunatic to the asylum in Lexington, Ky. The party consisted of James Skeens, Marion F. Jordan, Alice Dalton and the lunatic. They took passage at Fuller's Station on one of appellee's trains, which consisted of a large number of freight cars and two passenger coaches, such as is commonly known as a mixed train. The lunatic was carried, sitting in a large invalid chair.

Appellee's party took passage in the baggage car, which, on this particular train, was the forward half of one of the passenger coaches, the baggage department being divided from the passenger by a partition. As to why the party went into the baggage end of the car, instead of the passenger part, the evidence is somewhat conflicting with respect to the words spoken, but we do not believe that the variance is material.

The evidence for appellee tends to establish that his party were either ordered, or directed, to go in the baggage car by the conductor. On the other hand, appellant's testimony tends to establish the fact that the conductor only required appellee and his party to go into the baggage car, because they insisted on carrying the lunatic in the invalid chair, which was too large to enter the door of the passenger part of the car. Certain it is, however, that the conductor permitted the party to go into the baggage car, and assisted them in so doing; that he treated them as passengers while in the baggage car, collecting their fares; and it is not contended that he in anywise refused them permission to take passage in the baggage car, or even advised them not to do so.

After the party were in the baggage car, the lunatic sitting in the chair, her sister sitting on the arm thereof, appellee and Skeens, for want of a better seat, sat together on a tool box, which they found in the car. While thus riding, by a sudden lurch and jerk of the train, appellee was thrown from the box upon the floor and against the side of the car, and Skeens was thrown on top of him, striking him, as he claims, with his elbow or knee in his side and abdomen, thereby greatly injuring him, and causing a rupture or hernia; whereupon, to recover damages, this action was instituted by appellee, setting forth in his petition substantially the facts as herein stated, and claiming that his injuries were caused by the negligence of appellant, its agents and servants in operating its train.

The answer places in issue the material allegations of the petition, and pleads contributory negligence of appellee. The contributory negligence being denied, the issues were completed. A trial of the case by jury resulted in favor of appellee, who was awarded a verdict in the sum of \$800. Appellant's motion for a new trial having been overruled, it is here on appeal.

The instructions given by the court are as follows:

"No. 1. The court instructs the jury that the defendant did not assume the absolute safety of the plaintiff while a passenger on its train; but it was the duty of the defendant's agents in charge of its train upon which plaintiff was a passenger, to exercise the highest degree of care and diligence consistent with the mode of transportation adopted to protect him from injury.

"No. 2. If the jury believe from the evidence that the agents of defendant

in charge of the train upon which plaintiff was a passenger, so negligently operated said train as that plaintiff was by a sudden or violent jerk, not necessary or usual in the operation of said train, thrown upon the floor, and James Skeens was thrown upon plaintiff, striking him with his elbow or knee in the side or bowels, thereby causing plaintiff to have rupture or hernia, they will find for plaintiff such reasonable sum in damages as they may believe from the evidence will compensate him for the physical and mental pain, if any, suffered by him by reason of said injury, and for any permanent diminution of power, if any, to earn money by reason of such injury, not exceeding \$1,999.

"No. 3. The court instructs the jury that it was the duty of the plaintiff to exercise reasonable care to protect himself while a passenger on defendant's train, and although the jury may believe from the evidence that the defendant was negligent as in instruction No. 1, yet if they shall further believe from the evidence that the plaintiff was himself negligent, and that the injury, if any, to him would not have occurred but for such negligence on his part, the law is for the defendant, and the jury will so find.

"No. 4. The riding upon mixed trains, composed of freight and passenger cars, is unavoidably accompanied with more discomfort and danger than upon the trains devoted exclusively to passengers; and the passenger who accepts carriage upon such a train must be deemed thereby to have assumed the risk of such additional discomfort and danger due to the nature of the train. Now if you believe, from the evidence, that the train upon which the plaintiff, Jordan, was riding was such a train, and while he was a passenger thereon the car in which he was riding was forced against the one in front so as to cause the injury complained of, yet if the train and cars were properly equipped and were carefully handled, and there was no more jarring or jolting than is usually unavoidable in the handling of such trains, then the jury will find for the defendant.

"No. 5. The court instructs the jury that if they believe from the evidence that the plaintiff or Skeens insisted upon taking the invalid and chair into the baggage car, and attended upon the patient there, and at the time there were other seats and accommodation upon the train for the safely carrying the patient and her attendants, and that plaintiff would not have been injured except for his so riding in the baggage car, they will find for the defendant."

There is no rule of the appellant company, either pleaded or shown in the evidence, forbidding passengers riding in the baggage car; if there had been it might be contended with great force, and upon high authority, that appellee was guilty of negligence by the mere fact that he took passage in the baggage car.

The baggage car of a train is essentially a place of greater danger than the passenger coaches; it is nearer the engine, and in event of a collision, or other accident, it is more apt to be derailed or mashed than are the passenger coaches. There is also greater danger, from the fact that there are no fixed seats upon which passengers can sit, and this, of itself, in case of accident, or jar of the train, is more likely to cause injury than if the passenger was seated in the passenger coach, especially prepared for him. But where passengers situated as were appellee's party, were under the necessity of

going into the baggage car, with the permission, at least, of the conductor, we can not say that their act in so doing was, of itself, negligence, or relieved the appellant of any responsibility to care for their safety.

A mixed train is undoubtedly more dangerous than the regular passenger train, and when one takes passage upon such a train he assumes the additional risk. Wood, in his work on Railroads, Minor's Ed., volume 2, 1287, says: "A person who rides upon a freight train, or a gravel train, even, and pays his fare to the person in charge of the train, although the orders of the company to the persons in charge of the train are to take no passengers, is nevertheless entitled to recover for an injury received through negligence of the company, to which he has not contributed. Where a company is accustomed to carrying passengers on freight trains, it is bound to exercise the greatest possible care and diligence of which the management of such trains is admissible. It seems that in regard to the coach in which the passengers are to ride the duty is the same, whether it is a part of a passenger or a freight train. The same is, of course, true as regards the condition of its roadbed and bridges. But as to other appliances, the duty of the company is modified by the necessary difference between passenger and freight trains, and it is bound to use only such care in this regard as the nature of the train will permit. * * * A passenger, in riding on a mixed train, must assume all the risks which are necessarily incident to such travel, and can not insist on the same care and attention which he might demand on the regular train. If a railway company, said Appleton, J., 'admits passengers into a caboose car, attached to a freight train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coach at the time of the occurrence of the injury.' * * * Undoubtedly a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto; and if it is managed with the care requisite, it is all those who embark in it have a right to demand."

Elliot, in his work on Railroads, volume 4, section 1629, thus states the rule: "In a general sense, it may be said that where a railroad carries passengers on freight or mixed trains, it must exercise the same high degree of care for the safety of its passengers as in other cases. But we do not mean that its duty, and the precaution it must take, are usually the same with respect to the operation of such trains as with respect to regular passenger trains. As to its roadbed, bridges and the like, it would seem that the duty is absolutely the same, but it is obvious that the risk is greater in riding upon freight trains; that the same appliances can not be used, and the same speed and comparative freedom from sudden jerks and the like can not be attained. The duty of the company is, therefore, modified by the necessary difference between freight and passenger trains, and the manner in which they must be operated; and while the general rule, that the highest practicable degree of care must be exercised, holds good, the nature of the train, and the necessary difference in its mode of operation, must be considered, and the company is bound to exercise only the highest degree of care that is usually and practicably exercised and consistent with the operation of trains of that nature. Thus, it is not bound to equip every car with an air-brake, nor to run a bell rope through the cars to the engine. Nor is the

company necessarily negligent because in starting, or in taking up and letting out slacks, there is more or less of a jerk or sudden motion of the cars. Nor is it obligated to have a brakeman on every car. So a passenger, riding on a freight or mixed train, must be deemed to assume all the inconvenience and risk usually and reasonably incident to transportation or travel upon such trains, and is not entitled to insist upon having the same care and attention that he might justly demand upon a regular passenger train."

Appellee's evidence conduces to show that his party went into the baggage car upon the order, or direction, of the conductor; all of the evidence establishes the fact that they were there, at least, by his permission and consent; and that after they were seated, and the train started, that he was thrown down and injured, by a jerk or jar of the train, of more than usual suddenness and violence.

The question as to whether or not the jar or jerk, by which appellee was thrown down, was unusual or unnecessary in the operation of such a train as that upon which he took passage, was one peculiarly within the province of the jury, and we can not say that their finding on this subject was flagrantly contrary to the evidence.

The instructions of the court fairly presented to the jury the principles of law applicable to the issues involved in this case; indeed it is said of No. 5, by appellant's counsel, that it amounted to a peremptory instruction to find for the defendant. This being true, it is difficult to see of what appellant has to complain on this subject. As we believe the court correctly expounded the whole law applicable to the case in the instructions given, it is not necessary to note, or discuss, those which were offered by appellant, and refused by the court. The verdict was not excessive, and, as said before, not flagrantly against the evidence.

Wherefore, the judgment is affirmed.

GEORGETOWN AND LEXINGTON TRACTION CO. v. MULHOLLAND.

(Filed October 4, 1903—Not to be reported.)

1. Highways—Right of way over—Grading—Damage to abutting property owner—In an action by the owner of lands fronting on both sides of a public highway against an electric road company, which had acquired a right of way over the highway, to recover damages for injury to his fencing and private crossings, resulting from the grading in the construction of the railway, the answer of defendant alleging that the fences of the plaintiff were built upon the highway under a written agreement with the owners of the highway to remove them whenever requested to do so, or the public interest or its travel made it necessary for him to do so; that the right of the railway company to construct its line along the highway was inconsistent with the further maintenance of the fences thereon; that the company had, previous to the grading of its right of way, offered to move the fences back to his true line without cost to him, or to pay him the cost which he might incur in doing so, which proposition was refused, presented a good defense, and the court erred in sustaining a demurrer thereto.

2. Same—A grant by the fiscal court of a county of a right of way to construct an electric railway over a public highway, which it had acquired from the private owners, carried with it the right on the part of the railway com-

pany to remove all obstructions therein inconsistent with its free use for the purposes of the grant, and to grade it in such a manner as to make the easement available; and it was the duty of the owner of abutting property to remove fences which he had built on the highway when requested to do so by the railway company.

3. Measure of damages—Obstructed crossings—In an action to recover damages for obstruction to private crossings, which an owner of property on both sides of a public highway had constructed for the purpose of connecting his lands, by reason of the grading of a roadbed for an electric railway, the measure of recovery, if any, is such a sum as will compensate for the inconvenience or loss sustained between the time the crossings were injured and the time they were restored, if in fact they have been restored.

4. Damage to fences—If the fences were on the highway the owner is not entitled to recover any damage to them, by the acts of the railway company, which would not have accrued to him had they been upon his own line, provided he had notice that that part of the highway occupied by them was needed by the railway company for the enjoyment of its grant.

5. Highway—Additional servitude—An electric railway constructed along a public highway is not an additional servitude upon the highway, and the owner of abutting property is not entitled to recover anything growing out of the fact that the line is being constructed and operated in front of his property.

Berry & Webster and Montgomery & Lee for appellant.

J. F. Askew and R. E. Roberts for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Barker.

The Georgetown and Lexington Turnpike Road Co. was incorporated by the general assembly of the Commonwealth of Kentucky in the year 1831, and under and by virtue of its charter it condemned and purchased a right of way, fifty feet wide, from Georgetown to Lexington, and between the time of its incorporation and the year 1834 it built on its right of way a turnpike road, which it maintained and operated until the year 1897, when it was purchased by the Scott Fiscal Court, by virtue of the statute, and made a free turnpike.

After acquiring all of the rights of the turnpike road company the Scott County Fiscal Court granted to the appellant, the Georgetown and Lexington Traction Co., the right to build upon that part of its roadway not macadamized an electric road from Georgetown to Lexington. In pursuance of this grant appellant took possession, and graded a strip of land along the west side of the road acquired by Scott county, about eight feet wide, and was building thereon its electric railway at the time this litigation arose.

Appellee, James Mulholland, owns a farm of several hundred acres, which lies on both sides of the turnpike in question, having a frontage of about 5,500 feet on the east side and 2,340 feet on the west side. His land is fenced on both sides of the road, the fencing being partly stone and partly plank. Before the electric road was completed the appellee instituted this action in the Scott Circuit Court, setting up the foregoing facts, and, in substance, stating that the appellant had made deep cuts along the west side of the road, and high fills along the east side, so undermining his fencing on the

one hand as to insure its speedy fall, and so piling the dirt against it on the other as to make it useless as a fence; that for the purpose of utilizing both sides of his farm, he has, and had, private crossings connecting the east with the west side thereof; that by reason of appellant's roadbed being made so much higher than the level of the road was before it constructed its line his crossings were made useless, whereby he was damaged in the sum of \$1,000.

The appellant filed an answer, the first paragraph of which contains a general denial of the material allegations of the petition, and the second sets forth, in substance, the following statement of facts: That the Georgetown and Lexington turnpike owned and maintained for more than sixty-five years a public highway of the width of fifty feet, between Georgetown and Lexington; that appellee owned on both sides of the road, and that his fencing impinged upon the highway; that, as to this, he was a mere licensee, being under written agreement with the corporation to remove his fences whenever requested so to do, or the public interest, or its travel, made it necessary for him to do so; that the Scott County Fiscal Court purchased the turnpike, and succeeded to all the rights and privileges which the turnpike company had prior to the purchase; that appellant had been granted the right to construct and maintain an electric line along the road in question, and that this right was inconsistent with the further maintenance of appellee's fences thereon; that appellant notified appellee that his fences were obstructing its right to use the turnpike under its grant, and offered to move the same back upon his true line without cost to him, which offer he refused; and also offered, if appellee would move his fences off of the highway back to his own line, to pay to him all of his costs incurred thereby, which proposition was also refused; that all of this was prior to the time of the grading of appellant's roadway, or the erection thereon of its roadbed.

A general demurrer was filed to the second paragraph of the answer and sustained by the court, whereupon appellant prepared and tendered an amended answer, elaborating the facts contained in the second paragraph of its answer, and setting them forth with greater minuteness and particularity. Its motion to file this pleading was overruled, to all of which it excepted. This action of the court left in the case only the first paragraph of the answer, which contains a denial of the allegations of the petition. A trial of the case resulted in a judgment in favor of appellee for the sum of \$800. Appellant's motion for a new trial having been overruled it is here on appeal.

We think the court erred in sustaining appellee's demurrer to the second paragraph of appellant's answer, and also in refusing to allow the amended answer to be filed, which was offered, after the demurrer had been sustained. If appellee's fences were upon the highway over which appellant had been granted, by the Scott County Fiscal Court, the right to construct and operate its electric line, then it was his duty to remove them, upon the demand of appellant, if they interfered with the free use of the grant in question. The grant to appellant carried with it the right to grade its proposed line in such a manner as to make the easement available. This involved, of necessity, the right to remove all obstructions in the public highway inconsistent with its free use for the purposes of the grant. If the

Fences of appellee obstructed the free use of the grant to appellant, it had the right to remove them. In the case of *Miller v. Detroit, &c., Railway*, 84 Am. St. Rep., 569, it is said, speaking of a statement of facts similar to the one at bar: "These roads are not an additional servitude, as we have repeatedly held. When, therefore, their construction is duly authorized, it logically follows that the company has the right to remove from the highway any obstruction which interferes with the proper construction and operation of the road. Such power is necessarily implied. (*Dodd v. Consolidated Traction Co.*, 57 N. J. L., 483, 31 A. T. L., 980; *Southern Bell Tel. Co. v. Frances*, 109 Ala., 220, 55 Am. St. Rep., 980, 19 South, 1.) When a man dedicates his land for public highway, or it has been condemned for that purpose, and he has been compensated, it is definitely understood by him that whatever he may lawfully do within the boundary of that highway is done with the right of the lawful authority to appropriate the entire width of the highway for purposes of travel, if it become necessary. Street railways, in city and country, have come to be regarded as a public necessity, and their construction upon the highways universally sanctioned. If the township authorities may remove any obstruction to the public use, there seems to be no sound reason why they may not authorize street railway companies, telephone companies, and the like, to do so, when such companies are lawfully entitled to the use of the street. It is conceded that the township authorities in this case were authorized to grant the franchise to the defendant, and to determine in what part of the highway its roads should be constructed."

The language of the court, in the case cited, is entirely consonant with reason. If the allegations of the answer, and the amended answer, are true, then appellee was a mere licensee, and could be required to move at any time. The grant to appellant being inconsistent with appellee's right longer to maintain his fences on the highway, it was his duty to move off upon request of appellant.

As this cause must be reversed for the errors above indicated, and will have to be retried, we deem it proper to make the following suggestions as to the measure of damages to which appellee may be entitled: As to his crossings, he is entitled to recover such sum as will compensate him for the inconvenience or loss sustained by him between the time the crossings were injured by appellant and the time it restored them, if it has done so. This suggestion is made upon the idea that this action was instituted before appellant finished its road, and that, when finished, the crossings were restored to their former usefulness. If appellee's fences are upon the highway, he is not entitled to recover any damage, by the acts of appellant, which would not have accrued to him had they been upon his own line, provided he had prior notice that appellant needed that portion of the highway occupied by them for the enjoyment of its grant. If the cuts on the west side would not have undermined appellee's fencing on that side had it been back on his own line, then he is not entitled to damage by reason of the cuts. If the fills on the east side would not have injured his fencing had it been back on his own line, then he is likewise not entitled to damage by reason of the fills. The electric roadway in question was not an additional servitude upon the highway, and appellee was not entitled to anything growing out

of the fact that appellant has constructed, and is operating, a line along the highway in front of his farm. (Ashland and Catlettsburg Street Railway Co. v. Faulkner, 21 Ky. Law Rep., 151.)

These suggestions obviate the necessity of discussing the other errors complained of by appellant. Upon the retrial of the case the pleadings will be changed to comport with this opinion, and evidence will be admissible upon the issues raised thereby; and it is believed that this will meet the requirements of the case.

Wherefore, the judgment is reversed for proceedings consistent herewith.

RAMSEY v. KEITH'S ADM'R, &c.

(Filed October 8, 1903—Not to be reported.)

1. Nonresident infant defendant—Corresponding attorney's report—Guardian ad litem—Where an infant nonresident defendant was before the court by constructive service, through the appointment of a warning order attorney, it was proper for the court to appoint a guardian ad litem for him; and the report of the guardian ad litem that he had carefully examined the case and was unable to make an affirmative defense was sufficient to uphold the judgment of the court directing the sale of certain real estate in which the infant was interested as an heir at law of the deceased owner, notwithstanding the failure of the report of the corresponding attorney to recite that he had made a careful examination of the case before making his report.

2. Decedent's estate—Claims against—A person, other than the keeper of a tavern or house of private entertainment, is not entitled to recover against the estate of a decedent compensation for the board, lodging and washing of an infant son of such decedent in the absence of proof of a contract with the decedent providing that the claimant should care for the child, as alleged, and that compensation should be paid therefor.

3. Witness—Competency as to transactions with decedent—The affidavit of the claimant is not competent proof to show a contract with decedent for boarding her son and that compensation should be paid therefor.

Z. Gibbons and O. B. Ambrose for appellant.

L. J. Moore for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Barker.

Lillie Keith died intestate, domiciled in Fayette county, Kentucky. George C. Morgan was appointed and qualified as administrator of her estate. The decedent was a widow at her death, having been twice married. She left two infant sons, Broadwell N. Keith and Layton J. Ramsey, who are her only children and heirs at law. Her estate consisted of a small house and lot in Lexington, Ky., worth about \$1,000. She left no personal property whatever.

At her death the decedent seems to have been indebted to the State of Kentucky and to the city of Lexington for taxes, and to several persons in sums which, together with her funeral expenses, amounted, in the aggregate, to more than \$800. Her administrator instituted this action for the purpose of selling her real property, paying her debts and settling the estate. Several of her creditors, and her two sons, were made defendants to the action. Ap-

pellant, Layton J. Ramsey, the oldest of the two sons, resided in Florida, and was proceeded against as a nonresident. The case was referred to the commissioner of the court, to advertise for creditors, and to report on indebtedness.

It being made to appear to the court, pending the litigation, that the two sons of the decedent were infants, and that they had no guardian in this State, the chancellor appointed for them a guardian ad litem, who made report that he had carefully examined the case, and was unable to make an affirmative defense, and that he joined in the prayer of the petition for the sale of the real property.

Afterwards, on the 30th day of June, 1902, a judgment was entered confirming the report of the commissioner as to the indebtedness of the estate; ascertaining that the decedent left no personal property to pay the claims proved before the commissioner; that a necessity existed for the sale of the real property to pay the indebtedness; ordering the commissioner to sell the house and lot left by the decedent at public outcry, and to report his acts. From this judgment the defendant, Layton J. Ramsey, by O. B. Ambrose, the corresponding attorney appointed for him at the time the warning order was made, has appealed to this court.

Two grounds are urged in support of a reversal: First, the insufficiency of the report of the corresponding attorney; and, second, the illegality of the claim of Mary O'Neill, allowed.

It is urged that the report made by the corresponding attorney is insufficient, in that it fails to recite that he had carefully examined the case before he made his report; and that, under the principle enunciated in *Dineen v. Hall*, 23 Ky. Law Rep., 1615, it was erroneous to enter the judgment against the nonresident with the report of the corresponding attorney containing the defect mentioned. Undoubtedly the authority cited sustains this position, and if this was all that the record contains on this point, we would be compelled to reverse the case for this error; but after the defective report of the corresponding attorney was filed, it having been made to appear that the nonresident defendant, Layton J. Ramsey, was an infant, the court appointed a guardian ad litem for him, who, before the judgment, reported that he had carefully examined the case, and was unable to make an affirmative defense. The following provisions of the Code bear upon the subject in hand:

"Section 59. The clerk, at the time of making a warning order against a nonresident defendant, shall appoint a regular practicing attorney of the court, whose duty it shall be to make diligent effort to inform the defendant by mail concerning the pendency and nature of the action against him, and report to the court, during the first term which does not commence within sixty days after his appointment, the result of his efforts.

"Section 59 (subsection 5). If such attorney can not inform the defendant concerning the action, or if he learn that the defendant is under disability, other than coverture, or other than infancy and coverture combined, he shall so report to the court, and shall make an affirmative defense, if he can; or, if he can not make such defense, he shall report to the court, and shall be subject, with reference to such report, to the provision of subsection 8 of

section 86; and no act of his shall be treated as an appearance of such defendant.

"Section 59 (subsection 7). No judgment shall be rendered against such defendant, if under any disability other than coverture, or infancy and coverture combined, until a defense or report shall have been filed pursuant to subsection 5 of this section.

"Section 86 (subsection 8). No judgment shall be rendered against an infant, other than a feme covert, nor against a person of unsound mind, who is summoned in this State, until the regular guardian, or committee, or guardian ad litem of such defendant shall have made a defense, or filed a report stating that, after a careful examination of the case, he is unable to make a defense. His report, that he can not make a defense, must be filed on or before the day for making the defense, unless for cause shown. the court extends the time; and failing to file such report as required hereby, or by the court, shall be punished as contempt.

"Section 38 (subsection 2). A guardian ad litem must be a regular practicing attorney of the court; and may be appointed by the court, or judge thereof, whether a guardian, curator or committee appear for the defendant or not.

"Section 38 (subsection 3). It shall be the duty of the guardian ad litem to attend properly to the preparation of the case; and in an ordinary action he may cause as many witnesses to be summoned as he may think proper. subject to the control of the court; and in an equitable action he may take depositions, not, however, to exceed three, without leave of the court."

Taking all these provisions of the Code together, we are of opinion that the action of the court, in appointing a guardian ad litem for the infant nonresident defendant, Layton J. Ramsey, was proper, and his report is sufficient to uphold the judgment under the principle announced in *Dineen v. Hall*. Appellant was before the court by constructive service, and it had been made to appear that he was an infant. The object of the provisions, for the careful examination of the papers, is to protect the interest of the nonresident defendant by having the case thoroughly examined by a competent attorney. The guardian ad litem is required to be an attorney of the court, and his report, that he has carefully examined the case, is a sufficient compliance with the requirements of the Code, and fully protects the interest of the nonresident infant. This is all that the Code requires, and this seems to have been done.

The second ground urged by appellant for a reversal of the case is for the error in allowing the claim of Mary O'Neill. The account of Mrs. Mary O'Neill is as follows:

"Estate of Lillie Keith, deceased, Dr.

"to

"Mrs. Mary O'Neill.

"To board of son, Broadwell Keith, from March 16, 1897, to May 27, 1901,
217 weeks at \$2 per week \$460

"State of Kentucky, / ss.
"Kenton County.

"The affidavit of Mary O'Neill, who says that she is the owner of the annexed claim for \$460, against the estate of Lillie Keith, deceased; that

said claim is for the board, lodging, washing, etc., of Broadwell Keith, a son of said decedent, from the 16th day of March, 1897, to the 27th day of May, 1901, 217 weeks, at \$2 per week, \$460; that it is a just claim, and that no part of it has ever been paid, but still remains wholly due and unpaid; that there is no offset or discount against the same, nor any usury embraced therein, and that said decedent asked this affiant and claimant to take care of said son, Broadwell Keith, and that she promised to pay her for his board and keeping, and that the charges are reasonable, in fact a great deal less than it cost affiant to board and keep said Broadwell Keith; that affiant has, in addition, clothed and paid for the books and schooling of said Broadwell Keith for the period of 217 weeks, but charges nothing for that.

"(Signed and sworn to.)"

Section 2178 of the Kentucky Statutes, commonly known as the hospitality act, is as follows: "Any person, other than the keeper of a tavern or house of private entertainment, who shall entertain in his house another, or furnish him with diet or storage for his goods, not making an agreement for compensation therefor, shall not recover anything against the person so entertained, or furnished with diet or storage, or against his estate; but the person so furnishing another shall be considered as doing the same of courtesy."

There is no allegation, or evidence, that the claimant herein is either an innkeeper, or the keeper of a private house of entertainment; there is no evidence that any contract was made with the decedent for compensating the claimant for the boarding of Broadwell Keith, or that the decedent requested the claimant to board her son; the affidavit of the claimant, herself, upon this subject, is incompetent, and there is no other evidence in the record on that subject. We are of opinion, therefore, that the claim is within the provision of the statute, and should not have been allowed.

The judgment is reversed for proceedings consistent herewith.

COMMONWEALTH v. McCARTHY.

(Filed October 8, 1908—Not to be reported.)

Local option—Validity of election—An election, under the local option law with reference to the sale of liquors, held pursuant to an order made by the county court on the same day that the petition for the submission of the question was received was invalid, the statute providing that the order for the election shall not be made until the succeeding term of court.

C. J. Pratt and M. R. Todd for appellant.

Hall & McLean for appellee.

Appeal from the Kenton Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges the appellee with having sold liquors within the territory formerly comprising the Third Magisterial District of Kenton county; that the question as to whether spirituous, vinous or malt liquors should be sold within that territory was submitted to the legal voters of the district and a majority of whom voted against the sale of the liquor, which

was properly certified; that on the 16th day of February, 1874, a petition signed by the required number of legal voters was filed asking for the submission of the question, and that on the same day the county court ordered the election held. So the question presented is, was the order of the county court submitting the question valid?

The statute only authorizes the court to make an order for an election at the next term of court after a petition is filed. The court having made the order at the same term at which the petition was filed, the election held under it was invalid. (Smith, &c. v. Patton, &c., 20 Ky. Law Rep., 165; Doores v. Varnon, 94 Ky., 577; Webb v. Smith, 17 Ky. Law Rep., 1806; Wilson v. Hines, 18 Ky. Law Rep., 233; Cress v. Commonwealth, 18 Ky. Law Rep., 633; Commonwealth v. Shelton, 99 Ky., 120.) The court properly sustained a demurrer to the indictment.

The judgment is affirmed.

WURTH v. CITY OF PADUCAH.

(Filed October 9, 1903.)

1. Municipal bonds—Limitation—Where bonds issued by a municipal corporation were payable on a certain date named therein upon presentation and delivery thereof at a designated place of payment, a holder of such bonds, who did not present same for payment or institute action thereon for more than fifteen years after the date of payment stated therein, can not avoid the operation of the statute of limitation on the ground that a cause of action did not accrue until their presentation and demand of payment was made, which was, as alleged, within fifteen years before the institution of the action. The statute began to run immediately after maturity.

2. Same—Pleading—The allegation that the municipality, by its mayor and council, had "within fifteen years last past before the beginning of this suit," admitted and acknowledged the indebtedness for the bonds and had agreed and promised to pay same, is not sufficient to take the case out of the statute, the suit being on the original promise of the city to pay, and there being no allegation that the promise to pay was before the bar and within the statutory period.

3. Power of mayor and council to extend liability of city—The mayor and council of a municipality have no power to extend the liability of the city on bonds issued by it beyond the express terms of the instrument evidencing such liability in the absence of legislative authority, express or implied.

4. Same—The fact that the city may have levied and collected a tax for the purpose of meeting the bonds and coupons which it had executed does not have the effect to extend in anywise the statutory period of limitation in which a suit thereon could be maintained.

Sam Houston and Bloomfield & Crice for appellant.

J. M. Worten for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, August Wurth, brought this suit against the city of Paducah to recover on five bonds of the city and the coupons attached thereto, which he alleged were issued on the 13th day of November, 1868. The

following is a specimen of each of the bonds with the difference that they do not mature on the same day, but each of them had matured more than seventeen years before the institution of this suit.

"Bond No. 16.

"No. 16. The United States of America.

"\$1,000

State of Kentucky.

\$1,000.

"New Orleans & Ohio Railroad Co.

"Bond of the city of Paducah.

"The city of Paducah, State of Kentucky, acknowledges itself indebted to the New Orleans & Ohio Railroad Co. in the sum of \$1,000, for value received, negotiable and payable to bearer, at the National Bank of the State of New York, in the City of New York, for which sum of \$1,000, the said city of Paducah, in pursuance of law, issues this bond, signed by the mayor and clerk of the said city of Paducah, and does hereby promise and agree to pay the said sum of \$1,000 on the first day of January, 1871, upon the presentation and delivery of this bond at the above named place of payment; also the said city of Paducah promises and agrees to pay interest on said sum of \$1,000 at the rate of 6 per cent. per annum, payable at said bank on the 1st day of January and July in each and every year ensuing the date hereof, until the principal debt is paid, upon the delivery of the coupons hereunto attached, signed by the clerk of said city. This bond is one of a series of thirty-eight, of like date and amount, and issued by said city of Paducah to said New Orleans & Ohio R. R. Co., in payment of a bond of like amount issued by the city of Paducah, and due and payable.

"(Seal) Witness the seal of the city of Paducah, and the signatures of the mayor and clerk of said city, this 13th day of November, 1868.

"J. W. SAUNER, Mayor of Paducah.

"W. M. GREENWOOD, Clerk of Paducah."

The city answered, denying liability for various reasons, and plead the lapse of time and statute of limitation in bar of recovery. To which appellant replied, denying all the affirmative allegations in the answer relied on to escape liability, and in the second paragraph of their reply alleged that the bonds and coupons sued on were commercial paper, and stipulate that they do not become due and payable until demand, presentation and delivery thereof at the National Bank of the State of New York in the city of New York; and that no cause of action accrued thereon until these conditions were complied with; that on the 13th of March, 1900, demand was made for the first time at the bank for payment, which was refused; that within fifteen years before the institution of this suit the defendant, the city of Paducah, by its mayor and council, had admitted and acknowledged the liability of the city for the bonds and coupons sued on, and had agreed and promised to pay same. The city of Paducah interposed a general demurrer to each paragraph of the reply, which was sustained. Plaintiff thereupon offered to file an amended reply, in which they allege that the city of Paducah had levied and collected a tax sufficient to pay the bonds and coupons sued on, and held the money in trust for their payment, and that they had no right or power to appropriate the money so collected to

any other purpose. The trial court refused to permit this amended reply to be filed, and dismissed the petition, and plaintiff has appealed.

It seems to us that neither of the defenses relied on are sufficient to stop the running of the statute. We will consider them separately. The contention that no "cause of action" accrued upon the bonds until after presentation and demand for payment at the bank in the city of New York is the first one. The bonds provide in terms that they will be paid on a specified day upon their presentation and delivery at the place of payment named in the face of the bond. It is a well-settled rule of law that if an instrument be payable on demand at a specified time and place, the statute begins to run at its maturity, as payment could be immediately demanded, and, if refused, suit brought. But if payable at a certain time after demand or after notice, actual demand must be made or notice given in order to fix the period of maturity when the statute begins to run. (*Daniel on Negotiable Instruments*, volume 2, page 226; *Wheeler v. Warner*, 47 N. Y., 519; *Herrick v. Wolverton*, 41 N. Y., 581.) Appellant could not defeat the operation of the statute by a mere failure on his part to comply with the terms of the bonds as to presentation and demand for payment.

In the third paragraph of plaintiff's reply they state: "That the city of Paducah by its acts and proceedings has all the time since the issue of the bonds and coupons sued on herein recognized same as its bond and indebtedness, and within fifteen years last past before the beginning of this suit the city of Paducah, by its mayor and council, has admitted and acknowledged defendant's indebtedness for said bonds and coupons sued on, and agreed and promised to pay same."

The averments of this paragraph are equally ineffectual to take the case out of the statute: First, because the suit is upon the original promise of the city to pay the bonds, and it is not alleged that the recognition by the city and the promise to pay them was made before the bar and within the statutory period, and at a time when it was legally bound to pay them. But this defense would be unavailing, even if the averments of the reply had been technically within the rule, for the reason that the mayor and council of a municipal corporation have no power or authority to extend the liability of the city for its indebtedness beyond the express terms of the instrument evidencing such liability without legislative authority, express or implied. In *Clark v. Des Moines*, 19 Ia., 199, which is also reported in 87 American Dec., 428, Judge Dillon states the law on this subject with great force and perspicuity in these words: "The general principle of law is well known and definitely settled that the agents, officers, or even city council of a municipal corporation, can not bind the corporation when they transcend their lawful and legitimate powers. This doctrine rests upon this reasonable ground: The body-corporate is constituted of all the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are mere public agents of the corporators. Their duties and powers are prescribed by statute. Every one, therefore, may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule that the corporation is bound only when its agents, by

whom, from the very necessities of its being, it must act, if it acts at all, keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of ultra vires, that is, set up as a defense its own want of power under its charter or constituent statute to enter into a given contract, or to do a given act, in violation or excess of its corporate power and authority." (Dillon on Municipal Corporations, 4th edition, 291; Smith's Modern Law of Municipal Corporations, sections 186, 246, 247.)

Nor does the fact that the city of Paducah may have levied and collected a tax for the purpose of meeting the bonds and coupons sued on have the effect to extend in anywise the statutory period of limitation in which a suit could be maintained upon the bonds. The city might very properly during the life of the bonds have made provision for their payment upon presentation and demand as stipulated in the bond. But this fund did not become a trust fund for the payment of the obligations from which the city had been exonerated by the lapse of time and the statute of limitation. We are, therefore, of the opinion that the chancellor properly sustained a demurrer to the reply, and upon appellant's failure to plead, dismissed their petition. Judgment affirmed.

FENNELL v. MYERS.

(Filed October 9, 1908—Not to be reported.)

1. Action on note and account—Sufficiency of answer—In an action on a note executed by a firm and an account contracted by the firm against the surviving partner the allegation of the answer denying that the articles sued on were sold or delivered to the defendant, or that he promised to pay for them, does not present a defense, in view of the fact that his partner might have made the purchase within the scope of the partnership authority, and thereby bound the defendant.

2. Same—The allegation of the answer that the cause of action, if any, was against a certain firm, and that defendant was not, and never had been, a member of that firm, is not good, being a mere conclusion of the pleader, when unaccompanied by a statement of fact to sustain it.

3. Same—Limitation—The allegation of the petition being that the transaction with reference to the goods sued for was one between merchant and merchant, the five years' statute of limitation is applicable and not the two years' statute, as relied on by the answer.

4. Partnership—Liability of members—A person is liable on a claim against a partnership whether he was actually a member of it or not, if he held himself out as a member, or permitted another with his knowledge to hold him out as such, and upon the faith of such representations the credit was given to the firm.

Bingham & Davis and Irvine Blanton for appellant.

Appeal from Jefferson Circuit Court, Law and Equity division, No. 2.

Opinion of the court by Judge O'Rear.

The question for decision in this case is the sufficiency of appellee's answer to a suit upon an account alleged to have been contracted, and a note alleged to have been executed, by a firm, of which it is averred that appellee was at the time a member. The allegations of the petition state a cause of

action upon each of these matters. The petition as amended avers that appellee, J. M. Myers, and one Philip Bonn were partners, and that the note sued upon was executed by them, and that the merchandise sued for and set out in the itemized account was sold and delivered to them. In one of the amendments to the petition the caption states that the parties sued are "J. H. Myers and Philip Bonn, doing business as partners under the firm name of Myers & Bonn, defendants."

It appears that Bonn died about three years before the commencement of this suit. The liability, if it ever existed against the firm, is a joint and several one, and may be prosecuted against the surviving member alone if the plaintiff so elects. The answer filed by Myers says: "He was not a member of the firm of Myers & Bonn; that J. H. Myers and Philip Bonn are not now, nor were they ever, doing business as partners under the firm name of Myers & Bonn; that he and the said Philip Bonn are not partners under the said style, nor under any style; that they are not partners at all; that he was not a member of the firm of Myers & Bonn as stated, and that he is, therefore, not responsible," etc.

It is to be observed that the pleader confines himself in the opening sentence to saying that at the time of the filing of the pleading he was not a member of the firm of Myers & Bonn. As to whether he was then a member of the firm is obviously immaterial.

He next asserts that Myers and Philip Bonn were not then, and never had been, doing business as partners under the firm name of Myers & Bonn. He does not say, however, that they were not partners in fact without regard to the style or title of the firm.

The next allegation, that the defendant and said Philip Bonn are not partners under "said style," nor under any style; that they are not partners at all, all deal with the subject in the present tense, and has reference only to the time of the filing of the answer, which was more than three years after the sale of the goods sued upon, and after the execution of the note.

His next allegation, that he was not a member of the firm of Myers & Bonn, "as stated," evidently means that he was not a member of a firm of that style. Furthermore, it may be true that he was not a member of the firm of Myers & Bonn at some time. Yet he does not deny having been a member of the firm, or at least a partner with Bonn at the time of the transaction involved in the suit.

A demurrer to this answer was sustained. The amended answer filed by Myers denies that plaintiff, between the dates named in the account sued on, sold or delivered "to this defendant" the articles sued on, and denies that such articles were sold to this defendant at any time; denies that he promised to pay for them; denies that they were delivered to the defendant at his request." It may be true that appellee personally did not request the sale of the goods; that he personally did not buy them, and that personally did not promise to pay for them. It may also be true that he was a co-partner with Philip Bonn, and that Bonn, acting within the scope of the partnership authority, did buy the goods and did promise to pay for them, in which event appellee would be bound. Consequently this paragraph of the amended answer did not present a defense. The second paragraph had to do alone with the plea of limitation. The third paragraph was this: "This defend-

ant further says that the cause of action, if any, is against the firm of Myers & Bonn, but that this defendant is not now, nor was he ever, a member of that firm."

The allegation that the cause of action is against the firm of Myers & Bonn is a legal deduction or conclusion of the pleader. It is not accompanied by any statement of fact to sustain it. It is not material under the state of the pleading whether appellee was or was not a member of the firm styled Myers & Bonn. But for all that, it may be true that a firm styled Myers & Bonn, and composed of persons other than appellee, may have been liable to plaintiff upon this contract, and at the same time a different firm, composed of J. H. Myers, appellee, and Philip Bonn, may have also been liable to plaintiff upon the contract.

Concerning the plea of limitation, the two years' statute, applicable to merchants' accounts, being interposed, the plaintiff alleged that the firm was a mercantile firm, and that plaintiff was a merchant, and that the dealing about these goods sued for was a sale between merchant and merchant (these averments not being traversed), to which, under the statutes (section 2515, Kentucky Statutes) five years is the bar.

It is to be noted, too, that the defendant nowhere denied having signed the note sued upon, nor did he deny that it was signed by his authority. It would not be material, in our opinion, whether appellee was a member of the firm or not, if he held himself out as such, or permitted another with his knowledge to hold him out as such, and upon the faith of such dealings the credit was given that firm. This court so held in the case of *Hawkins & Armstrong v. Fellows*, 6 Dana, 128, and *Curlew Coal Co. v. Brief*, 2 Duv., 528.

The case was submitted to the circuit court upon the pleadings alone, and the court entered a judgment dismissing the petition. We think this was error. The only point in which the defendant's answer tendered any sort of issue is where he denied that the prices charged for the merchandise were reasonable. Even without proof the plaintiff would be entitled to a judgment upon the account sued upon for a nominal sum, and under the state of pleadings would have been entitled to a judgment for the amount of his note.

The judgment is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

FIDELITY TRUST AND SAFETY VAULT CO., TRUSTEE v. WALKER.

(Filed October 9, 1908.)

Trusts—Liability of trust fund to debts—Where a fund is conveyed to a trustee with the direction that the income therefrom is to be paid in equal monthly installments to A., "to be expended by him for the benefit of his children and family without any liability of accounting therefor, and on his death the principal shall pass in fee to his children," with power in him to "appoint same among his children by will," provided that if the income does not equal a stated amount monthly he is entitled to consume the principal so as to produce such sum monthly, with further provision that if he shall survive his present children he may demand and receive the principal

or dispose of it absolutely, or if he dies intestate that it shall go to his heirs at law, he takes such a beneficial interest in the fund as entitles him to receive the stipulated monthly payment, and it is proper to subject such monthly payment to the satisfaction of a judgment debt against him.

Thos. W. Bullitt and Alex. Scott Bullitt for appellant.

Simrall & Doolan for appellee.

Appeal from Jefferson Circuit Court, Chancery division, No. 1.

Opinion of the court by Judge O'Rear.

W. H. Stites was entitled to one-eighth in remainder of a sum of about \$75,000 bequeathed by one Gervas Lenox Taylor, of Dublin, Ireland. Mrs. Elizabeth Stites, mother of W. H. Stites, was the life tenant. On July 18, 1895, W. H. Stites by a bill of sale conveyed this interest to his mother in consideration, it is alleged (and for the purpose of this appeal accepted), of \$6,589.13 paid to him. On August 20, 1895, Mrs. Elizabeth Stites, for what real consideration is not shown, executed to appellant trust company a deed of trust conveying to it the said undivided one-eighth interest in remainder in said fund, to hold the same in trust as follows:

"1st. Out of the principal of said share, when received, said second party shall pay the sum of \$300, with interest from July 18, 1895, advanced to said W. H. Stites.

"2d. And shall pay to the personal representative of said Elizabeth Stites the sum of \$1,234.61, without interest prior to her death.

"3d. The residue of said fund shall be invested by said second party as trust funds are invested under the laws of the State of Kentucky, and the net income therefrom paid in equal monthly installments to said W. H. Stites, to be by him expended for the benefit of his children and family without any liability of accounting therefor, and on his death the principal shall pass in fee to his children, the issue of any children who may die leaving children to take their parent's share, with power in said W. H. Stites to appoint same among his children by will. Should he survive all of his present children the said W. H. Stites may, if he so elect, demand and receive from the said trust company the principal of said fund, and in default of his exercising said power, the same shall at his death pass to such persons as he by last will and testament may designate, and if he should leave no will it shall then pass to his heirs at law under the statute of descent of the State of Kentucky.

"Provided, That at any time after said life estate ends and said second party received said fund said W. H. Stites shall affirmatively show to said trustee that he is not indebted to any person in any sum whatever, the said income may be paid to him for his own exclusive use and benefit, if he shall so elect; and provided further, that if the income from said funds is less than \$50 per month net, the said second party, if said W. H. Stites shall so elect, shall pay to him in trust or in fee as hereinbefore directed the sum of \$50 per month so long as said trust fund shall last, and charge the amount of such payment over and above the income to the principal."

Prior to the transfer by W. H. Stites to his mother on July 18, 1895, he was bound to appellee in the sum of about \$1,700, evidenced by a judgment of a court of general jurisdiction of the State of Tennessee.

After the death of Mrs. Elizabeth Stites, and the payment by appellant trust company of the sum reserved in the deed to be then paid to her estate, appellee brought this suit against the judgment debtor and caused an attachment to be served on appellant trust company as garnishee, attaching the interest of W. H. Stites in the fund mentioned in and set apart by the deed of August 20, 1895. The garnishee answered that it owed the principal defendant nothing, and had not the possession of any property of his. Appellee then by amended petition, as allowed by section 227, Civil Code, not being satisfied with the garnishee's answer, set up the execution of the deed and the antecedent transfer, and alleged that they were colorable, fraudulent, and designed by W. H. Stites to cheat, hinder and delay his creditors. An issue of fact was tendered by the pleadings of the trustee as to the bona fides of the transaction. W. H. Stites' children living when the deed was made, being his only children, were made parties to the suit, and made the same defense as had been made by the trustee. They were all more than twenty-one years of age, and one of them, a daughter, was married. The case was tried out on the pleadings alone, the circuit court holding that the provisions of the deed nullified the trust as to all save W. H. Stites, and as to his interest subjected it to the extent of \$50 per month to the payment of appellee's judgment debt and the costs. Thereafter W. H. Stites (who was proceeded against as an absent nonresident) appeared in the county court of Jefferson county, tendered his resignation as trustee of his children under the deed, and nominated one of his sons, who was appointed by that tribunal in his stead. At the same time W. H. Stites renounced the trust in his behalf.

Therefore, the question for decision is not whether the recited consideration of the bill of sale from W. H. Stites to his mother actually passed, nor whether the intention of W. H. Stites in those transactions was or not mala fides; for in the absence of proof and by reason of the decision having been upon demurrer to appellants' pleadings, those facts being well pleaded, are to be considered as established in appellants' favor.

What interest did W. H. Stites take under the terms of the trust deed from Elizabeth Stites to the trust company?

What are the legal rights of appellants, W. H. Stites' children, under that deed?

The answers to these questions decide this case.

In the first place it is to be observed that the total net income from the principal is to be paid over to W. H. Stites by the trustee. He can expend it upon himself and the other members of his family, including his children, in such manner as he pleases. No one—not the children, nor the trustee, nor any one else—is permitted, by the express prohibition of the deed, to call him to account for the manner in which he uses, or disposes, of this income. If the income is not \$50 per month (and it is not, and will not probably be), then he is likewise empowered to consume the principal so as to produce to him an income of at least \$50 per month from this fund.

In the next place, W. H. Stites may, by will, dispose of the principal after his death, being restricted only to his own children and offspring, but being permitted to discriminate among them. Should he survive all his present children he may then demand and receive as his own the principal, or he

can dispose of it absolutely by will; or if he dies intestate without having consumed it, it goes to his heirs at law.

The only point of distinction between the estate thus created in the fund and the absolute estate therein is that if any of W. H. Stites' children survive him they would take the unexpended principal, subject to his power of appointment, that is, his right to discriminate among them, giving to one all, or any part, of the fund as he might determine. The contingency must be extremely rare in which a father would wish to exclude all his children from any part of his estate. Nor can the suggestion in the deed, that W. H. Stites is to use the income for his children and family, without any liability of accounting therefor, change the nature of the title in the income from an absolute one. It vests him with an unrestrained discretion, by which he may take to himself, as a member of his family, all of the income, or he might apportion its use among those of his family dependent upon him, and whom he is already morally and legally bound to support. That is about what people generally do with their own, anyhow.

Under no construction could W. H. Stites' children claim more of the income than his "family." In truth, the deed does not give the income to the "children and family of W. H. Stites, to be expended by him." It gives it to W. H. Stites. The expressed purpose for which it was to be expended was more in the nature of a request upon W. H. Stites as to the manner of its use. If it had given the whole fund absolutely to W. H. Stites at his mother's death, to be applied by him for the maintenance of his family, could his children, and other members of his family, have excluded him from a personal use of it, or could they have required by a chancery proceeding that he apportion it equitably among them then, or annually so long as they lived? The language used rather signifies a reason for the gift, than implies an irrevocable dedication of the income to the use of particular persons. Especially is this so when any meaning and effect is given to the expression "without liability to account therefor." That W. H. Stites could exclude his children from any sort of claim upon the income by merely showing he was free of debts, makes the interest of his children more equivocal, if possible, while affording a not unreasonable test of the main purpose of the instrument.

In the very excellent brief of able counsel appellants properly insist that every part of the instrument, and all of its provisions equally, if possible, be considered in arriving at the intent of the settler, which must control so far as it is not repugnant to the law. Applying this rule, one can not escape the conclusion that the person whose interest was studiously sought to be conserved in every line and provision of the trust was that of W. H. Stites. With the fullest possible right of personal enjoyment, with privilege of disposing of any surplus at his death in the manner most natural, and most likely to be desirable, little more could have been added to the completeness of his title. The interest of his children, if it can be said that they had any but a contingent one, was made to depend upon the natural instinct of their father to aid them as he might judge to be proper, having regard to his conception of his own interests, and the natural claims of other members of his family. This, at last, is precisely the "interest" that all children naturally have in their parents' property during the lifetime of the latter. It can not be said, then, that the children took a legal estate in the income of this fund.

If this were a proceeding by a creditor of W. H. Stites' children to subject their interest in the fund, what part of it could the chancellor lay hold on and say it was liable?

In *Pope's Ex'or v. Elliott*, 8 B. Mon., 56, it was held that where the executors were not compelled to pay a sum of \$25 per month to the support of a devisee, but were authorized to do so in their discretion, the interest of the devisee could not be subjected.

In *Cosby v. Ferguson*, 3 J. J. Mar., 264, a sum had been set apart in trust for the benefit of Cosby and his family, "the interest to be appropriated to the maintenance and use of himself and family during their lives." Cosby's interest was subjected to the payment of his debts. The court declined to pass on the question of what beneficial interest the children took.

In *Garner v. Wills*, 92 Ky., 386, the devise was to the testatrix's children, with this provision for the support of her husband: "I desire that my children give to my husband each year a sum sufficient to support him in a comfortable manner, and furnish to him a comfortable home and maintenance until his death."

It was also provided that if the children failed to furnish the testatrix's husband the home and support, the devise to them was to become void. It was held that the husband took no interest that could be subjected to his debts.

In *Webster v. Wathen*, 97 Ky., 318, the testatrix gave her estate to Hettie Cunningham Wathen. This provision was made as to a sister, Euphemia: "I want her (Hettie) to give any presents to my sister, Euphemia Cunningham Webster, that she may need, and that my estate can afford. I want Hettie, as far as possible, to look after my sister Euphemia's interest, and to protect her as far as lies in her power."

It was held that the will did not create a trust in behalf of Euphemia. In that case the court approved these cardinal tests of a trust created by will or deed:

- 1st. The words of the testator must be mandatory.
- 2d. The person intended to be benefited must be certain.
- 3d. The subject to which the obligation relates must be certain.

In *Davidson's Ex'or v. Kemper*, 79 Ky., 5, the court reviews the cases bearing on this subject, and thus stated the rule: "It will be observed that where, in the cases cited, the interest of the beneficiary has been subjected, there was an absolute appropriation of a certain sum for the benefit of the cestui que trust, to be applied in some instances under the direction of the trustee, but in no case, as here, has it been left discretionary with the trustee as to whether the cestui que trust should have the use or benefit of any of the property held in trust."

All of these cases are necessarily founded upon the idea that these persons did not take an enforceable beneficial interest in the estate sought to be subjected.

The trial court went upon the theory that this was a "spendthrift trust," where the most complete enjoyment and most ample dominion over an estate is given to one, with an attempt on the part of the donor to exempt it from liability for the debts of the beneficiary. As these creatures tend to beget idleness and irresponsibility and to shelter fraud, the policy of the

law has been to discountenance them. As said by Wait on Fraudulent Conveyances, section 360: "It is opposed to a wise public policy that a man should have an estate to live on, but not an estate to pay his debts with; or that he should possess the benefits of wealth without the responsibilities."

This policy has been signified in this State by statute since 1797. Section 2855, Kentucky Statutes, provides: "Estates of every kind held or possessed in trust shall be subject to the debts and charges of the persons to whose use, or for whose benefit, they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or possessed as they own or shall own in the use or trust thereof."

We hold that W. H. Stites took the beneficial interest in the principal funds in the hands of the trust company as trustee to the extent at least of the right to receive \$50 per month therefrom in any event. It was, therefore, not improper to have subjected that interest so far as was necessary to the payment of appellee's judgment debt.

These conclusions, we think, are supported by the following additional cases: *Dravo v. Seebolt*, 17 Ky. Law Rep., 1165; *Sale v. Thornberry*, 86 Ky., 266; *Enders' Ex'or v. Tasco*, 89 Ky., 17; *Bland v. Bland*, 90 Ky., 400; *Parsons v. Spencer*, 88 Ky., 305.

Judgment affirmed.

HENRY v. HENRY.

(Filed October 9, 1908—Not to be reported.)

1. Divorce and alimony—Where the court granted to the husband a divorce on the ground of abandonment by the wife, and it appears from the evidence that the wife is the owner of several thousand dollars' worth of property from which she derives an annual income of several hundred dollars, while the husband is practically insolvent, the action of the chancellor in refusing to allow her alimony will not be disturbed.

2. Same—In view of the fact that the wife erected a large barn on her land at the expense of the husband and realized considerable sums of money from the sale of products from his farm, the husband will not be charged with the use of the wife's land while he had it in his possession during her absence.

3. Maintenance of infant—An infant daughter, seventeen years of age, having rejected the offer of her father to support her at his home, the refusal of the chancellor to provide for her maintenance at the hands of her father will not be disturbed.

Tyler & Apperson for appellant.

Hazelrigg & Chenault and H. R. Prewitt for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Settle.

The action for divorce was brought by the husband upon the ground of one year's abandonment. The wife resisted his claim to a divorce and making her answer a counterclaim, asked for a divorce from him upon the ground of cruel and inhuman treatment, and a failure on his part to provide for her and her infant daughter, and also asked alimony.

The lower court granted appellee a divorce and refused appellant alimony..

Of that judgment, in so far as it refused her alimony, she now complains. While the decree of divorce can not be disturbed by this court, it may consider the evidence and grounds relied on by the lower court for granting it in determining whether it was error to refuse the wife alimony.

It appears from the evidence that appellant left her home for the West upon the ground of ill health, it being claimed by her that the climate of this State was unsuited to her disease, asthma. She says her intention was to return to her husband and to her home as soon as her health would permit, but she did not do so for two years, or express during her absence any purpose of returning. The evidence is voluminous and conflicting. Many of the witnesses have a manifest interest in the controversy, resulting either from relationship, or enmity toward one or the other of the parties. The contention of each of the parties is not without support from the evidence, but much of the evidence tends to show that the marital relations of the husband and wife were strained and unhappy. She seems to have been high tempered and exacting; he indifferent and at times ill-mannered and even abusive. It was not unnatural, therefore, that their domestic troubles should have culminated in a separation which was the more deplorable for the reason that they had lived together twenty-five years or more, during which time quite a number of children had been born to them, all of whom but one seem to be grown.

If appellant left her home and husband with the intention of returning to him it is hard to understand why she gave no manifestation of such intention during her absence by letter, or otherwise, or why she did not offer to resume her marital relations with him upon her return, which was immediately after his suit was instituted. If, however, his treatment of her was cruel and inhuman as claimed by her, that might be supposed to have furnished cause for leaving him, but if that caused her to leave, it is not likely that she had at the time any intention of returning to him.

Upon the record presented we are unable to say that the finding of the chancellor, that the wife was in fault in respect to the grounds for divorce relied on by the husband, is against the weight of the evidence, and, besides, some importance must be attached to his acquaintance with and knowledge of the parties and witnesses. The proof shows that the wife owns in her own right 118 acres of good land, worth at least \$5,000, from which she derives an annual rental of \$300; that she owns some investments, the value of which is not shown, and she carried with her upon leaving home several hundred dollars realized on the products and other effects of the appellee's farm, and she is shown to be frugal and economical. Upon the other hand, though, appellee owns 300 acres of land worth, say \$12,000; it is covered by a mortgage of \$7,500, and he is shown to be otherwise deeply involved in debt and very probably insolvent.

It is contended, however, that appellee should be charged with the use of the wife's land for the several years that he had it in possession, but the chancellor doubtless concluded that this matter should be squared by the value of the large barn which appellee erected on her land at his expense, together with the very considerable sums of money which the evidence shows she received year by year for products marketed by her from his farm. No proof was offered to show the cost of the infant daughter's support. She

was seventeen years of age when the suit was instituted. It is not shown by the record whether or not she is capable of earning support, but appellee expressed his willingness to take her to his home and support her. The chancellor doubtless held that if she, with her mother's consent, voluntarily rejected the father's offer of a home and support to live with the mother, no provision should be made in the judgment for her maintenance at the hands of the father.

Being unable to see that the judgment refusing the appellant alimony is against the weight of evidence the same is hereby affirmed.

CITY OF UNIONTOWN v. BERRY, &c.

(Filed October 9, 1908—Not to be reported.)

Plea of limitation—A defendant must expressly plead and rely on the statute of limitation in his answer if he would have the benefit of it. The mere allegation that a defendant has been in the possession of lands in controversy for thirty years is not a good plea of the statute.

H. X. Norton for appellant.

Allen & Hughes and P. B. Miller for appellees.

Appeal from Union Circuit Court.

The court delivered the following response to petition for rehearing:

Per Curiam: The statute of limitation argued in the petition for rehearing is not properly pleaded, nor is it relied on in the defendant's answer. It is not enough to say that defendants have been in the adverse possession of the land in controversy for more than thirty years. They must expressly plead and rely on the statute of limitation in the answer if they would have the benefit of it.

CREWS, &c. v. YOWELL.

(Filed October 9, 1908—Not to be reported.)

1. Bills and notes—Assignment—Action by assignee—Where the payee of a note has assigned his interest therein by parol merely to his co payee, it is necessary that he join as party plaintiff in an action to recover on the note, or, upon his refusing to do so, to be made a party defendant to the action.

2. Pledge of chose in action—Right of action in pledgee—The pledgee of a note, pledged as collateral security to secure the payment of another note executed by the pledgor to the pledgee, may institute and maintain an action against the obligor to recover thereon; any surplus of the proceeds after satisfying the debt for which it was pledged should be held for the benefit of the pledgor.

3. Joinder of actions—An action by the pledgee of a note pledged as collateral security against the obligor therein can not be properly joined with an action by the pledgee against the obligor of a note for which the first note was pledged as collateral.

Thompson & Spalding for appellants.

Ben Spalding for appellee.

Appeal from Marion Circuit Court.**Opinion of the court by Judge O'Rear.**

Appellee and Douglas were mercantile partners. Appellant, W. W. Crews, had executed to the firm his note for \$235.67, dated November 13, 1897. This suit was brought by appellee Yowell alone as plaintiff. His former partner, Douglas, was not joined either as plaintiff or defendant. The petition alleges the dissolution of the co-partnership, and avers that upon a distribution of its assets the \$235.67 note named was allotted to appellee.

Notes and bills and other written evidences of debt are assignable by the payee by our statutes, so as to vest the right of action in the assignee. But the assignment must be in writing. Otherwise, it is necessary for the plaintiff claiming to be the owner of the instrument to join its payees as plaintiffs, suing for his benefit, or, if they refuse to join as plaintiffs, then upon an allegation of that fact they may be joined as defendants.

While an assignment of the chose in action may be by parol as well as by deed or other writing, yet when it is by parol only, it is only an equitable assignment, it is necessary that the payee of such obligation shall have manifested the right of such assignee to collect it, either by executing a writing to that effect, or by joining in the action upon the assigned instrument. (*Newly & Taylor v. Hill, &c.*, 2 Met., 530.)

Appellee, E. G. Crews, had executed his note to appellant, W. W. Crews, for \$250.87, which W. W. Crews had assigned as collateral to the \$235.67 note above mentioned to Douglas & Yowell.

The petition in this case joined E. G. Crews as a party defendant; alleged the above facts, and sought a judgment in behalf of the plaintiff, K. H. Yowell, against E. G. Crews upon his note to the extent of \$225.67, less a small credit admitted to have been paid on the \$235.67 note. Judgment was rendered by default against both the Crews for \$225.67 and interest, subject to the credit named.

It is insisted by appellant, E. G. Crews, that Douglas & Yowell, or their assignee, Yowell, had not the right to maintain an action in the name of such payee or assignee upon the pledged note, but that the note should have been put up and sold, and the proceeds of such sale applied to the payment of the debt for which it was pledged. As to chattels and pledges other than choses in action this may be true, but when a chose in action, such as a bond, note or accepted order is transferred and delivered to a creditor as collateral security, the control of such chose in action passes to the pledgee. It is the right of the pledgee to collect it, and, if necessary, to bring an action at law, and to use the name of the pledgor of such chose in action. (*Jones on Pledges*, 664-665; *Hall v. Page*, 4 Ga., 438, 48 Am. Dec., 235.) The pledgee acts for the pledgor in the collection of the chose. When collected it should be applied as far as it will go to the payment of the debt which it secured. Any surplus will be held by the pledgee for the benefit of the pledgor. Such seems to be the general rule. Therefore, had this action been instituted by the firm of Douglas & Yowell, or by Douglas & Yowell for the use and benefit of appellee Yowell, or had Douglas & Yowell assigned the original note of W. W. Crews to appellee Yowell, which would have carried with it the collateral thereon, then this action could have been prosecuted against appellee, E. G. Crews, to recover on the \$250.87 note. To such

an action, however, W. W. Crews would not have been a necessary party. The actions upon the two notes are not such as may be joined under the Code of Practice, section 83, as they did not affect the same persons.

For the reasons indicated the judgment must be reversed and the cause remanded for proceedings not inconsistent herewith.

BAUM v. TURNER, &c.

(Filed October 9, 1903—Not to be reported.)

1. Attachment—Damages—Sufficiency of petition—In an action for damages against an officer who levied a general attachment upon personal property which was exempt from execution the rule applicable to actions on attachment bonds and for maliciously suing out an attachment, that it must be alleged that the levy had been discharged by the court before which the attachment was returnable, does not apply, and such an allegation is not necessary to make the petition good on demurrer.

2. Husband and wife—Rights of wife deserted by husband—Under subsection 4 of section 34 of the Civil Code, which provides that a wife who is deserted by her husband may bring or defend for him any action which he might bring or defend, a wife, whose husband has abandoned her, may institute and maintain an action against an officer for damages for the levy of a general attachment upon the exempted property of her husband, such property being then in her possession and used by her.

3. Same—The mere desertion of the wife by the husband does not render personal property exempt under the statute to a person having a "family resident in this Commonwealth" liable to seizure by his creditors and to subjection to their claims against him.

4. Sufficiency of petition—The failure of the petition to allege that the sureties on the official bond of the officer who levied the attachment had signed the bond and that it had been accepted and approved by the proper authority rendered it subject to demurrer as to the sureties.

N. B. Hays and Geo. W. Saulsbury for appellant.

J. G. Fitzpatrick and C. A. Wood for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant filed this action against appellees to recover damages for the seizure of certain personal property under an attachment. The court sustained a general demurrer to her petition, and she appeals. The sufficiency of the petition to state a cause of action is, therefore, the only question on the appeal.

It was alleged in the petition that the plaintiff, on January 6, 1901, was married in Louisville, Ky., to Joe Baum; that shortly thereafter she and her husband removed to Middlesboro, Ky., and bought household goods, consisting of one bed, bedstead, bedding, cooking stove and utensils, knives, forks, spoons, and such other articles as were necessary for housekeeping, and began to keep house; that about February 1, 1901, Joe Baum, her husband, left and deserted her, and she does not know of his place of abode; that she brings this action for herself and her husband, the said Joe Baum; that on February 9, 1901, two suits were filed in the police court at Middles-

boro by H. Weinstein & Bro. against Joe Baum for sums aggregating \$165.48, and attachments were sued out, which, on February 11, 1901, were placed in the hands of the defendant, J. C. Turner, deputy chief of police of Middlesboro, and he, in her absence from her place of residence, procured some neighbor children to open the outer door, and proceeded to seize all her household goods, took down her bedstead and cook stove, and commenced to remove same from her possession over her objection after he was warned that the property that he was taking was exempt from execution and belonged to her; that all of the articles taken were then being used by her as a housekeeper and for no other purpose and were of value to her \$250; that she offered to file her petition in the two cases in the police court claiming said property as exempt, but the court refused to allow her to appear and defend, holding that she had no standing in court; and no further action was taken in the cases, and that they were still pending, undetermined. She prayed judgment for \$5,000 damages.

The ground of the court's ruling in sustaining the demurrer appears to have been that the plaintiff did not show that the levy had been discharged by the court before which the attachments were returned. In support of the ruling *Nolle v. Thompson*, 60 Ky., 120 (3 Met.), is relied on. In that case it was held that no action will lie on an attachment bond or for malicious suing out an attachment until the attachment is discharged, and such final disposition of the attachment must be alleged. But this is not an action on an attachment bond, or for maliciously suing out an attachment. If the officer had seized the property under a specific attachment, directing him to take it, then this case would apply. But the writ under which the defendant acted being a general attachment, did not authorize him to take any property that was exempt from execution; and in so far as he went beyond the command of the writ his process was no protection to him, and he was a trespasser. Being a trespasser he was liable to immediate action, as much as if he had acted without any process at all.

When the question is whether the attachment was wrongfully sued out, the attachment defendant or any one claiming under him must, to establish the affirmative, show that the attachment has been discharged in the suit in which it was issued. But here the question is not as to the wrongful suing out of the attachment. The only question is, did the sheriff exceed the authority which his writ conferred upon him? The authorities are uniform that if the officer makes a levy which is not authorized by his process he may be sued as a trespasser by the person aggrieved. (*Freeman on Executions*, section 272; 12 Amer. & Eng. Ency. of Law, 2d edition, 249-251.) By section 34, subsection 4 of the Civil Code, it is provided: "If a husband desert his wife she may bring or defend for him any action which he might bring or defend, and shall have the powers and rights with reference thereto which he would have had but for such desertion."

This authorized the wife to bring the action for herself and her husband, who, it was alleged, had deserted her. They were housekeepers when he left. She remained in the house after he deserted her, continuing to keep house, and the question to be determined is, did the property which was exempt before the husband deserted her become subject to his debts thereafter? The property was his; he might dispose of it as he saw fit, and do

as he pleased with the proceeds up to the time of the levy of the attachment as far as appears. The petition does not show a severance of the domestic relation; however protracted the abandonment may have been, the parties constituted "a family" in law.

The statute creating exemptions of personal property from seizure for debts (section 1697, Kentucky Statutes), provides that certain property "of persons with a family resident in this Commonwealth shall be exempt from execution, attachment, etc." Unlike the statute concerning the homestead exemption, the debtor is not required to be "a housekeeper." It is enough in this case if he have "a family resident in this Commonwealth." It does not appear to be material where he resides. It is to be noted that these exemptions are in no instance allowed to a person who has no family or had none. The protection of the family as such from the misfortune of debt that can not be met was the prime consideration of the legislature. This is further evidenced by the fact that after the debtor's death the same exemptions, substantially, continue for the benefit "of his family." (Section 1708, Kentucky Statutes.) This last section shows, too, that the widow alone may constitute the family. The purpose of the statute is a humane one. And it is wise. It will be given, always, a liberal interpretation to effectuate its beneficent intentment.

The title and the legal custody and control of movable chattels must be lodged conveniently for their easy and safe disposal and transfer. So they are, in the case of exempted or personal property, reposed in "the head of the family," generally the husband and father. He may sell them, and pass a good title. Notwithstanding this, the fact that the welfare of the family and its rights to possess and enjoy this property to the exclusion of creditors is the great object of the statute must be borne in mind in construing it in a contest between "creditors" and the "family." True, the property may be the husband's, yet the wife and the infant children have a qualified use in it, and, therefore, the right to hold it as against an execution or attachment creditor. (*Bonnel v. Dunn*, 29 N. J. L., 435; *Regan v. Zeeb*, 28 Ohio St., 483; *Steele v. Leonori, &c.*, 28 Mo. App., 676.) Under subsection 4, section 34, Civil Code, *supra*, it was competent for the wife to institute and maintain on behalf of her absent husband a suit necessary to protect the exempt property from seizure for his debts. Or, if the officer or creditor have already disposed of the property, she may maintain the suit to recover its value, and the damages for its detention. It would be a mockery to confer by statute the right of enjoyment of property, and yet for the courts to deny relief when the right has been infringed. As said by Chief Justice Lewis in *Wilson v. Wilson*, 101 Ky., 731 (19 Ky. Law Rep., 925), in construing this same section under somewhat similar circumstances: "Any other interpretation or application would be a sacrifice of the substance for a shadow. And not to allow the exemption in question would be a denial of the benefit of the statute in a case plainly within its scope and purpose, and detrimental to a class of persons deserving its protection and intended to be protected."

That a deserted wife is "a family" under an exemption statute was held in *Berry v. Hanks*, 28 Ill. App., 51. In so far as the petition sought a recovery against Turner's sureties on his official bond it failed to state a

cause of action. It did not show that they had signed the bond, or that it had been accepted and approved by the town council.

Wherefore, the judgment is affirmed as to all of the appellees except J. C. Turner. As to him, it is reversed and cause remanded for further proceedings consistent herewith.

COMMONWEALTH v. ROARK.

(Filed October 9, 1903.)

Bail bond—Liability of sureties—Waiver—Estoppel—Where the sureties on the bail bond of one charged with a felony executed a power of attorney authorizing one of them to sign their names to the bail bond, except that one of the sureties instead of signing the power of attorney himself verbally directed his son to sign his name, the attorney in fact being then present, the fact that the surety whose name was signed by another was released from liability by reason of that act does not release the remaining sureties in the absence of knowledge of the circumstances on the part of the officer taking the bond, as the knowledge of the agent to sign the bond is imputed to the sureties whom he represented, and amounts to a waiver of any informality in the execution of the bond by the co-surety and to an estoppel to deny the validity of his signature.

C. J. Pratt, M. R. Todd, Nat A. Porter and W. B. Gaines for appellant,
W. C. Goad for appellees.

Appeal from Allen Circuit Court.

Opinion of the court by Judge O'Rear.

John Roark being in custody before the county judge of Allen county, charged with a felony, was admitted to bail by that magistrate for his appearance before the Allen Circuit Court to answer any indictment that might be found against him growing out of the charge.

Appellee, W. B. Roark, and others undertook, as his bail in a bond executed before the county judge, that he would so appear. But he defaulted. In a suit upon the forfeited bail bond one of the sureties, M. G. Brown, was discharged because it was conclusively shown that he did not in person sign the bond, or by a writing signed by him authorize another to sign his name to it. (Section 482, Kentucky Statutes; *Billington v. Commonwealth*, 79 Ky., 400.) The other answering sureties, appellees, W. B. Roark and J. M. Braswell, claim that they were released because Brown was not bound. The circuit court discharged them. The facts are, so far as necessary to understand the point to be decided, that W. B. Roark was, by a written power of attorney, apparently signed by all the other sureties, and in fact so signed, except by Brown, authorized as such attorney in fact to sign the names of the sureties to the bail bond. W. B. Roark was present when M. G. Brown agreed to sign the bond as a surety, but instead of signing his name to the paper, the power of attorney, he requested his son, who was present, to sign it for him, which was done. This was known to W. B. Roark. None of the sureties, except W. B. Roark, appear to have been present when the bond was executed before the county judge. It was not shown that the county judge knew that M. G. Brown had not in person signed his name.

to the power of attorney. Now, can it be that W. B. Roark and the other sureties, whom he was representing as their agent in that matter, are released from liability because Brown was not bound? There is a line of cases decided by this court, notably *Commonwealth v. Magoffin*, 15 Ky. Law Rep., 775; *Wilson, Rec'r v. Linville*, 96 Ky., 50 (16 Ky. Law Rep., 340); *Commonwealth v. Yarbrough*, 84 Ky., 496, and *Commonwealth v. Belt*, 81 Ky. Law Rep., 339, which go to the extent that where the county judge, or other official representing the Commonwealth, knowingly permits an incomplete bond to be accepted, as where some of the sureties' names were signed by others without written authority from such obligors, none of the sureties will be bound. And this, too, notwithstanding that all the sureties were present and saw the bond executed as it was, and notwithstanding that in law it is competent for a surety to waive the execution of the bond by one who had been named therein as his co-surety. In all of those cases the officer representing the Commonwealth knew that some of the sureties named in the bond had not signed it; or knew that some whose names were signed by others had not written authority to do so, at least knew that no such authority was exhibited or filed. Nothing appears in those cases to show that the sureties signing intended to waive the due execution of the bond by the others named in it, or that they were aware that the official had not fully complied with the law in requiring the due execution of the bond. From these facts the court argued that the other sureties had a right to presume that the official taking the bond had proper assurance that those signing it for others had legal authority to do so as to bind them. None of these cases hold, of course, that any one can presume anything to the contrary of his own actual knowledge. But this case goes beyond anything in any of those cited. The sureties here, excepting Brown, had by a valid paper appointed another to act in their stead and for them in this transaction.

Under familiar and salutary principles of the law of agency, when one elects to act by an agent, the knowledge of the latter acquired, or in mind, in that transaction is conclusively imputed to such principal. Otherwise, it would be safer to the principal to always act by agent, for the agent's guilty knowledge, perhaps the scienter of an action based on the contract made by him, would not affect the principal, though he might profit by the agent's act. (*Trimble v. Ward*, 97 Ky., 748, 17 Ky. Law Rep., 508.)

This matter is well stated by Lord Brougham in *Kennedy v. Green*, 8 Myl. & K., 699, who says that the reason of this rule is that the "policy and safety of the public forbid a person to deny knowledge while he is so dealing as to keep himself ignorant, * * * and yet all the while let his agent know, and himself perhaps profit by that knowledge."

W. B. Roark knew exactly how the power of attorney was executed by Brown; the county judge did not know. W. B. Roark appears to have concealed from the county judge the truth as to how the paper was executed—or, what amounts to the same thing, had presented it as genuine, when he knew it was not. His act being for himself and his co-sureties, was equivalent to a representation by each of them that the paper was the genuine signature of Brown; or at least they were willing to waive his executing the bond otherwise. They could have waived Brown's signature altogether. They can estop themselves, too, from denying that his signature to the power of attorney was genuine.

When one surety says to the official taking the bond: "I know all the facts relating to the signing of the power of attorney by my proposed co-surety; I assure you that he has signed the power of attorney, and request you to accept the bond under that signature of his, and of my own made with full knowledge of the circumstances, and thereupon to release the prisoner," such surety has waived any informality in the execution of the bond by his co-surety. It is also, if acted upon a good estoppel against his afterward denying the validity of his co-surety's signature. The action of W. B. Roark was tantamount to such assurance.

The judgment is reversed and cause remanded for a new trial under proceedings consistent herewith.

The whole court sitting, except Judge Paynter.

Chief Justice Burnam dissents.

STRUBBE v. LEWIS, &c.

(Filed October 9, 1908—Not to be reported.)

1. Written contract—Parol evidence of consideration—Under the provisions of section 470 of the Kentucky Statutes a consideration not expressed in a written contract may be proved by parol evidence.

2. Same—Where a written contract authorized a person to cut and remove timber from the lands belonging to another located on a certain river in a designated county, parol evidence was competent to identify the lands designated in the writing.

3. Limitation—In an action to recover sums expended in cutting and hauling timber from lands which were afterwards found to be the property of persons other than the vendor of the timber, in the absence of any charge that the vendor of the timber deceived the purchaser or that he entered into the contract for the sale of the timber by mistake, believing that he had title to the lands, it will be assumed that the action was based upon the implied warranty in the contract that the vendor had title to the timber sold, hence the fifteen-year statute applies, and not the seven-year statute with reference to fraud.

W. A. Morrow for appellant.

G. S. Shadoan, T. Z. Morrow, Jr., and Edwin P. Morrow for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge O'Rear.

Plaintiffs (appellees) declared upon a written contract, by which it was alleged that appellant had contracted to sell to them certain timber upon a certain-described boundary of land for a certain-named consideration; that acting under such contract they had entered within the boundary, and had cut about 500 logs, when others interfered and took the timber from them. In suits at law brought by appellees to test the title to the timber judgments had been rendered against appellees. They claimed that they had expended \$406.50 in cutting and hauling the timber, and were, therefore, damaged to that extent by reason of the failure of appellant's title thereto.

Upon the trial this contract was introduced as the one called for by the above pleadings:

"G. M. Nevels: You are authorized to cut and remove timber from the

lands belonging to W. G. Strubbe on Sinking creek and Big and Little South Fork rivers, in Wayne county, Kentucky. November 1, 1892.

"JOE C. PARKER, Agent."

It was averred that Parker was acting as the authorized agent of appellant, and that Nevel and appellee Lewis were co-partners in that transaction.

The court permitted evidence to go to the jury, over the objections of appellant, as to the consideration for the timber so sold; also as to the particular boundaries of land covered by the writing. Appellant now insists that this was a harmful error, in that it allowed parol evidence to enlarge the written contract sued upon, and that without an allegation that the writing was not the complete contract.

In our opinion the consideration was not necessary to be set out in the contract, although it was otherwise at common law. Section 470 of the Kentucky Statutes, concerning written contracts, provides: "But the consideration need not be expressed in the writing. It may be proved when necessary, or disproved by parol or other evidence."

The lands described in the writing are sufficiently definite to designate the subject of the contract. It was not improper to allow parol evidence to identify the lands designated by the writing. Appellant assumes, though it may be found that this is an action upon a contract in writing, that it is based upon fraud, in that appellant sold timber upon land which he did not own, and it is claimed for appellant that such an action is barred in five years after the right to sue accrued. More than five years having elapsed in this case after the accrual of the right of action before the suit was filed, the statute of limitation is pleaded.

We are of opinion that the action is not based upon fraud. It is not charged that appellant deceived appellees, knowing that he had not the title to the land, yet representing that he had for the purpose of deceiving them. Nor is it alleged that he entered into the contract by mistake, believing that he had the title to the land, whereas he did not have it. We are of opinion that this action was brought upon the implied warranty embraced within the contract, which is that the vendor had the title to the timber thereby sold. An action upon the breach of this implied covenant is an action upon a written contract to which the fifteen years' statute of limitation applies.

Perceiving no error in the record prejudicial to appellant the judgment is affirmed, with damages.

WYLES, COM'R v. BERRY.

(Filed October 9, 1903.)

1. Withdrawal of pleading—Admissions—An admission of fact in a pleading, which a litigant signed and swore to, and which the court permitted him to withdraw, against his interest in the litigation, may be proven by his adversary, as if made under other circumstances.

2. Same—The fact that the court, in its discretion, permits a litigant to withdraw a pleading filed by him does not authorize the removal of such pleading from the files of the record without leaving a properly attested copy of it.

3. Same—In the absence of the pleading which the court allowed to be

withdrawn its contents should have been admitted for the purpose of proving an admission made therein.

4. Money loaned by order of court—Action on bond—Evidence—In an action on a bond executed for the payment of money loaned by order of court it was proper for the payee to prove the financial worth of the person for whom the money was borrowed at the time the loan was made.

Lucius Desha for appellant.

J. Stanley Webster for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee, sued as principal upon a bond for the payment of money loaned by order of the Harrison Circuit Court, pleaded *non est factum* to the obligation. Upon the trial the plaintiff offered to prove that appellee had filed an answer, originally, in the action upon the bond, pleading that he had signed it as surety only, whereas it appears to have been executed by him as principal. He was permitted, without objection, and before reply, to "withdraw" that answer, and to file another denying the execution of the paper. The trial court refused to require appellee to replace the withdrawn pleading with the files of the suit, though he admitted he had it in his possession, and refused, too, to admit evidence as to its contents.

Appellee should have been required to replace the paper among the files of the suit, and if that could not be done, its contents should have been admitted. Even if a party is permitted, in the discretion of the court, to withdraw a pleading, it does not follow, and, indeed, it is not proper, that he should be permitted to take it off the files of the record without leaving a properly attested copy. The effect of the order permitting the withdrawal is merely to eliminate the pleading as a pleading tendering an issue to be tried in the case. If it contains an admission of fact relevant to the trial, and if it is signed or sworn to by the party in whose behalf it was filed, such admission may be proved on the trial against the party making it as may be any other admission of his against his interest. We are aware that in some jurisdictions, and in some instances in this State, pleadings are not required to be verified by the personal oath of the party, nor to be signed by him. In such cases in the absence of showing that he authorized and knew of the making of the statement asserting a fact purporting to be within his personal knowledge, and afterward sought to be proved as an admission, it should not be allowed. But where he signs the pleading, and especially where he swears to the truth of its statements, we perceive no reason why an admission of fact in it against his interest may not be proved by his adversary, as if made under other circumstances. The weight of authority, as well as sound reason, seem to support this rule. (*Pope v. Allis*, 115 U. S., 363; *Delaware Co. v. Diebold, &c.*, 133 U. S., 473; *Gibson v. Herriott*, 55 Ark., 86; *Rairdan v. Central Iowa Ry. Co.*, 69 Iowa, 527; *Baltimore, &c., R. R. Co. v. Evarts*, 112 Ind., 533; *Daub v. Englebach*, 109 Ill., 267; *Peckham Iron Co. v. Harper*, 41 Ohio. St., 100; *Fite v. Black*, 92 Ga., 363; *Blankman v. Vallejo*, 15 Cal., 639.)

The affidavit of J. I. Blanton, offered to contradict or impeach his testimony, was properly rejected as it was not conflicting with his statements

on the trial. Evidence offered by appellant tending to show the financial worth of J. I. Blanton at the time the money was loaned, who appears to have been the person for whom the money was actually borrowed, should have been permitted.

Judgment reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

HUYSER v. COMMONWEALTH.

(Filed October 9, 1903.)

1. Legislative act—Subject expressed in title—Constitutionality—An amendatory act of the general assembly, entitled "An act for the better enforcement of an act approved March 10, 1894, entitled 'An act whereby, etc.' " (meaning the local option law), is not violative of the provisions of section 51 of the Constitution, that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title" because it embraces one or more offenses not provided for in the original act, where such offenses are germane to the subject-matter expressed in the title, viz., the better enforcement of the local option law.

2. Statute—Uncertainty—A provision of the amendatory act, empowering the court after a person has been convicted twice for violations of its provisions to require of him a bond for his "good behavior," is not void for uncertainty because it fails to define the meaning of the term "good behavior," as that term is as old as the common law and well understood.

3. Criminal law—Double punishment—The provision of the statute authorizing the court to require of a person twice convicted of violations of the local option law a bond for his good behavior is not subject to the objection that it imposes double punishment.

4. Same—Construction of statute—The provision of an amendment to the local option law, empowering the court to require a bond for good behavior of a person "on the second or any subsequent conviction for a violation of the act or any of its amendments," refers to a conviction for an offense committed after his conviction for a previous like offense.

S. M. Payton for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Ezra Huyser, was convicted in the lower court under each of four indictments for selling spirituous liquors in violation of the local option law, his punishment in three of the cases being a fine of \$60 each, and in the fourth a fine of \$100. The fines, together with the costs of the prosecutions, were immediately paid by him.

It appears from the record that the four convictions of appellant occurred at the same term of court, and the last two of them on the same day, and that these convictions were had under the provisions of an act of the legislature of Kentucky, amendatory of the general local option law, approved March 11, 1902, page 41, Acts 1902.

There are two sections of this amendment imposing penalties for a violation of the act. Section 2 provides that "it shall be unlawful for any per-

son to sell, lend, give, procure for or furnish to another any spirituous, vinous or malt liquors, or have in his possession spirituous, vinous or malt liquors, for the purpose of selling them in any territory where said act is in force, and any person so offending shall be fined not less than \$50 nor more than \$100, and imprisoned not less than ten nor more than fifty days."

It will be observed that the object of the foregoing section is not the punishment of the person who himself sells, or otherwise disposes of, spirituous, vinous or malt liquors where local option is in force, for his punishment is provided for by section 5 of the act, but its object is the punishment of the persons who shall sell, lend, give, procure for, or furnish to, another such liquors, to be sold by the latter where local option is in force, or for having in his (the former's) own possession such liquors for the purpose of selling them in the forbidden territory.

Section 5, under which appellant was convicted, takes the place of section 4 of the original act, and its object is the punishment of any person who sells liquors where local option is in force; its language embraces any sale, barter, or loan of spirituous, vinous or malt liquors that may be "directly or indirectly" made within the inhibited territory. This section also makes it an offense for any person to knowingly furnish or rent a house, room, wagon, or any conveyance or thing in which such liquors are sold, bartered or loaned. And the punishment prescribed for the offenses named in this section is a fine of not less than \$50, nor more than \$100, or imprisonment in jail not less than ten nor more than fifty days, or both fine and imprisonment, in the discretion of the court or jury.

Section 3 of the amendment provides that "on the second or any subsequent conviction for a violation of said act, or any of its amendments, the court shall require the defendant to execute bond in the sum of \$200 to be of 'good behavior' for the period of twelve months."

A subsequent paragraph of section 3 allows the court, in its discretion, to increase the amount of the bond, and if the bond is not given, to commit the defendant to jail for a period not exceeding ninety days, to be fixed by the court.

During the same term of the court at which the four convictions of the appellant were secured, and on the same day of his conviction on each of the two indictments last tried, a rule was issued against him by order of the court, returnable on the tenth day of that term, requiring him to give bond, as provided by section 3 of the act *supra*. Appellant appeared in obedience to the rule and filed a response thereto, which the court held insufficient. Whereupon the rule was made absolute, and it was adjudged that he execute bond in the sum of \$200 for his "good behavior" for a period of twelve months, and upon his failure to do so that he be confined in jail ninety days.

The bond was not executed by him, and we are now called upon to consider the questions of law raised by the appeal of the case to this court. No complaint is made of the action of the lower court in the matter of the fines imposed under the indictments, but it is contended for appellant that the court had no authority to require of him the execution of the bond because, first, the act of March 11, 1902, is in violation of section 51 of the State Constitution, in that it relates to more than one subject; second, that section 3

of the act is void for uncertainty; and, third, that the act imposes a double punishment.

Section 51 of the Constitution provides that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title."

The title of the act approved March 11, 1902, is as follows: "An act for the better enforcement of an act approved March 10, 1894, entitled 'An act whereby the sense of the people of any county, city, town or district, or precinct, may be taken as to whether spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, and to amend section 4 of said act.'"

The general subject of the act is the better enforcement of the "local option law," and is so expressed in its title. Though embracing one or more offenses that are not to be found in the original law of which it is an amendment, it contains no provision that is not germane to the subject expressed in the title, and as a whole its meaning is so obvious that it can be readily understood by a person of ordinary intelligence.

The court has repeatedly announced in effect that no provision of a statute, directly or indirectly relating to the subject expressed in the title, having a natural connection therewith, and not foreign to the same, should be deemed within the inhibition of section 51 of the Constitution, which provides that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title." (*Chiles v. Drake*, 59 Ky., 146; *L. & O. T. R. Co. v. Ballard*, 59 Ky., 165; *Jacobs v. L. & N. R. R. Co.*, 73 Ky., 248; *Allen v. Hall*, 77 Ky., 85; *McArthur v. Nelson*, 81 Ky., 67; *Commonwealth v. Godshaw*, 82 Ky., 435; *Conley v. Commonwealth*, 98 Ky., 125; *Weber v. Commonwealth*, 24 Ky. Law Rep., (part II). 1737.)

Tested by the foregoing rule, the statute in question is not repugnant to section 51 of the Constitution, and we so decide.

We are not disposed to agree with appellant's contention, that so much of section 3 of the act *supra* as empowers the court after two convictions for a violation of its provisions to require of the person so convicted a bond for his "good behavior" is void for uncertainty, because it fails to indicate in express language what is meant by the words "good behavior."

Section 382 of the Criminal Code provides that "a person may be arrested for the purpose of requiring of him security to keep the peace, or for his 'good behavior.'" The grounds for such arrest are set forth in subsections 1, 2 and 3 of section 382, but the Code nowhere defines the meaning of the term "good behavior." It is, however, an expression as old as the common law. Behavior is the mode of conducting oneself, and is used to express one's manner of living. To be put upon one's "good behavior" is to be in a state of trial, in which something important depends on propriety of conduct. Therefore, the legal signification of the expression "good behavior," as used in the statute *supra*, is that one who is placed under bond for his "good behavior," as therein authorized, is to be in a state of trial or probation with respect to the subject-matter of the statute, he must for a given time behave with such propriety of conduct as to make himself amenable to the statute. In other words, he must keep within its letter and spirit, by refraining from any further violation of its provisions during the period of probation, otherwise he or his surety will have to pay the penalty named in

the bond. We are of the opinion, therefore, that the meaning of the words "good behavior," found in the statute, is so well known, and their connection, with the intent and purpose of the statute, so patent that they can not fail to be understood by persons of ordinary intelligence; and if so it follows that the statute can be neither uncertain nor void in the particular complained of.

We are likewise unable to sustain the third, and last, contention of appellant's counsel, that the statute *supra*, as amended, or that part of it requiring the bond upon a second or any subsequent conviction, imposes double punishment, and is, therefore, unconstitutional. If it be conceded that the judgment requiring the convicted person to enter into bond for good behavior is punishment, that is a part of the penalty inflicted by virtue of the provision of the statute, it is a punishment which falls under the head of preventive justice. (Blackstone's Com., volume 4, page 253.) The only actual punishment, however, that could result to the appellant from the requisition of the judgment as to the giving of the bond would arise from his failing to execute it, as his imprisonment in jail for the period of ninety days would be the consequence.

The law makes a distinction between the one time offender and the hardened offender, or criminal, for the former may amend his way, become a good citizen, and thereby atone for his one act of wrongdoing, while the repeated offenses of the latter may so provoke the majesty of the law as to compel the infliction upon him of its severest penalty, and even a repetition thereof as a complete deterrent, if demanded by the public good.

This principle has been recognized by the law-making power of our State, and carried into effect by the repeated adjudications of this court. For instance, section 1130, Kentucky Statutes, provides that any person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction; and if convicted a third time of felony he shall be confined in the penitentiary during his life. The validity of this statute has been repeatedly upheld by this court upon the ground that it is not in violation of the constitutional provision that no one for the same offense shall be twice put in jeopardy. The increased punishment is not for the former offenses, but the previous convictions merely aggravate the last offense, and add to its punishment. The accused is not required to answer to the former charges and defend against them. Nothing is heard in reference to the former trials save the fact of conviction. (Mount v. Commonwealth, 2 Duvall, 98; Taylor v. Commonwealth, 3 Ky. Law Rep., 783; Boggs v. Commonwealth, 9 Ky. Law Rep., 342; Chenowith v. Commonwealth, 11 Ky. Law Rep., 561; Wharton v. Commonwealth, 7 Ky. Law Rep., 561.)

There was a discretionary jurisdiction at common law in the court trying a person charged with misdemeanor, to bind the accused after conviction, and as a part of the judgment to good behavior for a time, and such jurisdiction was inherent in every court of record having criminal jurisdiction.

"If a person have been convicted of a misdemeanor, it is usually part of the judgment that he shall find security for his good behavior for some time" (9 Bacon's Abr., 309.)

"This requisition of sureties has been several times mentioned before as

part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors; but there, also, it must be understood rather as a caution against the repetition of the offense than any immediate pain or punishment." (Bl. Com., volume 4, page 251.)

It will be observed, therefore, that section 8 of the statute *supra*, in requiring security for good behavior of the person convicted follows, and is but declaratory, of the common law.

An examination of the case of the State of West Virginia v. Gillilon, 57 L. R. A., 426, which is strongly relied on by counsel for appellant, will show that it is not in conflict with the view herein expressed. In that case the defendant was convicted under indictment for fraudulently selling spirituous liquor by retail without license, and his punishment fixed at a fine of \$15; in addition he was required by the court to give bond in the sum of \$500 for his good behavior, * * * and "not to sell intoxicating drinks contrary to law for the period of twelve months." The indictment was under section 1, chapter 32, Criminal Code of West Virginia, which prescribes as punishment for the offense of which the accused was convicted a fine of not less than \$10 nor more than \$100, and, at the discretion of the court, imprisonment in the county jail not exceeding three months. It appears from the opinion of the Supreme Court of West Virginia, in the case *supra*, that the Criminal Code of that State contains no provision authorizing the trial court to require such a bond as was attempted to be exacted of the person convicted, hence it was held that as the offense of which he stood convicted was not an offense at common law, but purely one of statutory creation, the court was without jurisdiction to impose a common law punishment, but was restricted to the infliction of the penalty prescribed by the statute, which did not include the authority to require of the accused a bond for his good behavior, but only subjected him to a fine and imprisonment in jail not exceeding three months. It is the law in Kentucky, as in West Virginia, made so by statute, that a common law offense, for which punishment is prescribed by statute, shall be punished only in the mode so prescribed, but in the case at bar the offense as well as the punishment is statutory, and our statute, unlike that of West Virginia, expressly confers upon the court jurisdiction to require such a bond as appellant was adjudged to execute, that is to say, this jurisdiction is not derived from the common law, but it is conferred by the very letter of the statute.

For the reasons indicated we are of the opinion that the case of West Virginia v. Gillilon can not be accepted as authority in point. But while we are unable to sustain the objection raised against the statute under consideration by counsel for appellant, we are, nevertheless, constrained to hold that the action of the lower court in requiring of appellant the bond in question was premature. The authority for requiring bond conferred upon the court by section 3 of the amendment may be exercised by the court only "on the second, or any subsequent, conviction for a violation of the act (local option law), or any of its amendments."

In our opinion the words "second or any subsequent conviction," refer to a conviction of the accused for an offense against the statute, committed after his conviction for a previous like offense.

In requiring of the offender a bond for his good behavior the aim of the

statute is two-fold: First, to prevent further violation of its provision; second, to effect the reformation of the offender. How can the latter object be attained, and what opportunity for reformation would be afforded him, unless the construction here suggested should obtain?

In *Brown v. Commonwealth*, 100 Ky., 127, the appellant at the June term, 1896, of the Lincoln Circuit Court was indicted upon two charges of breaking into a warehouse. These indictments were returned on the same day. He pleaded guilty to each, and after verdicts fixing his punishment at five years' imprisonment in the penitentiary in each case, was sentenced. On the day following the sentence in each of these cases he was again indicted, the last indictment charging him with the crime of feloniously breaking into and entering a dwelling house, and also setting up the two former convictions for felony at the same term. Upon the trial, and notwithstanding his plea of not guilty, the jury found him guilty, fixed his punishment at confinement in the penitentiary for life, and the court sentenced him accordingly, all which was done pursuant to section 1130, Kentucky Statutes. An appeal was taken, and in construing that section of the statute this court said: "The question presented for decision is whether the statute in question authorizes the imposition of the increased penalty for an offense not committed after the original convictions. We think not. The statute was manifestly intended to provide an increased penalty for a subsequent offense in order to deter the offender from its repetition. * * * The reformatory object of the statute, namely, to provide a deterrent from future crime, would not be effected by a construction which gives to the offender no opportunity to reform. Moreover, doubtful questions as to the severity of the penalty are to be resolved in favor of the accused. * * * We are of the opinion that the words 'convicted a second time of felony,' and 'convicted a third time of felony,' must be restricted to felonies committed subsequent to the dates of the convictions relied on to effect an increase of the penalty, for otherwise, no locus penitentiae would be offered to the accused."

We do not feel at liberty to depart from the rule thus announced by this court, and hence must hold that the action of the lower court requiring of the appellant the bond for good behavior in this case was unauthorized, because such action was taken before there was a second or subsequent conviction of the appellant for the violation of the local option law in the meaning of the statute.

Wherefore, the judgment of the lower court, requiring of appellant the execution of the bond, is reversed, and cause remanded for further proceedings consistent with the opinion herein.

LARKIN v. RYAN.

(Filed October 13, 1903—Not to be reported.)

1. When one may sue for others—Where a small town has been without trustees or other officials for thirty-five or forty years a citizen of the town may institute and maintain an action in his own behalf and of the citizens of the town to test the right of the citizens generally to have free access to a spring which furnished the town with water.

2. Passway—Adverse user—Where the citizens of a town had used the

water from a spring and a passway to the spring for seventy-five years uninterruptedly and under a claim of right, and the walls of the spring had been kept in repair and the spring had been cleaned at public expense during that time, a citizen, suing for himself and his fellow citizens, was entitled to an injunction to prevent the closing of the passway by one who had purchased the lands surrounding the spring.

A. E. Cole & Son and Virgil McKnight for appellant.

E. L. Worthington and L. W. Galbreath for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

It appears from the record in this case that in the town of Washington, Mason county, Kentucky, which is a small town of 100 or more inhabitants, that there is a well-known spring of water which was never known to go dry, and that has been used by the people of that town for near seventy-five years. During all this time there has been an alleyway leading to it which was used by the public. This spring and alleyway appears to have been dedicated to the public by the immediate grantee of Simon Kenton, and the right of the public to use it has never been questioned until shortly before the bringing of this suit in 1900.

Once or twice during this time, with the consent of the public, gates have been put across this alleyway for the convenience of the owners of the land adjoining it, but with the understanding that at all times persons were to be allowed to pass through it without let or hindrance, and in dry seasons the gate was always thrown open for the benefit of the public.

The appellant in 1900 purchased the land adjacent to the alleyway and spring, and as there was no reservation of the alleyway and spring in the deed to him, he erected and locked a gate across the alleyway and only allowed those to enter whom he saw fit, and prohibited the appellee and others from entering and getting water. Then the appellee, for himself and the other citizens of Washington, brought this suit to enjoin appellant from obstructing the access to the spring. The court below granted the relief and appellant has appealed, and asks a reversal for the following reasons:

1st. The appellee had no right to bring the action in his own behalf and in behalf of the citizens of Washington; that if such right of action existed it should have been brought by the trustees of the town of Washington.

2d. Because there was not sufficient proof of a dedication of the spring and alleyway to the public.

As to the first proposition it appears from the proof that the town of Washington has been without trustees or other officials for thirty-five or forty years; and that the public are very much interested in keeping the alleyway open and their access to the spring unobstructed, and all the citizens of the town have a common or general interest in this matter.

Section 25 of the Code is as follows: "If the question involve a common or general interest of many persons, or if the parties be numerous, and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all."

In 17 B. M., 514, which was a case where one party brought a suit for himself and for many others under this or a similar section of the Code, and

where a like objection was made to his suing in such capacity, the court said: "It is not shown that any of the parties in whose behalf the action is brought disapprove of it. The presumption is that they concurred in its object. But even if the contrary were shown, it would be no ground for dismissing the suit, inasmuch as the plaintiffs would certainly have a right to prosecute it for themselves."

In the case at bar many of the citizens of the town gave their testimony, showing their approval and concurrence in the prosecution of this action, and even if they had not concurred the appellee alone, by reason of his interest therein, could have maintained the action.

As to the second proposition, the evidence is overwhelming that the public had used this passway and the water from the spring for at least seventy-five years, uninterruptedly and under a claim of right, and that at public expense the walls of the spring had been kept in repair and the spring had been cleaned for all this time. Several of the owners of the land now owned by appellant testified that when they owned the land they understood and recognized the right of the public to the use of this alleyway and this spring.

Perceiving no error in the judgment of the lower court it is, therefore, affirmed.

SNOWDEN v. SNOWDEN.

(Filed October 18, 1903—Not to be reported.)

Divorce—There being in the record sufficient evidence to sustain the charge of the wife's unchastity, the court should have granted a divorce to the husband.

J. Alexander Childs for appellant.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Nunn.

The appellant filed his petition in the Fayette Circuit Court against the appellee for a divorce, the grounds being adultery, and that she was guilty of such lewd and lascivious behavior as proved her to be unchaste. The appellee was summoned and failed to answer. The depositions of five witnesses were taken by the appellant, and the officer taking the depositions certified to their credibility.

While there is much incompetent and irrelevant testimony contained in the proof, yet we are of the opinion that there was sufficient evidence to sustain the allegation of appellant's petition, and the lower court should have granted him a divorce.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

FOWLER & GUY v. POMPELLE.

(Filed October 13, 1903—Not to be reported.)

1. **Mechanic's lien**—Amount in controversy—Jurisdiction of appeal—Where a mechanic's lien is asserted against real property the title thereto is brought in controversy, and the Court of Appeals has jurisdiction of an appeal from the judgment regardless of the amount of the claim asserted or adjudged.

2. Lien for labor performed—A person who hauls material to be used, and which is used, in the construction of a building is entitled to a lien on the building and the land on which it stands for his services under the provisions of section 2463 of the Kentucky Statutes.

A. E. Cole & Son for appellants.

W. D. Cochran for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

It appears from this record that appellants are endeavoring to enforce a lien under the mechanics' lien law for the sum of \$90 against appellee's property. The lower court dismissed their action, and they have appealed from that judgment. Appellee moves to dismiss this appeal, claiming that this court had not jurisdiction because the amount in controversy is less than \$200. Under the recent decisions of this court we can not sustain appellee's contention. In the case of *Smith's Adm'r v. Catlin, &c.*, 28 Ky. Law Rep., 381, the court said: "The amount sought to be recovered is \$199.50, with interest, and to pay which a lien is asserted upon a certain parcel of land, and asked to be enforced. It is insisted that the court has no jurisdiction of the claim because the amount in controversy is less than \$200, exclusive of interest and cost. Some cases are cited which support the contention of counsel for appellee that the fact that a lien is asserted on land, or has been adjudged against it, will not give this court jurisdiction where the amount sought to be recovered or is adjudged less than the minimum amount of which this court has jurisdiction. The opinions relied on are principally by the Superior Court. This court has been uniformly holding for a number of years that where a lien is asserted on land the title to it is brought in controversy, and the court has jurisdiction regardless of the amount of the claim asserted or adjudged. Whether the court was in error in so holding it is too late now to consider." There are several other cases to the same effect, one or more of which was where there was an attempt to enforce mechanics' liens.

The only contention made by counsel for appellee in his brief for an affirmation of this case was that the claim of appellants was for hauling material to be used, and which was used, in the erection of appellee's house, and that for such labor there is no lien given under section 2463 of the Kentucky Statutes.

That section, in so far as it is necessary to quote, is as follows: "A person who performs labor or furnishes material in the erection, altering or repairing a house * * * by contract with * * * the owner, contractor, or subcontractor. * * * shall have a lien thereon and upon the land upon which the said improvements shall have been made."

Counsel in this case have not referred us, nor have we been able to find any case construing this section of the statutes with reference to this class of labor. Appellants' claim was for labor in hauling frames, dressed lumber, laths, shingles, doors, sash, sand and brick used in the erection of appellee's building, and as alleged in the petition by contract with the appellee and the contractor who erected the house and under a contract by them to pay the same. It is conceded that the material man who furnished these

articles to appellants to haul, and the laborers and contractor who actually erected the building, have liens for the material furnished and the labor performed, yet it is claimed by appellee that these appellants, who performed labor just as necessary to the erection of the buildings as the persons furnished the material or the persons who nailed the lumber on the building, have no lien. We can not agree to this construction of the statute. In our opinion, under a proper construction of the statutes, they are just as much entitled to a lien for their services as any of the persons named.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

WIGGINTON, &c. v. NEHAN.

(Filed October 13, 1903—Not to be reported.)

1. Motion for new trial—It appearing from the language of a motion for a new trial in an equity case tried in a court of continuous session that the motion was intended as a motion to set aside the judgment, it will be considered as such, notwithstanding it was filed too late for consideration as a motion for new trial.

2. Party to action—Where the purchaser of real estate at judicial sale executed sale bonds, appeared by attorney to obtain a respite of a rule which had been served upon him for nonpayment of the bonds, and afterwards filed exceptions to a subsequent sale of the property, he was before the court for all purposes connected with the second sale, its confirmation, and the collection of the proceeds thereof.

3. Same—By taking an appeal from the judgment of court confirming a sale of real estate, the purchaser at a former sale renders himself amenable to the jurisdiction of the appellate court, as well as to that of the lower court for whatever purpose the case may be remanded to that court.

4. Sale of real estate—Advertisement—The mere allegation in a motion to set aside a judgment for the sale of real property, that the sale was not advertised according to law, will not be considered by the court as a ground for setting aside the judgment in the absence of allegation and proof showing wherein the sale was not properly and legally advertised.

5. Same—Appraisement—Affidavits of witnesses stating that property sold by order of court was worth considerably more than the value fixed by the appraisers will not be allowed to overthrow the sworn valuation of the appraisers in the absence of a statement of facts showing reasons why the opinions of such witnesses should be given unusual weight.

6. Same—Where the purchaser at judicial sale fails to pay his sale bonds and a second sale of the land is ordered, a second appraisement is not necessary.

7. Redemption of real estate—A purchaser at judicial sale who fails to pay his sale bonds has no right of redemption from the second sale, and can not complain that the property sold for less than two-thirds of its appraised value at the second sale.

8. Divisibility of land—The mere fact that a tract of land contains ninety-five acres does not of itself establish the fact that it is divisible without materially impairing its value, and this court will not disturb the finding of the trial court, that it was not divisible without materially impairing its value, in the absence of proof.

9. Judicial sales—Setting aside—A sale of real estate by order of court will

2. Lien for labor performed—A person who hauls material to be used, and which is used, in the construction of a building is entitled to a lien on the building and the land on which it stands for his services under the provisions of section 2463 of the Kentucky Statutes.

A. E. Cole & Son for appellants.

W. D. Cochran for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Nunn.

It appears from this record that appellants are endeavoring to enforce a lien under the mechanics' lien law for the sum of \$90 against appellee's property. The lower court dismissed their action, and they have appealed from that judgment. Appellee moves to dismiss this appeal, claiming that this court had not jurisdiction because the amount in controversy is less than \$200. Under the recent decisions of this court we can not sustain appellee's contention. In the case of *Smith's Adm'r v. Catlin, &c.*, 23 Ky. Law Rep., 381, the court said: "The amount sought to be recovered is \$199.50, with interest, and to pay which a lien is asserted upon a certain parcel of land, and asked to be enforced. It is insisted that the court has no jurisdiction of the claim because the amount in controversy is less than \$200, exclusive of interest and cost. Some cases are cited which support the contention of counsel for appellee that the fact that a lien is asserted on land, or has been adjudged against it, will not give this court jurisdiction where the amount sought to be recovered or is adjudged less than the minimum amount of which this court has jurisdiction. The opinions relied on are principally by the Superior Court. This court has been uniformly holding for a number of years that where a lien is asserted on land the title to it is brought in controversy, and the court has jurisdiction regardless of the amount of the claim asserted or adjudged. Whether the court was in error in so holding it is too late now to consider." There are several other cases to the same effect, one or more of which was where there was an attempt to enforce mechanics' liens.

The only contention made by counsel for appellee in his brief for an affirmance of this case was that the claim of appellants was for hauling material to be used, and which was used, in the erection of appellee's house, and that for such labor there is no lien given under section 2463 of the Kentucky Statutes.

That section, in so far as it is necessary to quote, is as follows: "A person who performs labor or furnishes material in the erection, altering or repairing a house * * * by contract with * * * the owner, contractor, or sub-contractor. * * * shall have a lien thereon and upon the land upon which the said improvements shall have been made."

Counsel in this case have not referred us, nor have we been able to find any case construing this section of the statutes with reference to this class of labor. Appellants' claim was for labor in hauling frames, dressed lumber, laths, shingles, doors, sash, sand and brick used in the erection of appellee's building, and as alleged in the petition by contract with the appellee and the contractor who erected the house and under a contract by them to pay the same. It is conceded that the material man who furnished these

articles to appellants to haul, and the laborers and contractor who actually erected the building, have liens for the material furnished and the labor performed, yet it is claimed by appellee that these appellants, who performed labor just as necessary to the erection of the buildings as the persons furnished the material or the persons who nailed the lumber on the building, have no lien. We can not agree to this construction of the statute. In our opinion, under a proper construction of the statutes, they are just as much entitled to a lien for their services as any of the persons named.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

WIGGINTON, &c. v. NEHAN.

(Filed October 13, 1903—Not to be reported.)

1. Motion for new trial—It appearing from the language of a motion for a new trial in an equity case tried in a court of continuous session that the motion was intended as a motion to set aside the judgment, it will be considered as such, notwithstanding it was filed too late for consideration as a motion for new trial.

2. Party to action—Where the purchaser of real estate at judicial sale executed sale bonds, appeared by attorney to obtain a respite of a rule which had been served upon him for nonpayment of the bonds, and afterwards filed exceptions to a subsequent sale of the property, he was before the court for all purposes connected with the second sale, its confirmation, and the collection of the proceeds thereof.

3. Same—By taking an appeal from the judgment of court confirming a sale of real estate, the purchaser at a former sale renders himself amenable to the jurisdiction of the appellate court, as well as to that of the lower court for whatever purpose the case may be remanded to that court.

4. Sale of real estate—Advertisement—The mere allegation in a motion to set aside a judgment for the sale of real property, that the sale was not advertised according to law, will not be considered by the court as a ground for setting aside the judgment in the absence of allegation and proof showing wherein the sale was not properly and legally advertised.

5. Same—Appraisal—Affidavits of witnesses stating that property sold by order of court was worth considerably more than the value fixed by the appraisers will not be allowed to overthrow the sworn valuation of the appraisers in the absence of a statement of facts showing reasons why the opinions of such witnesses should be given unusual weight.

6. Same—Where the purchaser at judicial sale fails to pay his sale bonds and a second sale of the land is ordered, a second appraisal is not necessary.

7. Redemption of real estate—A purchaser at judicial sale who fails to pay his sale bonds has no right of redemption from the second sale, and can not complain that the property sold for less than two-thirds of its appraised value at the second sale.

8. Divisibility of land—The mere fact that a tract of land contains ninety-five acres does not of itself establish the fact that it is divisible without materially impairing its value, and this court will not disturb the finding of the trial court, that it was not divisible without materially impairing its value, in the absence of proof.

9. Judicial sales—Setting aside—A sale of real estate by order of court will

not be set aside on the ground that the judgment debtor had agreed with a purchaser at a previous judicial sale to grant him further indulgence in the payment of the sale bonds where no evidence of the agreement appears in the record.

10. Same—A judicial sale of real estate will not be set aside on the ground that the court in adjudging a second sale on the failure of the purchaser at the first sale to pay his sale bonds directed the commissioner not to receive bids from such purchaser, where nothing appears to show an intention on his part to bid at the second sale or that he could have paid for the property if it had been knocked down to him.

Samuel Avritt for appellants.

Lieber & Lincoln for appellee.

Appeal from Jefferson Circuit Court, Chancery division No. 2.

Opinion of the court by Judge Settle.

On May 21, 1894, Margeretha Imhof sold and conveyed to appellant, J. H. Wigginton, ninety-five and nine-tenths acres of land in Jefferson county. The consideration for the land was a lot in Louisville conveyed Mrs. Imhof by J. H. Wigginton at a valuation of \$575 and the assumption by the latter of four notes of \$740.11 each, which the former had theretofore executed in part payment for the land to one George Schuster, by whom it was sold and conveyed to her, which four notes Schuster assigned to the appellee, J. M. Nehan.

The appellant, J. H. Wigginton, took possession of the land at the time of his purchase and continued therein until May, 1901, during which time he paid in full one of the lien notes assumed by him, and made numerous payments on one or more of the others. In April, 1899 (eleven months after the maturity of the last note), appellee Nehan instituted suit on the unpaid notes, and to enforce the lien retained in the deed from Schuster to Mrs. Imhof to secure their payment.

For the accommodation of the appellant, J. H. Wigginton, action was stayed until January, 1900, at which time judgment was rendered against him by the lower court in appellee's favor for the amount due on his notes and for costs, and also for a sale of the land in satisfaction thereof. By direction of the court's commissioner the land was duly appraised and its value placed at \$2,000, and after its advertisement by hand bills, and three insertions in a daily newspaper, as required by the judgment, it was sold at public outcry, and the appellant, B. M. Wigginton, a son of J. H. Wigginton, became the purchaser at the price of \$1,825. He did not, however, execute the sale bonds until compelled by rule to do so, but the bonds were then given with his father as surety, without objection from the appellee.

The purchaser having failed to pay the first bond, which matured in August, 1900, on October 3, following, a rule was issued by the court, at appellee's instance, against the purchaser and his surety to pay it. Though both of them were served with the rule they failed to respond, and it was made absolute; but after their arrest under attachment they appeared by counsel, and by appellee's consent the rule was rescripted from time to time until December 22, 1900. In fact no action was taken against appellants under the rule until after the maturity of the last bond, which became due February 19, 1901, but on February 26 another rule issued against appellants, return-

able March 2 following. On motion of the appellant action was delayed on this rule until March 9, and it was then made absolute, and two weeks later appellants were given notice by appellee that he would, on March 30, move the court for an order directing a resale of the land. No resistance was offered by the appellants to the motion, and it was granted by the court, and judgment duly entered directing a resale of the land in payment of the balance of the debt due, which the judgment stated to be \$1,482.53, the appellants having paid \$600 on the sale bonds after their execution.

The judgment last-named directed the sale of the land for cash, and ordered the commissioner to receive no bids from the appellants. Under this judgment the land was resold on April 22, 1901, at which sale the appellee became the purchaser at the price of \$1,462.24. The sale was reported to the court April 29, and laid over for exceptions, and as the land had brought \$12.71 in excess of appellee's debt, interest and costs, that sum was collected by the commissioner of appellee, and paid into court.

On May 4, 1901, J. H. Wigginton filed exceptions to the report of sale upon the ground alone that the value fixed upon the land by the appraisers was less than it was worth. On May 6 the exceptions were overruled and the sale confirmed, but with leave to the appellants until May 8 to pay the amount of the purchase price and retake the property. But the appellants failing to avail themselves of this privilege, the court ordered that a deed be made by the commissioner conveying the land to the purchaser, which was accordingly done.

On May 25, 1901, more than fifteen days after entering the order confirming the sale, and more than thirty days after the judgment of resale, the appellant filed a motion and grounds for a new trial, and to set aside the two judgments and the last sale under the second judgment, which the court overruled June 23, 1901. The appellants complain of the judgment and proceedings of the lower court whereby they were deprived of the land in controversy, and ask a reversal upon the following grounds set forth in their motion for a new trial, and to set aside the judgments and sale: First, because the judgment of resale of March 30, 1901, is erroneous and contrary to law; second, that B. M. Wigginton, purchaser of the land under the first judgment, was not made a party and was not properly before the court; third, that the land was not advertised for sale according to law; fourth, that the land was appraised at much less than its real value; fifth, that it sold for much less than two-thirds of its market value, and the sale was not made by the commissioner according to law; sixth, that the land is divisible without materially impairing its value, and less than one-half of it would have sold for enough to pay the balance due on appellee's debt; seventh, that in consideration of certain sums, aggregating \$600, paid by appellant, B. M. Wigginton, to appellee between the first and second sales, it was understood that the latter would give him further time to pay the balance due on the land, which time was not given; eighth, that the court erred in adjudging that the appellants be excluded from bidding at the last sale of the land.

Section 997, Kentucky Statutes, seems to provide that applications must be made in courts having continuous sessions for new trials in equity causes, and that, too, within fifteen days after judgment. It appears from the record that the motion for a new trial in this case was made beyond the time.

fixed by the section *supra*, but we are disposed to consider the grounds for a new trial as a motion to set aside the judgment in question, especially as we find from the language of the motion that it was so intended. Thus treating it, we are of the opinion that the first ground, viz., that "the judgment of resale of March 30, 1901, is erroneous and contrary to law," presents nothing for the consideration of the court, as it states a mere conclusion, and indicates no particular in which the judgment is either erroneous or invalid.

The second ground of the motion is specific, as it is therein contended that B. M. Wigginton, the purchaser of the land at the first sale, is not a party to the action, nor properly before the court; but we do not think this contention good, as by his purchase of the land at the first sale, his execution of the sale bonds, his appearance by attorney to obtain a respite of the rule against him and his surety, to say nothing of the service of the rule upon him, and the filing of his exceptions to the last report of sale, he made himself a party to the action for all purposes connected with its sale, its confirmation, and the collection of the proceeds, as has been repeatedly held by this court. Besides, by taking the appeal he has made himself amenable to the jurisdiction, not only of this court, but of the lower court as well, for whatever purpose the case may be remanded to that court.

The third ground of the motion, that the land was not advertised for sale according to law, is a mere conclusion, in that it fails to specify in what respect the sale was not properly and legally advertised. The judgment directs the proper advertisement, the report of the commissioner shows that it was so advertised, and in the absence of either allegation or proof to the contrary, it must be presumed that the commissioner did his duty in the matter of the sale as directed by the judgment, and required by law.

The fourth ground of the motion goes to the matter of the appraisement, and was also raised by the exceptions filed to the sale. No proof was offered in support of the exception, but in support of the motion to set aside the sale and judgment made after the confirmation of the sale appellants filed the affidavits of two persons, who testified that the land is worth considerably more than the value fixed by the appraisement, but there is no fact stated by either witness to the effect that their reasons or opportunities for knowing the value of the land are such as to give their testimony unusual weight; what they say was a mere expression of opinion, and can not be allowed to overthrow the sworn valuation by the appraisers.

We do not agree with counsel for appellants that an appraisement before the second sale was necessary. The one appraisement that was made before the first sale was sufficient. It was decided by this court in *McKee v. Stein*, Gd'n, 91 Ky., 240, that where a purchaser at judicial sale, whether he be the defendant or a stranger, fails to pay his sale bonds, and a second sale is made to satisfy them, he has no right to redeem the land from the second sale, and no appraisement is required where no right to redeem the land exists.

The fifth contention of the appellants, that the land sold for less than two-thirds of its "market" value, is likewise untenable, as no right of redemption exists in favor of either of them.

The sixth ground is that the land is divisible without impairing its value,

and that the court should have directed the commissioner to sell it in separate parcels, or only so much as would pay the debt. No evidence, in the form of affidavits, or otherwise, was offered by appellants to prove that the land was divisible; the fact that the tract contains ninety-five acres does not necessarily establish that fact. In *Lucy v. Hopkins*, 11 Ky. Law Rep., 907, it was said by this court: "Error does not appear from the direction in the judgment as to the mode of sale. * * * The petition need not, however, expressly aver whether the property is or is not divisible. This may appear by the description of it in the pleading. The court is then satisfied by the pleading of the fact." (*Cockrell v. Mize*, 11 Ky. Law Rep., 637; *Sears v. Henry*, 13 Bush, 413.)

In the case at bar the land was accurately described in the petition; it was for the court to determine whether it could be divided without materially impairing its value; it did so decide, and there is nothing appearing from the record that would authorize us to conclude that the decision is erroneous.

The seventh ground of complaint is that appellant, B. M. Wigginton, between the dates of the two sales, paid to appellee on the sale bond divers sums, aggregating \$600, "with the understanding" that further indulgence would be given him (Wigginton) by which to pay the balance due. If there were such an understanding as here claimed, it is strange it was not made known before the last judgment of sale was taken, for both the Wiggintons had written notice from appellee of the date upon which his motion for the judgment would be made. It is also strange that two rules should have been taken up against appellants to compel them to pay the bonds given at the first sale, and these rules respited time and again, in order to get a settlement of the amount due, but to no avail. And it is also passing strange that no evidence whatever was introduced by appellants on the motion for a new trial to prove the alleged agreement for indulgence. It is not shown either that there was any consideration for such an agreement; the payments were made after the first bond became due, and were coerced by the rule; in fact there is no evidence in the record that such an agreement was ever made.

The eighth, and last, ground urged is that the court erred in directing the commissioner to permit no bidding for the land by the appellants. This court has never decided the question here raised. But in the case of *Hughes v. Swope*, 88 Ky., 254, where complaint was made that the commissioner resold the property because the purchaser said he could not execute the bond that day, it was held by this court that the commissioner was vested with a discretion in such matters, and approved his action. In *Murdock's case*, 2 Bland (Maryland), 465, it is said: "This court will not suffer its proceedings to be delayed or prevented in any way whatever, and, therefore, when it has ascertained that a person who had been reported by the trustee (commissioner) as the highest bidder had been unable to comply with his bid, or had conducted himself fraudulently, or had attempted to baffle the court, upon a resale the trustee has been ordered to reject the bid of such person altogether."

Without questioning the soundness of the rule thus stated, we deem it unnecessary to apply it in this case, although it is shown by the record that appellants were in contempt of the lower court in failing throughout to

comply with the rules issued against them. But as there is nothing in the record to show that they had any intention of bidding at the resale of the property, or that they were able to pay for it if knocked down to them, or either of them, it is manifest that they were not prejudiced by the provision of the judgment refusing them the right to bid.

We regard it unnecessary to consider the alleged error in the amount of the judgment, as it was not made a ground of exception to the report of sale, nor relied on in the motion thereafter made to set aside the judgment and sale and for a new trial; indeed it may be said that all the matters relied on in support of the motion, if true, should have been presented in the form of exceptions to the report of sale, and supported by proof, for it is a well-settled rule, approved by this court, that where objections which might or would defeat the confirmation of the sale, are known to the purchaser, or a party, before confirmation, but he fails to urge them, he can not do so after confirmation. (*Huler v. Armstrong*, 7 Bush, 590; *Fishback v. Col. Blg. Asso'n*, 20 Ky. Law Rep., 795.)

For the reasons indicated the judgment of the lower court is affirmed.

THOMPSON, &c. v. BROWNLIE, &c.

(Filed October 13, 1903—Not to be reported.)

1. Judgment—Failure to describe lands ordered sold—The judgment in an action instituted for the purpose of liquidating the affairs of a corporation, directing the sale of lands owned by the corporation, is not void because neither the petition nor the judgment described the lands, and can not be set aside after the term at which the sale was confirmed, although such failure would have been reversible error on appeal.

2. Same—Caveat emptor—While it is to the interest of parties that all holders of liens on property to be sold by order of the court should be made parties to the action, yet where the holder of a lien was not made a party it was not error to adjudge the title to be sold as it was, and a purchaser is not entitled to have such sale set aside, the doctrine of caveat emptor applying especially to judicial sales.

Hazlerigg & Chenault and W. L. Brown for appellants.

Sam C. Hardin for appellee, J. McNeill.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge O'Rear.

In this suit to wind up the affairs of a mining corporation, the petition failed to describe the real estate owned by it. A judgment was entered appointing a receiver to take charge of all the property of the corporation, real and personal, and to sell so much of it as was necessary to pay its debts, and distribute the remainder among the stockholders. The amount of the indebtedness had not been ascertained, nor was the property described in the judgment of sale. At the sale appellee McNeill became the purchaser.

The receiver's report of sale to McNeill was confirmed in 1895. In 1897 McNeill filed objections and exceptions to the report on the ground that the property had not been described in the petition and judgment. He insists that the judgment and all proceedings under it were void.

It has been decided by this court, in *Carpenter v. Strother*, 16 Ben Mon., 295, and in *McGowan v. Pennebaker*, 3 Met., 502, that a sale can not be set aside after the expiration of the term at which it is confirmed unless the judgment was void.

Dawson v. Litsey, 10 Bush, 411, decides that an order confirming a sale made under the judgment of a court is final. (*Bean v. Hoffendorfer*, 84 Ky., 685; *Kincaid v. Tutt*, 88 Ky., 392; section 518, Civil Code.)

The question, therefore, recurs in this case whether the judgment under which the land was sold is void. Section 125 of the Civil Code requires that a petition for the recovery of land or for its subjection to a demand of the plaintiff must describe it so that it may be identified. Under this section it was held in *Blakewell v. Townsend*, 91 Ky., 609, that where neither the petition nor the judgment of sale, nor the order confirming the sale, described the land at all, so that it could be identified, a judgment of the sale of so much of the land as did not lie in the county where the action was pending was void. The court held that the jurisdiction to sell real estate depended upon the statement of certain facts, and that the existence of those facts must appear affirmatively in the record. This action, however, is not one to recover land, nor to subject it to a demand of the plaintiffs. It is for the liquidation of the affairs of a corporation, brought in a court having jurisdiction, in which the sale of certain real estate owned by the corporation came to be decreed as an incident of the suit. We do not doubt but that it would have been more regular to have described the land in the judgment so that it might be identified from the judgment, and that a failure to so describe it is reversible error. (*Knott v. Jonson*, 3 Ky. Law Rep., 330; *Bartlett v. Gray*, 4 Ky. Law Rep., 615; *McDyer v. Scaggs*, 7 Ky. Law Rep., 222; *Terry v. Swinford*, 19 Ky. Law Rep., 712.)

We are aware of no authority nor reason for holding that a judgment of sale of real estate in such a proceeding as this, where the judgment did not describe the land sold, was void.

Where a sale is erroneous only, the purchaser will not be relieved on that account if the proceedings in the conduct of the sale were regular. (*May v. Ball*, 22 Ky. Law Rep., 1681; *Blake v. Wolf*, 23 Ky. Law Rep., 1143; *Scott v. Ford*, 20 Ky. Law Rep., 1932; *Haynes v. Payne*, 5 Ky. Law Rep., 242.)

Another objection urged against the sale by the purchaser was that a part of the land which he bought was encumbered; there being a lien of \$100 owing to the vendor. While it may have been to the interest of the parties that the holders of all liens against the property should have been parties to the action, so that the property might have been sold free of encumbrance, yet where the holder of a lien was not a party to this action it was not error to adjudge the title held by the corporation to be sold as it was. Certain the judgment of sale was not void. The purchaser bought only such title as the corporation had. He has received, or can receive, all that was sold. The doctrine of *caveat emptor* applies especially to judicial sales. (*McMurry v. Montgomery, & Co.*, 86 Ky., 206.)

The judgment of the circuit court setting aside the sale and quashing the sale bonds is reversed and cause remanded for further proceedings consistent herewith.

BOGARD v. ILLINOIS CENTRAL R. R. CO.

(Filed October 13, 1903.)

Personal injuries—Damages—Pleading—In an action to recover damages for personal injuries alleged to have been inflicted by reason of the negligent operation of a railroad train the defendant company is not entitled to have the plaintiff give the number of the train producing the injury and the names of the parties in charge of it, and the court is not authorized to dismiss plaintiff's petition for failure to furnish such information; but the defendant is entitled to have the plaintiff state the time when, and the place where, the accident occurred, and whether it occurred during the day or night or by a freight or passenger train, provided the defendant makes a showing that it has not such information nor the means for readily ascertaining it.

Hendrick & Miller for appellant.

Wheeler & Hughes, J. M. Dickinson and Pirtle & Trabue for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 7th of October, 1902, the appellant, Abe Bogard, brought suit against the Illinois Central R. R. Co. in the McCracken Circuit Court to recover damages alleged to have been suffered by him by reason of certain alleged acts of negligence of appellee in the operation of one of its engines and train of cars in McCracken county. The petition is as follows:

"The plaintiff, Abe Bogard, says that he is a citizen and resident of the State of Kentucky and county of McCracken, and that the defendant is a corporation, authorized by the laws of Kentucky to operate a railroad, and is now, and was at all times hereinafter named, operating and running a railroad in and through the county of McCracken and State of Kentucky, and said defendant is empowered by law to sue and be sued, contract and be contracted with; and heretofore, and within the last twelve months, while engaged in operating and running an engine along its said road in the said county of McCracken, the defendant, without fault or negligence on the part of the plaintiff, carelessly, recklessly and wrongfully, and by willful, reckless and wrongful act, ran its engine and train upon and against plaintiff, and knocked him down, and greatly bruised and injured his legs, thighs, hips, back, spine, arms, chest, neck and head, and made plaintiff sick and sore for many days, and plaintiff's said injuries are permanent, and he will never recover from some of same; thereby negligently inflicting upon him, and causing him to suffer great bodily pain and mental agony, and causing him to lose much valuable time, and to incur doctor's bill to the amount of \$25; and by said collision, caused by the negligence and wrongful act of defendant running its engine aforesaid upon plaintiff, he has been damaged in the sum of \$2,000.

"Wherefore, he prays judgment against the Illinois Central R. R. Co. for \$2,000, his costs herein expended, and for all proper relief."

The railroad company at the appearance term of the action moved the court, in writing, to require the plaintiff, in addition to the facts alleged in his petition, to state the date of the injury complained of, the point where it occurred, the number of the train producing it, and the parties in charge

thereof. Over the objections of plaintiff the motion was sustained, and, declining to plead further, his petition was dismissed without prejudice, and he has appealed to this court. The only question which arises upon the present appeal which is reviewable in this court is whether or not the court below had the power to grant the application of the defendant; and, if so, whether the facts in the case justified their exercise herein. If it has exceeded its authority we have jurisdiction, and it is our duty to correct the error of law. There is no uncertainty or indefiniteness with respect to the nature of the charge made against the defendant. The difficulty, under which the defendant claims to labor, is that the plaintiff has not sufficiently specified the facts as to the time and place where the alleged acts of negligence occurred to enable them to intelligently defend the action.

The defendant operates a trunk line through McCracken county, and it has perhaps fifty miles of track within the county; in course of twelve months thousands of trains pass over its road, operated by hundreds of different employes, at all hours of the day and night. The plaintiff necessarily has information as to the time and place of the accident, whether it was day or night, whether the injury was inflicted by a freight or passenger train; and a state of case might exist when it would be impossible for the defendant to secure this information, so necessary for the proper conduct of its defense. When such a case arises the trial court has inherent power to require such information to be furnished. This question was very fully considered in the case of the Commonwealth v. Snelling, 15 Mas., 321. The opinion in that case was delivered by Chief Justice Shaw. It was held that where a person is indicted for a libel containing general charges of official misconduct against a magistrate, the court was authorized to require him previously to the trial, in case he intended to give the truth of the publication in evidence, to file a bill of particulars specifying the instances of misconduct which he proposes to prove. After a thorough review of all the authorities, he says: "The general rule to be extracted from these analogous cases is that where, in the course of a suit, from any cause, a party is placed in such a situation that justice can not be done in the trial, without the aid of the information to be obtained by means of a specification or bill of particulars, the court, in virtue of the general authority to regulate the conduct of trials, has power to direct such information to be seasonably furnished, and in authentic form."

In *Tilton v. Beecher*, 54 N. Y., 176, in an action of "criminal con.," the application of the defendant for a bill of particulars was refused by the trial court on the ground of want of power to grant the bill. Upon appeal to the appellate court of New York it was held that the court below had the power to grant a bill of particulars. The opinion in that case was written by Judge Rapello, and after a most exhaustive review of the authorities, English and American, bearing upon the question, said: "In action upon money demands, consisting of various items, a bill of particulars of the dates and description of the transactions out of which the indebtedness is claimed to have arisen is granted almost as a matter of course, and this proceeding is so common and familiar that when a bill of particulars is spoken of it is ordinarily understood as referring to particulars of that character. But it is an error to suppose that bills of particulars are confined to actions for the

recovery of money demands arising upon contract. A bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading. They have been ordered in action of libel, escape, trespass, trover and ejectment, and even in criminal cases, on an indictment for being a common barrater, on an indictment for nuisance, etc., and concludes as follows: "A reference to a few of the authorities upon which these decisions were founded will show that in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial that he should be apprised beforehand of the particulars of the charge which he is expected to meet, the court has authority to compel the adverse party to specify those particulars so far as in his power."

A full discussion of the law applicable to motions of this character is found in 8 En. of P. & Pr., 517. The author says: "There is no inflexible rule as to the class of cases in which a bill of particulars will be granted, but it rests within the sound judicial discretion of the court, to be exercised only in furtherance of justice. But the rule is quite well established that a party will not be obliged to furnish facts already known to his adversary, nor when the means of ascertaining the facts are equally accessible to both parties."

We are of the opinion that upon a proper showing that defendant did not have the information or the means of readily ascertaining the time when, and place where, the accident occurred, and whether it occurred during the day or night, or was inflicted by a freight or passenger train, that the plaintiff should be required to furnish such information if in his power. But it is not necessary or proper in an action for personal injuries that the petition should set out specifically the injuries complained of, or the details of the alleged acts of negligence of the defendant in inflicting the injury. In our opinion the trial court erred in sustaining the motion to require the plaintiff to give the number of the train producing the injury, or the names of the parties in charge thereof. It is not at all probable that such information is in his possession; and if the identity of the train inflicting the injury is established, the means of ascertaining these facts are more accessible to the defendant than to the plaintiff. Nor should the motion have been sustained at all without some showing by the defendant, by affidavit or otherwise, that they did not have the required information, or reasonable means of obtaining it.

The judgment of dismissal is, therefore, reversed and cause remanded for proceedings not inconsistent with this opinion.

SANDERSON v. HUNT.

(Filed October 13, 1908.)

Slander—Discharge in bankruptcy—A judgment for slander comes within the provisions of section 17 of chapter 3 of the bankruptcy law of 1898, which except from the operation of a discharge in bankruptcy "judgments in actions * * * for willful and malicious injuries to the person or property of another," and such a judgment is not discharged by a discharge in

bankruptcy in a proceeding in which it is included in the schedule of liabilities.

Bugg & Wickliffe for appellant.

D. G. Park for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee recovered a judgment against appellant for the sum of \$3,500 in an action for slander. The writ of *capias ad satisfaciendum* was awarded appellee. Appellant, by proceedings had in bankruptcy subsequent to the judgment, was discharged of all of his provable debts. He included in his schedule of liabilities the judgment above named. The question for decision here is, was that judgment a liability from which the bankrupt was discharged under the act of congress? (80 Stat. at L., 550, chapter 541.) Section 17 of chapter 3 of the bankrupt law of 1885 provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as, first, are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; second, are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another." * * *

It is conceded that unless this claim falls within the provision of "willful and malicious injuries to the person or property of another," the exception mentioned in the act would not apply, and appellant would be discharged.

An essential element of every slander is that it shall have been maliciously uttered. Any act that is done unlawfully and maliciously is necessarily willfully done, that is, it is done of the volition of the actor. A slander is necessarily a willful and malicious act.

It is argued for appellant that the injury done by a slander is neither to the person nor to the property of the one about whom it is spoken. At common law the right of personal security consists in a person's legal and uninterrupted enjoyment of his life, of his limbs, his body, his health and his reputation. Of the "rights of persons," referred to by Blackstone (Bl. Com., page 134), their infringement is discussed in part in this language: "The security of his reputation or good name from the acts of detraction and slander are rights to which every man is entitled by reason and natural justice, since without these it is impossible to have the perfect enjoyment of any other advantage or right."

In volume 2, page 118 (Bl. Com., Cooley), under the head of "Injuries affecting personal security," he says: "As to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their body, their health, or their reputation." All these, as is each of them, are injuries to the person.

The act of congress must be understood as having used the words in the section quoted with reference to their common law acceptation. (Sutherland on Statutory Construction, 289.) An injury to one's person may be done in a number of ways. For example, it may be done to some member of his body, it may be to his health, it may be to his sense of feeling, it may be to his state or peace of mind. Any injury done to him that wounds him in

any of these parts is essentially a personal injury, that is, an injury to his person—an injury to that which constitutes a part of his person. The law may not allow a recovery for all such injuries, but for such as it does allow a recovery for it may be classed generally as a recovery for a personal injury. As was said by the Supreme Court of Rhode Island, in *McDonald v. Brown*, 58 L. R. A., 763: "Wounded feelings, mental anguish, loss of social position and standing, personal mortification, and dishonor, are clearly injuries that pertain to the person. In so far as we are aware injuries to the character are always classed in the law with injuries to the person."

In *Colwell v. Tinker*, 169 N. Y., 531, 58 L. R. A., 765, it was held that criminal conversation with the wife is a personal injury to the husband, without regard to the statutory declarations to that effect, in New York. This was in a proceeding for a discharge under the section of the bankruptcy act quoted. As touching the intent and spirit of the bankrupt laws that court well said: "The policy of the bankrupt law is to discharge the honest and unfortunate debtor from his contract obligations, and not to free him from judgments involving his fraud, which implies moral turpitude or intentional wrong or judgments for willful and malicious injuries to the person or property of another."

In the case of *Re Freche*, 109 Fed., 620, decided in June, 1901, Judge Kirkpatrick, of the United States District Court, held that a judgment based upon a criminal conversation with the daughter of the judgment creditor was not one for which a bankrupt could be discharged under the section quoted. In summing up the elements constituting the rights of the plaintiff, the father of the seduced girl, to recover in that case the learned judge said: "Therefore, upon the foundation of loss of services, there has been built up a right of the parent to recover in such action damages for the personal injuries upon him by the act of seduction, and to receive compensation for being thereby subjected to mental anguish, anxiety, permanent sorrow, dishonor and disgrace. The jury is entitled to consider all these injuries in assessing the plaintiff's damages. In this respect the injury is to the person of the plaintiff, and the damages recovered are analogous to those in action of slander or libel."

Appellant cites sections 83 and 74 of the Civil Code of Practice of Kentucky as indicating a legislative differentiation existing in this State regarding those personal injuries which appertain to the members of the person, and those which affect only the character. Section 83 of the Civil Code deals with those civil actions which may be joined in one suit. It provides: "(5.) For injuries to character. (6.) For injuries to person and property." Section 74 of the Civil Code, concerning the venue of actions, provides: "Every other action for an injury to the person of the plaintiff, and every action for an injury to the character of the plaintiff against a defendant residing in this State, must be brought in the county in which the defendant resides, or in which the injury is done."

It was, of course, competent for the legislature to provide what actions might be joined in one suit. All actions affecting real property may not be joined under that section, as, for example, an action upon a contract, express or implied, concerning real property, and an action for the recovery of real property. Yet this does not argue at all that both actions may not

affect the rights of property. It may be, too, that the legislature might have omitted from section 74 the words "and every action for an injury to the character of the plaintiff," as they were already embraced in the provision of the clause "action for the injury of the person of the plaintiff." However that may be, as said in *Colwell v. Tinker*, supra, it was the common law definition of the term "injuries to persons," that must be looked to in interpreting the act of congress, rather than the local acts of the several States.

The judgment of the circuit court refusing to discharge appellant is affirmed.

SPALDING, REVENUE AGENT, &c. v. O'CALLAGHAN'S EX'OR, &c.

(Filed October 18, 1903—Not to be reported.)

Taxation—Situs of personal property—Where the Commonwealth, through its auditor's agent, has assessed personal property in one county as belonging to a person living therein and the State and county taxes so assessed have been paid, the identical property can not be again assessed for State and county taxes for the same period in another county after a decision of the court adjudging the ownership thereof to be in a person residing in the latter county.

Wm. W. Spalding and C. S. Hill for appellants.

John S. Kelley for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is an appeal from a judgment of the Marion Circuit Court enjoining the appellants, W. W. Spalding, as auditor's agent, and John M. Cooper, presiding judge of the Marion County Court, from assessing against the appellee, C. J. O'Connell, executor of Eugene O'Callaghan, and others, certain moneys on deposit in banks at Owensboro for the years 1887 to 1897, inclusive, for taxation in Marion county. The facts on which the suit was founded are as follows: In 1887 the city of Owensboro instituted a proceeding to compel Jerry O'Callaghan, a citizen and resident of Owensboro, Daviess county, Kentucky, to list for taxation funds belonging to him which he had on special deposit in banks at Owensboro. This proceeding terminated in a judgment subjecting the property to taxation. (*City of Owensboro v. O'Callaghan*, 13 Ky. Law Rep., 418.) Shortly after the institution of this proceeding by the city of Owensboro Jerry O'Callaghan executed a deed of gift of all his property, of whatsoever kind and character, and wherever situated, to his brother, Eugene O'Callaghan, who was at that time a Roman Catholic priest, residing at Loretto, in Marion county, Kentucky. Jerry O'Callaghan continued in the possession of the property, managing and controlling it, precisely as he had done before the execution of the deed of gift, appropriating to his own purpose such part of the principal and interest as he chose. This state of affairs continued until 1896, the property not being listed for taxation by either Jerry or Eugene O'Callaghan. In 1896 the Commonwealth of Kentucky, through the sheriff of Daviess county, instituted a proceeding in the Daviess County Court to have this money assessed.

elected to have this property assessed as the property of Jerry O'Callaghan in the county of Davless, treating his deed of gift as a mere device to escape taxation, it can not be permitted to play fast and loose any more than any other litigant. Appellee does not contend that the State did not have the right to have the property assessed and subjected to taxation once. Their contention is that having procured a judgment of the Davless Circuit Court that the funds belonged to Jerry O'Callaghan, and were liable for assessment and taxation at the place of his residence, they can not disregard this proceeding upon the theory that they were mistaken as to the true ownership of the property, and again subject it in this proceeding. It is the double taxation which they object to. In our opinion it is a sound one, and the State is estopped by the judgment they procured in the Davless Circuit Court.

Judgment affirmed.

HENDRIX v. HENDRIX.

(Filed October 18, 1908—Not to be reported.)

Divorce—Power of court to set aside—The trial court is without authority to annul a decree of divorce from the bonds of matrimony on the motion of one party only after the expiration of the term at which such decree was rendered.

E. A. W. Roberts and William Cromwell for appellant.

W. L. Jett for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

On the 27th of July, 1900, the appellant filed his petition in the Franklin Circuit Court against the appellee for a divorce from the bonds of matrimony and for cause stated; that they had been living apart without any cohabitation for five consecutive years next before the filing of his action; that she abandoned him in August, 1894, and that he had endeavored to persuade her to return to his home, but she had failed and refused to do so, and that she had remained separate and apart from him ever since that date. Summons was issued and executed upon her August 4, 1900. On January 4, 1901, the appellee filed what she denominated an answer and cross petition, and denied that she had abandoned appellant at any time; and denied any effort on his part to get her to live with him, but alleged that he had abandoned her in November, 1895. She alleged that they had three children by their marriage, giving their names, and asked that the court compel him to help support them, and for alimony for herself, and that she be granted a divorce from bed and board.

The appellant took the depositions of two witnesses in his behalf, one of whom was certified by the officer taking them as a credible person, and they established the truth of the allegations in the appellant's petition. The appellee did not take any proof. On September 18, 1901, the court rendered the following judgment:

"Franklin Circuit Court. James T. Hendrix v. Christianna Hendrix. This cause coming on for trial upon the pleadings and the proof, and the

court being sufficiently advised, it is, therefore, adjudged that the plaintiff, James T. Hendrix, be, and he is hereby, divorced and forever released from the bonds of matrimony with defendant, Christianna Hendrix, and he is restored to all the rights and privileges of an unmarried man."

Thus matters stood until February 1, 1902, when the attorney for appellee filed his affidavit, stating that without his knowledge or consent an order granting the appellant the divorce was made and entered at the last term of the court (September, 1901); that he was present in court every day during the term and did not know that the case was submitted, heard and judgment rendered until after the term had expired. On May 3, 1902, the court made an order that this affidavit of appellee's attorney be taken and considered as her petition herein, and that the judgment for divorce heretofore granted to appellant be set aside and held for naught, to which appellant objected and excepted and prayed an appeal to the Court of Appeals, which was granted.

It will be observed that the answer in effect only puts in issue the allegations of the petition except in so far as it asks him to help support the children, and with reference to the children the court still has the power to compel appellant to do the proper thing by them. The only question necessary to be determined upon this appeal is, did the lower court have the power to set aside the judgment of September, 1901, granting the appellant a divorce from the bonds of matrimony?

In our opinion the court was without such power. The grounds for setting aside ordinary judgments at law or in equity after the expiration of the term do not apply to judgments for divorce, which become final. During the term, however, and while the condition of both parties remains unchanged, the judgment may be set aside at the instance of one party, but not without notice to the other. In 21 Ky. Law Rep., 482, in the case of *Bristoe v. Bristoe*, the court said: "Under the statute this court has no revisory power over a judgment for divorce. Section 426 of the Civil Code, provides that 'a judgment for divorce from the bond of matrimony may be annulled by the court which rendered it upon a petition verified by the parties in person so requesting it,' and this is the only method provided by law for the vacation of such judgments." To the same effect is the case of *Bentz v. Bentz*, 21 Ky. Law Rep., 1225, and the case of *McCracken v. McCracken*, 22 Ky. Law Rep., 1449.

From these authorities it is clear that the lower court had no authority to make the order setting aside the judgment granting the divorce, and his order with reference thereto was and is void, and the court should have sustained appellant's motion to set it aside.

For these reasons the judgment is reversed and the cause remanded for further proceedings consistent herewith.

KIRK, &c. v. ROBERSON, SHERIFF.

(Filed October 14, 1903—Not to be reported.)

1. School tax—Special legislative acts—Repeal—A special act authorizing a county to levy an annual tax in aid of the common schools in the county, provided a majority voted in favor of the tax at an election held for that

elected to have this property assessed as the property of Jerry O'Callaghan in the county of Daviess, treating his deed of gift as a mere device to escape taxation, it can not be permitted to play fast and loose any more than any other litigant. Appellee does not contend that the State did not have the right to have the property assessed and subjected to taxation once. Their contention is that having procured a judgment of the Daviess Circuit Court that the funds belonged to Jerry O'Callaghan, and were liable for assessment and taxation at the place of his residence, they can not disregard this proceeding upon the theory that they were mistaken as to the true ownership of the property, and again subject it in this proceeding. It is the double taxation which they object to. In our opinion it is a sound one, and the State is estopped by the judgment they procured in the Daviess Circuit Court.

Judgment affirmed.

HENDRIX v. HENDRIX.

(Filed October 18, 1908—Not to be reported.)

Divorce—Power of court to set aside—The trial court is without authority to annul a decree of divorce from the bonds of matrimony on the motion of one party only after the expiration of the term at which such decree was rendered.

E. A. W. Roberts and William Cromwell for appellant.

W. L. Jett for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Nunn.

On the 27th of July, 1900, the appellant filed his petition in the Franklin Circuit Court against the appellee for a divorce from the bonds of matrimony and for cause stated; that they had been living apart without any cohabitation for five consecutive years next before the filing of his action; that she abandoned him in August, 1894, and that he had endeavored to persuade her to return to his home, but she had failed and refused to do so, and that she had remained separate and apart from him ever since that date. Summons was issued and executed upon her August 4, 1900. On January 4, 1901, the appellee filed what she denominated an answer and cross petition, and denied that she had abandoned appellant at any time; and denied any effort on his part to get her to live with him, but alleged that he had abandoned her in November, 1895. She alleged that they had three children by their marriage, giving their names, and asked that the court compel him to help support them, and for alimony for herself, and that she be granted a divorce from bed and board.

The appellant took the depositions of two witnesses in his behalf, one of whom was certified by the officer taking them as a credible person, and they established the truth of the allegations in the appellant's petition. The appellee did not take any proof. On September 18, 1901, the court rendered the following judgment:

"Franklin Circuit Court. James T. Hendrix v. Christianna Hendrix. This cause coming on for trial upon the pleadings and the proof, and the

court being sufficiently advised, it is, therefore, adjudged that the plaintiff, James T. Hendrix, be, and he is hereby, divorced and forever released from the bonds of matrimony with defendant, Christianna Hendrix, and he is restored to all the rights and privileges of an unmarried man."

Thus matters stood until February 1, 1903, when the attorney for appellee filed his affidavit, stating that without his knowledge or consent an order granting the appellant the divorce was made and entered at the last term of the court (September, 1901); that he was present in court every day during the term and did not know that the case was submitted, heard and judgment rendered until after the term had expired. On May 3, 1902, the court made an order that this affidavit of appellee's attorney be taken and considered as her petition herein, and that the judgment for divorce heretofore granted to appellant be set aside and held for naught, to which appellant objected and excepted and prayed an appeal to the Court of Appeals, which was granted.

It will be observed that the answer in effect only puts in issue the allegations of the petition except in so far as it asks him to help support the children, and with reference to the children the court still has the power to compel appellant to do the proper thing by them. The only question necessary to be determined upon this appeal is, did the lower court have the power to set aside the judgment of September, 1901, granting the appellant a divorce from the bonds of matrimony?

In our opinion the court was without such power. The grounds for setting aside ordinary judgments at law or in equity after the expiration of the term do not apply to judgments for divorce, which become final. During the term, however, and while the condition of both parties remains unchanged, the judgment may be set aside at the instance of one party, but not without notice to the other. In 21 Ky. Law Rep., 482, in the case of *Bristoe v. Bristoe*, the court said: "Under the statute this court has no revisory power over a judgment for divorce. Section 426 of the Civil Code, provides that 'a judgment for divorce from the bond of matrimony may be annulled by the court which rendered it upon a petition verified by the parties in person so requesting it,' and this is the only method provided by law for the vacation of such judgments." To the same effect is the case of *Bentz v. Bentz*, 21 Ky. Law Rep., 1225, and the case of *McCracken v. McCracken*, 22 Ky. Law Rep., 1449.

From these authorities it is clear that the lower court had no authority to make the order setting aside the judgment granting the divorce, and his order with reference thereto was and is void, and the court should have sustained appellant's motion to set it aside.

For these reasons the judgment is reversed and the cause remanded for further proceedings consistent herewith.

KIRK, &c. v. ROBERSON, SHERIFF.

(Filed October 14, 1903—Not to be reported.)

1. School tax—Special legislative acts—Repeal—A special act authorizing a county to levy an annual tax in aid of the common schools in the county, provided a majority voted in favor of the tax at an election held for that

purpose, and in force by reason of a vote in its favor at the time the present Constitution was adopted, was not repealed by the adoption of the present Constitution, nor by the legislative act of July 6, 1892, regulating common schools, which provided that that act should not affect, modify or repeal any local or special laws then in force for the benefit of any school, except as to teachers therein provided.

2. Same—Such special act is not repealed by the act of March 1, 1902, authorizing the legal voters of any county to vote a school tax for the purpose of extending the term of the common schools, as the latter act is not one regulating the entire subject of common schools, but an enabling act for the benefit of such counties as see fit to take advantage of its provisions, and the county concerned has not voted a tax under it so as to exempt the taxpayers from that provided by the special act.

L. W. Robertson for appellants.

Frank P. O'Donnell and C. D. Newell for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hobson.

By an act approved April 29, 1890, the county of Mason was authorized to levy an annual tax not exceeding 25 cents on each \$100 of taxable property in aid of the common schools, provided a majority voted in favor of the tax at an election to be held for that purpose. The vote was taken, resulting in favor of the tax, and it has since been levied and collected until this controversy arose as to the tax for the year 1903. The only question made is that the special act has been repealed, and that the fiscal court of Mason county is not authorized to levy the tax.

The special act is not inconsistent with any provision of the Constitution which took effect upon its adoption, nor is it inconsistent with any provision of the Constitution requiring legislation to enforce it. It was not repealed by the act of July 6, 1892, regulating common schools, for it was provided in that act that it should not affect, modify or repeal any local or special laws then in force for the benefit of any school, except as to teachers as therein provided. (Kentucky Statutes, 4433.) A word importing the singular number only in a statute may be applied to several persons or things. (Kentucky Statutes, 457.) The words "any school," therefore, in the provision referred to may be applied to several schools, and as the special act of April 29, 1890, was for the benefit of the schools of Mason county, it was saved from repeal by this provision. (Roberts v. Clay City, 102 Ky., 88; Hickman College v. Trustees, 23 Ky. Law Rep., 1271, and cases cited.)

It is insisted, however, that the act was repealed by the act authorizing the legal voters of any county to vote a school tax for the purpose of extending the term of the common schools, approved March 1, 1902. (Acts 1902, page 98.) But that act as appears from its title, as well as the provisions of the act, is prospective in its operation. Its purpose was to widen the power of levying taxes in aid of the common schools, not to take away power that already existed. It provides, in substance, that upon a proper petition being filed the county court shall order an election to be held to take the sense of the legal voters of the county as to a tax not exceeding 15 cents on each \$100 worth of taxable property assessed in the county for the purpose of extending the term of the common schools. If the tax is voted, the sheriff is to collect

it and pay it over to the county superintendent, who is to distribute it. It is also provided in the act that when a tax shall have been voted in any county under the provisions of the act it shall exempt the taxpayers in any common school district from the payment of any tax that may have been voted in the district for the purpose of extending the school term. (Section 12.) No tax has been voted in Mason county under the act, and no vote has been taken on the question. Until such a tax is voted the taxpayers in any common school district are not exempt from the payment of taxes that have been voted for the purpose of extending the school term. It was plainly the legislature's intent to leave existing taxes already voted in force in common school districts until a tax shall have been voted in the county under the provisions of the act.

It has often been held that where the legislature passes a general law which purports to regulate an entire subject, other acts within its purview are repealed, but this rule has no application to the act of March 21, 1902. It is not an act regulating the entire subject of common schools, but simply an enabling act for such counties as see fit to take advantage of its provisions, and until this is done existing taxes in school districts are not affected by its provisions. In *Pearce v. Mason County*, 18 Ky. Law Rep., 266, this court, after referring to the provisions of the Constitution in regard to special legislation said: "These provisions look altogether to future legislation, and manifestly do not affect, directly or indirectly, laws already in force. The existing special legislation on the subjects named in the various subsections of section 53, with respect to which special acts are now prohibited, does not stand repealed by the mere force of such prohibition. * * * The positive mandate is against local and special legislation in the future, and even if we conceive that the Constitution breathes a spirit of hostility to past legislation of that class, it is expressly continued in force until repealed in the manner we have heretofore pointed out; nor does the fiscal court lack power to carry out the provision of the act in lieu of the old court of claims and levy. The provisions of the law creating such court and conferring authority on it seem ample." (Section 144, Constitution; section 1840, Kentucky Statutes.)

Judgment affirmed.

POSTAL TELEGRAPH CABLE CO. v. CITY OF NEWPORT.

(Filed October 14, 1903—Not to be reported.)

1. Telegraph company—Municipal tax—Where a telegraph company constructed its lines along the streets and alleys of a city under an ordinance granting it such privilege and providing that it should pay a stipulated annual license tax to the city therefor, such a tax will be considered as a contractual obligation; and the company can not be relieved of the payment of same on the ground that the ordinance was void because not accepted in writing by the company as provided therein, as the act of the company in constructing its line will be deemed an acceptance on its part and the acquiescence of the city in that act will be considered as a waiver of an acceptance in writing.

2. Same—Interstate commerce—Such a tax can not be considered a license tax within the inhibitions of the Federal Constitution with reference to the imposition of restrictions upon interstate commerce.

3. Taking of property without compensation—The provisions of the act of congress of July 4, 1866, giving to telegraph companies, under certain conditions, the right to construct and operate their lines over and along military and post roads are permissive only, and do not authorize the taking of municipal property without compensation.

4. Discrimination in taxation—The taxation in question being considered as a contractual obligation, it is not subject to the criticism that it is in violation of the State Constitution because unreasonable and not uniform, in the absence of any allegation that any other telegraph company has been admitted to the use of the streets without compensation.

Harlan Cleveland for appellant.

Aubrey Barbour for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hobson.

The city of Newport by an ordinance of December 5, 1895, granted to the Postal Telegraph Cable Co. the right to use the streets and alleys of the city for the purpose of erecting its poles and stringing its wires, and it was provided in the ordinance that the company should pay the city a license tax of \$1,000 per annum. This suit was filed on September 9, 1899, by the city against the company; it was alleged in the petition that the defendant secured from the plaintiff the use of its streets for the purpose named by the ordinance referred to; and that thereunder the defendant had erected its poles and strung its wires in the streets and alleys of the city and had since enjoyed the rights and privileges granted to it, and had thereby accepted the ordinance, but that in disregard of its contract it had failed to pay the city the \$100 due for the year ending December 5, 1897, or for the year ending December 5, 1898. A copy of the ordinance was filed with the petition as an exhibit and judgment was prayed for the \$200 due. The defendant filed an answer, in which it admitted the passage of the ordinance, but denied that it thereby acquired the right to use the streets and alleys. It alleged that by the ordinance it was provided in substance that if the company failed within thirty days after the approval of the ordinance to signify to the general council its acceptance of the grant in writing, subject to the limitations therein set out, then all the rights and privileges granted should become null and void, and of no effect. It alleged that it did not accept in writing, or otherwise, the provisions of the ordinance, but it admitted that shortly after the passage of the ordinance it began the erection of its poles and the stringing of its wires in and over the streets and alleys of the city, and has since operated its system thereon. Further answering, the defendant alleged that on March 17, 1866, it accepted the act of congress, approved July 4, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," and the acts amendatory thereof, and that by the statutes of the United States it thus acquired the right to construct and operate its lines over and along all military and post roads of the United States, and that all public roads and highways and all letter carrier routes established in any city or town for the collection and delivery of mail were by these statutes declared post roads; that all the streets and alleys of the city of Newport are such post roads, and that it had erected its poles and strung its wires therein

under the acts of congress, and that it voluntarily submitted to such provisions of the ordinance as related to the manner in which its poles should be erected, but not to so much of it as required it to pay \$100 a year; that it paid its taxes as other taxpayers; that other companies are using the streets, just as it is using them without being required to pay \$100 a year; that there was no consideration for the alleged contract which made an unreasonable discrimination between the defendant and other telegraph companies, and was in violation of the interstate commerce clause of the United States Constitution and the act of congress on the subject of post roads. The court sustained a demurrer to the answer after it had been several times amended, and the defendant failing to plead further, entered judgment in favor of the plaintiff.

A reversal is sought in this court on the ground that under the denials of the answer the ordinance can not be treated as a contract, but only as a license tax, which is void under the United States Constitution as a restriction on interstate commerce, and also void under the State Constitution because unreasonable and not uniform. The congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a State or one of its municipalities than the property of an individual. The acts of congress, referred to, in the answer, conferred on the defendant no right to use the streets and alleys of the city of Newport which belonged to the municipality. This was expressly held in *St. Louis v. Western Union Telegraph Co.*, 148 U. S., 92, and *Postal Telegraph Co. v. Baltimore*, 156 U. S., 210. The acts of congress are only permissive so far as the rights of the Federal government go. The defendant entered on the streets soon after the ordinance was passed and constructed its system. It had no authority to do so except under the ordinance. Its action was an acceptance of the ordinance in the absence of some expressed disclaimer, which is not alleged. Its failure to accept the ordinance in writing might be waived by the city, and this waiver may be implied from its acquiescence in the defendant's acts. Besides, the ordinance which was made a part of the petition, a copy of it being filed therewith, is not copied in the transcript, and it must be presumed it sustained the judgment rendered on this point.

This is not the case of a license tax imposed on a telegraph company already in the use of the streets and alleys of the city. The defendant entered the city and got the use of the streets and alleys by virtue of the ordinance and it took its rights subject to the charge which the city made for the grant. The question of the reasonableness of the grant was for the parties to decide. If the defendant was not satisfied with the terms of the grant it could have refused to accept it. It is not material now how many poles the defendant set up; the city took its chance on these things and fixed a lump sum. The defendant in going ahead under the ordinance also took its chance, and it can not be heard to say now that the charge was too high. The poles and wires in the street are a serious servitude, and, although the defendant was a foreign corporation and engaged in interstate commerce, it could not impose this servitude upon the city, thus taking its property without compensation. What was a fair compensation for the servitude was a question for the parties to decide. The contract was not without considera-

tion nor is it to be construed as imposing a license tax and, therefore, the case does not fall within the line of decisions to the effect that a State can not impose any burden upon interstate commerce within its limit under the guise of a license tax.

This also disposes of the objection that the ordinance is void under the Constitution and laws of the State of Kentucky on the ground that municipal corporations are without power to exact license taxes from some and not from others engaged in the same business. It is not alleged that the city has admitted any other company to use its streets without compensation. The other companies referred to in the answer, for all that appears therein, may have acquired their rights on other terms and before the adoption of the present Constitution. There is nothing, therefore, to show any discrimination. No other questions are made, and on the whole case we are of the opinion the court properly sustained the demurrer to the answer.

Judgment affirmed.

ST. BERNARD COAL CO. v. SOUTHARD.

(Filed October 14, 1903—Not to be reported.)

1. Evidence—Reading of deposition taken by adverse party—It was not error in the trial court to permit the adverse party to read upon the trial a deposition taken by the other, where it would have been competent for either party to have called the witness, had he been present, to testify to the facts stated in the deposition.

2. Peremptory instruction—Where the plaintiff in an action for damages for personal injuries received by reason of coal falling upon him from the roof of a room in which he was mining coal, testified that he had not discovered the dangerous condition of the roof and relied upon the assurance of the room dresser that the room was in safe and proper condition, the court properly overruled a motion for a peremptory instruction for defendant.

C. J. Waddill, Gordon & Gordon & Cox, E. G. Sebree and J. F. Dempsey for appellant.

Jonson & Jennings, Wm. H. Yost and R. Y. Thomas, Jr., for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, R. E. Southard, was injured by the fall of a strip of coal six or seven feet long and eight or ten inches thick from the roof of a room where he was engaged in cutting coal whilst in the employ of the St. Bernard Coal Co. In his petition he alleges that the appellant placed in charge of the rooms in its mine one Volner Sisk, whose duty required him to examine the walls and roofs of the different rooms immediately after every fall of coal, and to have removed therefrom all particles of coal, slate or stone adhering thereto, which would be liable to fall therefrom; and that the rules of the company forbid miners from entering or beginning to work in such rooms without the permission of the room dresser; that on the 29th of May, 1900, while in the employ of the appellant, he inquired of Sisk what room he should go to work in, and that Sisk replied to him that No. 3 would be ready as soon as the cars were loaded and removed, and to go to work in

that room as soon as it was done; and in obedience to this direction, after the loaded cars had been removed from the room, he began cutting coal with his machine, when suddenly a block of coal fell from the roof, striking him on the head and shoulders, inflicting serious injuries. The company in its answer admitted that plaintiff was in their employ as a machine runner in its mine, and that his duty required that he should work wherever directed by his superiors; that it employed Volney Sisk as a shooting boss and room dresser; that he had full authority over the machine runners; that it was his duty to examine the walls and roofs of the different rooms in which coal was to be mined, and remove therefrom all particles of coal, slate or stone adhering to the walls or roof of the rooms which would be liable to fall or drop therefrom in order that the miners and machines could work with safety therein; that the room in which appellee was hurt had been blasted and cleaned up by the loaders, but that the room dresser had not finished; that when plaintiff applied to Sisk for a place to work he was directed to one of several rooms, including the number in which he was hurt, and told to go to work in which ever one he found ready; that appellee was an experienced miner, perfectly competent to tell whether the room had been cleaned up or not; that, without making proper examination, he began to work in the room in which he was injured immediately underneath a large lump of coal which he could by the exercise of ordinary care have discovered, and that he was in consequence guilty of such contributory negligence as precluded recovery. A jury trial resulted in a verdict for the plaintiff for \$1,350, and the defendant upon this appeal complains of numerous alleged errors in the trial: First, that the trial court erred in overruling its motion for a continuance on account of the absence of George H. Falls, superintendent of the mine in which appellee was hurt, and in permitting the plaintiff to read Fall's deposition to the jury.

While there are some exceptions to the rule of law which permits the adverse party to read upon the trial a deposition taken by the other, we do not think the facts in this case bring it within these exceptions. In the class of cases in which these exceptions occur the witness whose deposition was sought to be read was incompetent to testify in behalf of the party against whom he was called, but was made so by the party entitled to use him first taking his deposition; or, where the testimony was incompetent as against the adverse party, but made competent by the party offering it. (*Sullivan, &c. v. Thornton Norris*, 71 Ky., 521.) It was perfectly competent for either party to have called upon Falls to prove the facts testified to in his deposition. They simply tend to show the employment of plaintiff, the rules of the company as to entering rooms, and the fact that they were in charge of their room dresser; and that plaintiff had no right to enter without his permission.

It is next insisted upon the authority of the *Breckinridge and Pineville Syndicate, Limited v. Murphy*, 18 Ky. Law Rep., 915, that the court should have directed the jury to find a verdict for the defendant. In that case it was shown that the plaintiff, an experienced miner, knew of the dangerous condition of the roof, and notwithstanding such knowledge on his part, continued to work in it. In this case the plaintiff testified that he had not discovered the dangerous condition of the roof, but relied upon the assurance

of the defendant's room dresser that the room had been put in safe and proper condition. We think the motion for the peremptory instruction was properly overruled. The last ground relied on for a reversal is error of the trial court in giving and refusing instructions to the jury.

The only substantial issues tendered by the answers in this case were, first, that the room in which the plaintiff was injured was in a safe and suitable condition as a place of labor; second, that plaintiff had not obeyed the directions of the defendant's room dresser in going into the room to work; third, that after doing so, he had not exercised ordinary care for his own safety. Upon the issues of fact the proof was conflicting, and they were properly left for the jury to decide. It is not a debatable question of law that a master must exercise ordinary care to furnish a servant a reasonably safe place in which to work, and to keep it in such condition; and that a servant has a right to rely upon the discharge of this duty by the master, and if he fails to discharge it, is responsible to the servant who is injured in consequence thereof. (*Ohio Valley Mining Co. v. McKinley*, 17 Ky. Law Rep., 1028; *Ashland Coal and Iron Ry. Co. v. Wallace*, 101 Ky., 688; *Vandyke v. Memphis, New Orleans and Cincinnati Packet Co.*, 24 Ky. Law Rep., 1285.) The instructions in this case clearly and fairly give to the jury the law upon the issues raised by the pleadings and proof.

Upon the whole case we perceive no error prejudicial to the rights of appellant and the judgment must be affirmed, and it is so ordered.

Judge Nunn not sitting.

PIKE, MORGAN & CO. v. WATHEN.

(Filed October 21, 1903—Not to be reported.)

1. Debtor and creditor—Conveyance of property in satisfaction of debt—Where a conveyance of real estate by a debtor jointly to a mortgage creditor and the surety on that creditor's debt recited as its consideration the payment of a nominal sum of money and warranted the title against all claims and incumbrances except two mortgages superior in point of time to that of the grantee creditor, and it appeared from parol testimony that the grantees assumed the payment of the two prior mortgages and that the three mortgages were soon afterwards surrendered to the debtor endorsed "satisfied," the conclusion of the trial court that the consideration for the conveyance was the payment of the three mortgage debts was correct.

2. Rescission of conveyance—Usury—In an action by the debtor to recover usurious interest paid on the debt the grantee creditor is not entitled to a rescission of the contract upon tendering a deed reconveying it on the condition that the mortgage debts should be purged of usury, and that the property should be sold at public sale and the proceeds applied to the satisfaction of the debts.

Drury & Drury and Hazelrigg & Chenault for appellants.

George A. Prentice and W. O. Haynes for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is prosecuted by the appellants, Pike, Morgan & Co., from a judgment rendered by the Union Circuit Court in favor of the appellee,

James A. Wathen, for \$3,047.08, with interest from January 26, 1900. The facts with reference to the case, as appear of record, are in substance as follows: That appellee, James A. Wathen, was the owner of a large and valuable farm lying near Morganfield, Ky., and that he was engaged in speculating, and was for several years a borrower of large sums of money; that he became indebted to one Holman in the sum of about \$6,000, with interest, and gave him a first mortgage on his farm, and became indebted to one Mrs. Sugg in the sum of about \$4,000, with interest, and gave her a second mortgage on his farm, and became indebted to appellants, Pike, Morgan & Co., bankers of Uniontown, Ky., in large sums of money, upon which he made payments; after which, and on the 12th day of August, 1898, he executed to this bank his note for what was then due it for the sum of \$10,118.85, with 8 per cent. interest, and executed to the bank a third mortgage on the farm, and also gave W. T. Wathen, Sr., and others as security for the payment of this note to the bank.

Appellee being thus involved for these sums of money, the bank being desirous of collecting its debt, and W. T. Wathen, Sr., being anxious of having the matters settled and relieved of responsibility as surety to the bank, Sylvester Pike, as president of the bank, and W. T. Wathen prevailed upon the appellee to make a conveyance to them of this 281-acre farm for the consideration of \$25 and other good considerations named in the deed. This deed was dated January 22, 1900. Afterwards appellee sued appellants, Pike, Morgan & Co., for about \$3,400 for usurious interest which he claimed to have paid them.

The appellants answered, traversing the allegations of the petition, and alleged that they had not been paid their debt, and that the land so conveyed by the appellee was not worth more than their debt and the Holman and Sugg debts, with their legal interest, and that they had not collected any usury from appellee. It induced and caused Sylvester Pike, its president, and W. T. Wathen, Sr., to execute a conveyance, reconveying the property to appellee, reciting the fact that appellee was complaining and suing the mortgagees for the usury paid by him, and stating that they wanted to do exact justice to him, and that the deed was made upon the following conditions: First, the mortgage debts above mentioned were to be purged of all usury, if any they contained; second, if the appellee, or any one for him, should within sixty days thereafter pay to the mortgagees their debts purged of usury, but if he should not do so, then the mortgages were to be enforced for the benefit of the mortgagees, and the land should be sold at the courthouse door at public sale, and the proceeds applied to the payment of the mortgage debts, purged of usury, and any balance remaining after so doing was to be paid to the appellee. The appellants tendered this deed in their amended answer to appellee, and asked a rescission. The appellee declined to accept this deed, or to rescind, and the court refused to compel him to accept it, and referred the case to the master commissioner, with directions to report the amount of usury paid to appellants by appellee. Proof was taken by the parties, and the commissioner reported that the amount of usury so paid was \$2,047.08, for which sum the court rendered judgment, and, as stated, the appellants have appealed from that judgment, and the ap-

pellee has taken a cross appeal, claiming that the lower court failed to adjudge him as much as he was entitled to by over \$700.

The appellants contend that the court erred to their prejudice for the reason that in consideration of the conveyance by appellee to Wathen and Pike they did not assume the payment of these mortgages; that the consideration named in the deed was only \$25. In this we are of the opinion that appellants are mistaken, for, in addition to the \$25 named in the deed, this language is used: "And the parties of the first part (meaning appellee and wife) covenant and agree to and with the parties of the second part that they have full power, good right and lawful authority to make this conveyance; that they are in peaceable possession of the property herein conveyed, and that they will forever warrant and defend the title thereof against all liens and incumbrances of any nature and kind whatsoever, except mortgages to Sam Holman, Sr., recorded on mortgage book 'K,' page 6, and mortgage book 'Q,' page 419, to Mrs. B. A. Sugg, recorded in mortgage book 'T,' page 299, and to Pike, Morgan & Co., recorded in mortgage book 26, page 40."

This language, as used in this deed, means, if it means anything, that these vendees took this property and assumed the payment of these mortgages, and in addition to the deed the appellee, without contradiction, testified that the consideration for that conveyance was their assumption to pay these mortgages, and it was understood that they amounted to \$21,000, and within a few days thereafter these mortgage notes were all surrendered and delivered to him, including the one due appellants, endorsed "satisfied." And in addition to all this Sylvester Pike, president of appellants, used the following language with reference thereto in his deposition: "Wathen was indebted to the bank, and he desired to sell his farm to pay his debts, and he offered it to the bank and W. T. Wathen for \$21,000. * * * My understanding at the time the trade was made was that the bank and W. T. Wathen bought this farm at this price because we did not know of any other property he owned, and because I understood it to be a full settlement of all of this business, usury and all. * * * It was conveyed to me and W. T. Wathen for the reason that there were a number of partners in Pike, Morgan & Co., and it was a great difficulty to hunt them all up and get a deed. So many men and women in it, and I made a bond binding myself to convey the property when we sold it, and placed the bond in the bank."

In answer to a question: "To whom was the price of the farm paid?"

Answer. "To Sam Holman and John A. Sugg and the bank."

Question. "How much was paid to Holman, how much to Sugg, and how much to the bank?"

Answer. "I could not state the amount to each; the total was \$21,000."

Question. "How was the bank's debt paid; in money or otherwise?"

Answer. "It was paid with one-half interest in farm which was conveyed to me for the parties interested, as stated above."

The appellants sought to show in this case, and did prove by several witnesses, that the land purchased from appellee was not equal in value to the amount of these mortgages with their interest, and that he took it at the price named, because the appellant was insolvent, and it had no hopes of getting anything more from him. This same defense was attempted to be made in the case of *Mann v. The Bank of Elkton*, 104 Ky., 866. The court

in that case said: "If this be true, it is wholly immaterial, because the consideration for the sale was the amount which the appellant owed the appellee, and all parties understood this amount to be the face of the notes, with interest, etc."

In this case it appears from the record, without contradiction, that the consideration to be paid was the full amount of all the mortgage notes, with interest, usury, and all amounting to \$21,000. And appellants were not compelled to accept the land in satisfaction of their debt, as it appears that W. T. Wathen, Sr., one of the sureties on appellee's note to it, was at the time these transactions took place worth \$25,000 or \$30,000 in property, subject to execution.

The principles in the case of *Mann v. The Bank of Elkton*, supra, apply in this case, the facts being similar. As to the cross appeal of appellee, we are of the opinion that the court did not err in dismissing appellee's claim for the additional amount sued for. The preponderance of the evidence showed that appellee paid this usurious interest in the years 1892 and 1898 on notes other than the one above referred to. There is some evidence tending to show that these notes were brought forward and included in the large one which was settled in the land transaction, but the preponderance of the evidence shows that this was not the case, and appellants' plea of the statute of limitation was a good and valid defense to that part of appellee's claim, which the court refused to allow.

Perceiving no error in the judgment of the lower court its judgment is hereby affirmed on both the appeal and cross appeal.

McCALL, &c. v. BURK.

(Filed October 14, 1903—Not to be reported.)

1. Trust—Accounting by trustee—Where the trustee of property held in trust for the benefit of three infants agreed with the father, who had qualified as guardian of two of them, that the father should take the two and reside upon one piece of the property, using the profits therefrom for the benefit of those beneficiaries, while the trustee should take the third child to his own home and care for her, applying the rents and profits from the other property to her support, the profits from the first piece of property being fully double those from the latter, the trustee will not be required to account for the rents on the latter to one of the beneficiaries who received the benefit of the first.

2. Husband and wife—Testimony of wife—While the wife can not testify as to any communication between herself and her husband, she may testify for his estate after his death to a transaction between him and another which was had in her presence.

3. Improvements placed on trust property—Improvements which a trustee allows his wife to place on property held by him in trust belong to the beneficiaries, and he is chargeable with the rents received from such improvements, but should be credited with what he paid out for them.

4. Charges against trustee—The trustee is not required to account to the beneficiaries for moneys received by him in payment for the right of way of a railroad through one tract of the trust property where it appears that he applied the amount so received to reimburse himself for payments which he claimed to have made on the purchase price of the other property, and no

claim was made for such sum by the beneficiaries until many years after his death.

5. Same—Where the widow of the trustee took charge of the trust property after his death and rented it out she must account to a beneficiary who had not conveyed his interest therein to her for his share of the rents and profits.

Thos. R. Brown for appellants.

R. S. Dinkle for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Hobson.

On February 22, 1882, J. H. Burk and his wife, Mildred Burk, conveyed a tract of land in Lawrence county, to which Mildred Burk had title; also a house and lot in Catlettsburg which she had purchased, but had no deed for, to R. B. McCall, in trust for the use of William Burk, Ida Morgan and Valentine Burk until they each arrived at the age of twenty-one years, and as each became of age his part was to be set apart to him. McCall accepted the conveyance. Ida Morgan was a daughter of Mrs. Burk by a former marriage; William Burk was a son of J. H. Burk by a former marriage; and Valentine Burk was the son of J. H. and Mildred Burk. When the deed of trust was made Mrs. Burk was sick with consumption, and she died shortly thereafter. The financial condition of Burk at the time was bad, and it would seem from the evidence that he was a poor manager. After the death of his wife Burk qualified as the guardian of his two children, and taking the boys with him, moved back up to the farm in Lawrence county, and continued to live there with them, enjoying the use of the farm, McCall paying part of the taxes and furnishing him some money from time to time until after the death of McCall. McCall took the girl, Ida Morgan, to his house and took care of her until she was of age and married. More than a year during this time she was sick and had to be nursed. McCall paid her doctor's bill; also for her medicines and the like. McCall had charge of the house in Catlettsburg, which rented for \$6 a month. In the year 1885 William Burk became of age, and in 1887 he conveyed his interest in the Catlettsburg house and lot to McCall for \$125. Ida Morgan became of age in the year 1889, and thereafter, and before she married, conveyed her interest in the Catlettsburg house to the wife of McCall, he having died in January, 1890. Valentine Burk became of age in January, 1896, and thereafter filed this suit against the personal representative and the widow and children of McCall to recover his part of the rent of the Catlettsburg house from the time that McCall took charge of it under the deed of trust. A large amount of proof was taken, and the court having entered judgment in favor of the plaintiff, the defendant appeals.

The defendant alleged that by agreement between McCall, as trustee, and Burk, as the father and guardian, Burk took charge of the farm and was to take care of the two boys, while McCall took charge of the house in Catlettsburg, and was to take care of Ida Morgan. This arrangement is proved by Mary McCall, a daughter of R. B. McCall, and it is also proved by Susan McCall, his widow; Burk denies it, but the circumstances shown by the evidence fully sustain their testimony. A wife can not testify as to any communication between her and her husband, but she may testify for his estate

after his death to a transaction between him and another which was had in her presence. The proof is clear that during the whole time Burk kept the farm and the boys on it, enjoying the proceeds, and that McCall took care of Ida Morgan. No demand was made of McCall for any part of the proceeds of the rent of the Catlettsburg property, although they all well knew he was collecting the rent and supporting Ida Morgan. The rent of the farm was worth more than twice the rent of the house. McCall died shortly after Ida Morgan was of age, and under all the circumstances we conclude that he ought not to be held answerable for anything to Valentine Burk on account of the rents of the Catlettsburg property.

During the time he held the Catlettsburg property McCall allowed his wife to put up a carpenter's shop at the back end of the lot which he held in trust. The court properly held that this shop belonged to the children. A trustee is not allowed to use for himself the trust property, and he can not permit his wife to do it. He was properly charged with the rent of this carpenter's shop, and credited for what was paid out for it. Counting interest on the expenditure, and after deducting the rents, we make a small balance coming to him which would offset any rents in his hands between the time Ida Morgan became of age and his death, or so nearly offset them that we conclude no judgment should be entered against his estate on account of rents.

McCall collected as trustee about the year 1882 from a railroad company \$350 for right of way through the Lawrence county farm. He claimed to have applied this money to the payment of the purchase money of the Catlettsburg house and lot, and no demand seems to have been made of him for it, and none of his estate, until the bringing of this suit by Valentine Burk in the year 1896. J. H. Burk swears that he paid for the Catlettsburg property, while Mrs. McCall swears it was not paid for. Burk is not at all clear as to where he got the money, and the proof as to his financial condition at the time and his mode of getting along does not tend to add weight to his testimony. The fact that no deed had been made to the Catlettsburg property is a circumstance of some weight. But besides all this, it is perfectly clear that McCall claimed this money in his own right on account of the purchase money of the property, and that all of the parties knew he had it. William Burk was of age in 1885; Ida Morgan was of age in 1889; McCall died in 1890; during all of this time Burk and his family were hard run, and yet none set up a claim to this money until 1896, when Valentine Burk did so in this action. Under all the facts we are satisfied that the claim should not be allowed after McCall's death, when from the nature of the case, and the great lapse of time, his people would be unable to show the facts more definitely.

After the death of McCall his widow took charge of the property and rented it out, Ida Morgan having deeded to her her interest in it. The court entered a judgment against her in favor of Valentine Burk for one-third of these rents. This was proper. It is complained that the rents are put too high, and that the credits allowed to her are not large enough. While as to some of the items there is, in our opinion, perhaps ground for this complaint, no interest was charged to the widow, and on the whole case we do not see that she has any substantial grounds of complaint.

The judgment in favor of Valentine Burk against Susan L. McCall as the administratrix of R. B. McCall, deceased, is reversed and the cause is remanded for a judgment on this branch of the case as herein indicated. The remainder of the judgment is affirmed. Appellants will recover their costs in this court, but only one-half of the cost of making the transcript will be taxed.

WESTERN UNION TELEGRAPH CO. v. CROSS' ADM'R.

(Filed October 14, 1903.)

Nondelivery of telegram—Punitive damages—Punitive damages can not be recovered for the failure to deliver a telegram to an obscure person, whose street address was unknown, announcing the death of her daughter, where the telegraph company made an effort to find her.

Original ante, page 268.

Richards & Ronald for appellant.

C. J. Waddill for appellee.

Appeal from Hopkins Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

So much of the opinion as refers to the half-mile limit, or rule fifty, introduced in evidence, is withdrawn. We adhere to our ruling that on the facts of this case no instruction on punitive damages should have been given.

The numerical weight of authority is against the allowance of substantial damages for the nondelivery of social telegrams. By reason of the peculiar character of the action we are unwilling to extend the rule heretofore laid down so as to allow punitive damages in this class of actions.

Petition overruled.

MAYS v. COMMONWEALTH.

(Filed October 14, 1903—Not to be reported.)

Criminal law—Continuance—Where a person accused of the crime of willful murder is confined in jail without bail from the date of his arrest until his trial, and during that time, and continuously from a date on which he was arraigned in court and his case set for trial, the jail in which he was imprisoned was quarantined on account of an epidemic of smallpox, resulting in his being deprived of consultations with his attorney and excluded from his friends and family, he was not given ample opportunity for the preparation of his defense, and the court erred in overruling his motion for a continuance.

N. L. Goldsmith, Kohn, Baird & Spindle and H. T. Wilson for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Barker.

On the 4th day of October, 1902, the appellant, Eugene Mays, was indicted by the grand jury of Jefferson county, charged with the crime of willful

murder. One the 6th day of October he was brought into court by the jailer, arraigned, and pleaded not guilty of the crime charged in the indictment. His case was set for trial on November 17, and he was thereupon ordered to be remanded to jail without bond.

On the 17th day of November appellant was not brought into court, because there was an epidemic of smallpox existing in the jail; but in his absence his case was continued to November 24; it seems to have been reached for trial on the 25th day of November, 1902, whereupon appellant was brought into court by the jailer, and entered a motion for a continuance, in support of which he filed his own affidavit, and the affidavit of H. Turner Wilson, one of his attorneys. This motion was overruled by the court, and a trial being had, appellant was found guilty of murder, as charged in the indictment, and his punishment fixed at death by the verdict of the jury. His motion for a new trial having been overruled, appellant has brought the case here for review.

Having reached the conclusion that the judgment must be reversed for error in overruling the motion for a continuance, it will not be necessary to notice, or discuss, any other ground assigned for a new trial.

It appears from the affidavit of the appellant that from the time of his arrest until the day of his trial he had been confined in jail without bond; that during this time an epidemic of smallpox had prevailed in the jail, which resulted in that institution being put under strict quarantine by the jailer and the court. Prisoners were not brought from the jail for trial, and no one was permitted to go in, or come out, for fear of endangering the health of the public by causing an epidemic of smallpox in the city. He was not permitted to see his attorneys, his relations, or friends, during the time between his arraignment and the day upon which he was brought into court for trial. He had no communication with his attorneys; had not been able to inform them as to the nature of his defense, or to have, in any way, the benefit of their advice or counsel. His attorneys had not been able to see him from the date of his arraignment until the date of his trial. We take the following statement from appellant's affidavit: "That this 25th day of November, 1902, is the first time he (appellant) has had the opportunity to see or consult with his attorney, his mother, or any of his friends, or to take any steps to prepare his defense."

The statements of neither of these affidavits were contradicted nor denied. If they had not been true, their falsity could have been shown without difficulty. It only remains, then, to ascertain whether or not, under this state of facts, appellant was entitled to a continuance of his case, for the purpose of preparation. The general rule is that a large discretion is vested in the trial court in the matter of continuance, but a refusal to grant it is subject to exceptions under section 280 of the Criminal Code. That a defendant charged with the crime of murder should have ample opportunity under, and with, the advice of counsel, to prepare his defense, is a proposition that will not be denied by any. In this case the accused is a negro boy about seventeen years of age; the record shows that he had been, without fault on his part, so quarantined in jail as to be unable to communicate with his family, his friends, or his counsel. That, in this condition, he could not properly prepare his defense, is apparent.

In the case of *Bates v. Commonwealth*, 13 Ky. Law Rep., 133, this court, in reversing the judgment, in part because of the refusal of the trial court to grant a continuance, said: "The affidavit for a continuance disclosed that the appellants had employed a lawyer of their own county, in whom they had confidence, and upon whom they relied to attend to their case; that he was the first attorney retained by them; was at the examining trial; had consulted with them, and in fact understood their case better than any one else, including themselves, owing to their having been confined in jail and unable to see to it in person; that they were informed by telegrams from him that, owing to the duties incumbent upon him as an officer of the United States, he could not be in attendance on the day fixed for trial, but could be present by the second day thereafter. A refusal to grant a continuance is, under section 280 of our Criminal Code, subject to exception. If it appears that the defendant is entitled to it, then refusal of it is ground for reversal on appeal. If it were not so, the accused would be deprived of a fair trial. If, for instance, a material witness for him be absent, and due diligence has been exercised to procure his attendance, it would be reversible error to compel the defendants to try without having the benefit of testimony. We do not mean, of course, that the trial court has no discretion in the matter of continuances. It is, however, a legal one, and if it be so exercised as to deprive the accused, when not in fault, of a fair trial, justice requires that he should not be remediless. * * * One accused of crime should not be forced to trial at the indictment term, in the absence of his counsel, or of an attorney upon whom he mainly relies in good faith to conduct his defense. Here the accused were upwards of a hundred miles from home. They appear to have at once employed a lawyer of their own county, well known to them, and in whom they not only say, but it may be presumed from their acquaintance with him, they had full confidence. So far as this record shows, they in good faith relied upon him to conduct their defense. They were indicted in a few days after the killing; they were in jail, and in twelve days after they were indicted they were tried and convicted, although the court had notice from their affidavit that the attorney in whom they relied would be present in two days thereafter. The case should either have been continued until the next term, or until the time that the attorney had telegraphed he would be present. The circumstances made it one of those 'extreme cases' where continuances should be granted, and the refusal of it was such an abuse of legal discretion as requires the interference of this court." To the same effect is *Leslie v. Commonwealth*, 19 Ky. Law Rep., 1203, and *Brooks v. Commonwealth*, 100 Ky., 194.

In the *Encyclopaedia of Pleading and Practice*, page 833, it is said: "In criminal cases the accused is entitled to a continuance where he is brought to trial so speedily after his arrest or indictment that he can not make a proper defense, or where he requires further time by reason of his confinement in the prison since his arrest, or where he has not been served with a copy of the indictment required by statute."

It is manifest that in the case at bar appellant was not afforded an opportunity commensurate with the gravity of the charge against him in which to prepare his defense; shut off from the world, unable to communicate with his relatives or friends, with no knowledge of the whereabouts of his wit-

nesses, overcome by the awfulness of his situation, it is inconceivable that he could have been ready for trial upon the calling of his case.

It is neither necessary nor profitable to enter the field of speculation as to whether or not he could have produced the witnesses for affirmative defense by the exercise of diligence, had he been given an opportunity. Intelligent cross-examination of opposing witnesses is one of the most potent agencies for the elucidation of truth; and we know that without an opportunity to inform his counsel of the nature of his case, and his relations with the witnesses for the Commonwealth, this was impossible.

It seems to us that the very statement of the facts must carry conviction to the mind that the denial of a continuance to the defendant under these circumstances, was an abuse of that large discretion reposed in the trial court by law, and constitutes an error so prejudicial to the rights of the accused that we can not ignore it.

For these reasons the judgment is reversed for proceedings consistent with this opinion.

GOODRIDGE v. GOODRIDGE.

(Filed October 14, 1908—Not to be reported.)

Divorce—Custody of children—The judgment of the trial court awarding to the father the custody of infant children, after divorce from the wife, will not be disturbed where it appears from the evidence that the mother is a woman of bad character and that her physical surroundings are not well adapted to the rearing of children, while, on the other hand, the father is a man of good morals and amply able to properly care for and educate them.

S. W. Tolin and John S. Gaunt for appellant.

D. E. Castleman and Ira Julian for appellee.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Barker.

On the 7th day of June, 1901, the appellee, W. H. Goodridge, instituted this action in the Boone Circuit Court against his wife, Veranda Goodridge, charging her with having been guilty of such lewd and lascivious behavior as proved her to be unchaste, and also with having at divers times committed the offense of adultery.

Appellant, by answer, denied the allegation of the petition, and also pleaded condonation on the part of her husband. In her prayer she asked to be adjudged the care and custody of her two infant children, twins, a boy and girl about eight years.

Upon the trial the chancellor entered judgment divorcing appellee from the bonds of matrimony with the appellant. By the terms of this judgment the children were to remain in the care and custody of appellant until the further order of the court, appellee, in the meantime, to pay her \$16 per month for their support and maintenance.

Each party was permitted to take proof on the question as to which should have the future custody of the children, and the case was continued for further, and necessary, orders.

Both parties did subsequently take proof on the question left open by the

judgment, and the court afterwards, on the 21st day of April, 1902, rendered the following judgment: ' This case being submitted for judgment on the question as to the custody of the infant children, and the court having considered the entire record in this case, and being fully advised, awards the plaintiff, W. H. Goodridge, the care and custody of the infant children, Howard L. Goodridge and Helen L. Goodridge, and the defendant, Veranda Goodridge, is ordered and directed to surrender said children to the sheriff of this county, B. B. Alphin, who will deliver them to the plaintiff.'

From this judgment appellant prosecutes this appeal. An examination of the whole record convinced the trial judge that appellant was not a suitable person to have the care and custody of the children, whose welfare is involved in this record. The question was one eminently suited to the province of the chancellor. In his judgment he recites that he is personally acquainted with all of the witnesses who deposed in the case, except four; and he is, therefore, in a far better position to weigh the evidence properly than this court, and, therefore, we are not disposed to interfere with his finding of the facts.

It is not necessary for us to pass upon the question of the competency of the evidence adduced by the appellee to show that the general reputation of appellant for chastity was bad. There was much of this class of evidence, to all of which the chancellor sustained exceptions. Outside of this, the bad character of appellant was abundantly shown. Moreover, the evidence shows that appellant lives in a small house with her father's very large family, and we are of the opinion that her surroundings are poorly adapted to the rearing of the children, either morally or physically.

Appellee is shown by a preponderance of the evidence in this case to be a thrifty, substantial and moral man, amply able to care for and maintain his children, and to properly educate and start them in life. Section 2123, of the Kentucky Statutes provides: "Pending an application for divorce, or on final judgment, the court may make orders for the care, custody and maintenance of the minor children of the parties, or children of unsound mind, or any of them, and at any time afterwards, upon the petition of either parent, revise and alter the same, having in all such cases of care and custody the interest and welfare of the children principally in view." * * *

We think the judgment of the court, in awarding the care and custody of the children to the father, in this case was in strict compliance of the statute, to keep their welfare in view. This judgment may be altered, or revised, at any time upon the petition of either parent; and we do not doubt that upon a proper showing in the future the chancellor will make such orders as may be necessary to afford the mother sufficient opportunity to see and enjoy the company of her children.

For the reasons herein indicated the judgment is affirmed.

MILLER, &c. v. STAGNER.

(Filed October 14, 1903—Not to be reported.)

Life estate in lands—Power of sale—Application of proceeds—A devisee, who takes a life estate in lands under the will of the deviser, and is given the power to sell and convey the lands upon the express condition that the

proceeds be reinvested in other good property, can pass a good title to the property without the purchaser being bound to look to the reinvestment of the proceeds in the absence of an express requirement to that effect in the will. (Section 4846, Kentucky Statutes.)

C. H. Breck for appellants.

J. A. Sullivan for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hobson.

William Malcom Miller died a resident of Madison county in the year 1889. By his will he made the following provision for his son, Malcolm M. Miller: "I hereby devise to my son, Malcolm M. Miller, during his natural life, the following portion of my farm, situated in Madison county, Kentucky, upon which I now reside (here follows description of land devised), containing 300¼ acres of land. This devise to Malcolm M. Miller is made subject to a charge for the sum of \$537.85 in favor of John C. Miller, said sum being to equalize said John C. Miller with Malcolm M. Miller, and same shall be due and payable one year after the probaton of this will. Although I have only given to M. M. Miller a life estate in this property, yet I give him the right and power to sell and convey same upon the express condition that the proceeds shall be invested in other good property, to be held under the same limitation and condition; and I also empower said Malcolm M. Miller to dispose of same to his children by last will and testament in unequal portions if he shall so desire, but in the event of his failure to do so, then at his death said property shall descend and belong to his legal heirs in equal portions."

Thirty-five acres of the land were sold under the judgment of the Madison Circuit Court in discharge of liens upon it, leaving 265¼ acres. At the time of the death of the testator the devisee had three children, a son and two daughters. They are now over twenty-one years of age, and on June 1, 1908, Malcolm M. Miller, by deed, in which his wife and two daughters joined, conveyed to his son, William Malcolm Miller, in consideration of \$6,000, 110 acres of the land. William Malcolm Miller then made a trade with appellant, B. M. Stagner, by which he sold Stagner the 110 acres of land for \$7,425, and tendered Stagner a deed therefor, in which his father and mother and both sisters joined. Stagner declined to accept the deed, and thereupon this agreed action was filed to test the sufficiency of the title. The only question to be determined is whether Malcolm M. Miller, under the terms of the will, can convey a perfect title to the land, or whether the purchaser must see to the application of the purchase money. The circuit court held the title good, and Stagner has appealed.

Section 4846, Kentucky Statutes, is as follows: "Where lands are devised to be sold on special or general trust, or are conveyed or devised to trustees, or executors in trust, to be sold generally or for any specific purpose, the purchaser shall not be bound to look to the application of the purchase money unless so expressly required by the conveyance or devise."

In *Grotenkemper v. Bryson*, 79 Ky., 853, property was devised to three sons, and they were directed to pay the remainder of the testator's debts after exhausting certain other property out of their resective interests in

their estate. The sons sold the land, but did not pay the debts. A creditor of the testator then undertook to subject the land in the hands of the purchaser to the payment of his debts. It was held that under the statute above quoted that the purchaser was not bound to see to the application of the purchase money, and that he took by his purchase a good title to the property.

That case controls here. The devisee, Malcolm M. Miller, although given only a life estate by the will, is authorized by it to sell and convey the property. In selling and conveying he acts as trustee under the will and holds the proceeds received for the property also as trustee. He is authorized to sell and convey upon the express condition that the proceeds shall be invested in other good property, to be held under the same limitation and condition. This condition is imposed upon the devisee who is charged with the trust of reinvesting the proceeds. The land is, therefore, devised to a trustee in trust, to be sold for a specific purpose according to the terms of the statute, and the purchaser is not bound to look to the application of the purchase money, there being nothing in the devise expressly requiring him to do so.

Wherefore, we are of the opinion that under the will the purchaser's title is good, and the judgment appealed from is affirmed.

Chief Justice Burnam not sitting.

ILLINOIS CENTRAL R. R. CO. v. VINSON.

(Filed October 14, 1908—Not to be reported.)

1. Railroads—Duty to passenger—It is the duty of a railroad company in the operation of a mixed train to use the highest degree of care that is practicable in the operation of trains of that character, but it is not responsible for jerks or bumpings of the cars, such as are usually incidental to such trains when operated with proper care.

2. Same—Duty of passenger—In traveling on a mixed train a passenger assumes the risks usually incidental to such a train properly operated, and it is incumbent on him while on the train to exercise increased care for his own safety in proportion to the increased danger of that mode of travel.

Original ante, 38.

Reed & Oliver, W. Mike Oliver, J. M. Dickenson and Pirtle & Trabue for appellant.

Hendrick & Miller for appellee.

Appeal from Marshall Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

It was the duty of the defendant in the operation of its train to use the highest degree of care that was practicable in the operation of mixed trains of that character, but it was not responsible for jerks or bumpings of the cars, such as are usually incidental to such trains when operated with proper care.

In traveling on a mixed train the plaintiff assumed the risks usually incidental to such a train properly operated, and it was incumbent on him while on the train to exercise increased care for his own safety in propor-

tion to the increased danger of that mode of travel. If the defendant failed to exercise proper care in the operation of the train as above defined, and by reason thereof the plaintiff was injured, while exercising such care for his own safety as may be ordinarily expected of a person of ordinary prudence, situated as he was, as above indicated, the defendant is liable. But if the plaintiff failed to exercise such care, and but for this the injury would not have occurred, or if the injury was the result of one of the risks usually incidental to travel on trains of that character operated with proper care, the defendant is not liable. In lieu of instructions 2, 3, 4, 7 and 8, on another trial the court should instruct the jury as above indicated.

Petition overruled.

NEWTON v. JOHNSON BROS., &c.

(Filed October 14, 1908—Not to be reported.)

1. Appeals—Jurisdiction—This court has no jurisdiction of an appeal from a judgment involving only \$50.

2. Same—Where the trial court in adjusting the claims of A. against B. ascertained that in a previous judgment, over which it then had no control, it had erred in entering a judgment in favor of C. as against certain funds belonging to B., on which A. claimed a lien, this court will not disturb the judgment as between A. and B., the judgment in favor of C. being for an amount which the court could not take jurisdiction of on appeal.

W. E. Garth and John M. Galloway for appellant.

W. B. Gaines for appellees, Porter & Ellis.

W. E. Garth for appellees, Johnson Bros.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Paynter.

This case, in so far as it affects Porter & Ellis, was before this court on a previous appeal (23 Ky. Law Rep., 1385). The appeal was dismissed because Porter & Ellis were given a judgment for \$50 against Newton, the court holding that it did not have jurisdiction. Since that judgment was rendered Porter & Ellis have neither sought nor obtained a judgment against the appellant, Newton. It is said that in settling the issues between appellant Newton and Johnson Bros. it was demonstrated that the court erred in the previous judgment in fixing Newton's liability to Porter & Ellis at \$50. This ascertainment was made at a time the court had no control over the judgment which it had rendered in favor of Porter & Ellis against Newton.

Johnson Bros. are made appellees, but we are unable to discover that on the final judgment on the issues between appellant Newton and Johnson Bros. that the court failed to give him judgment for all to which he was entitled.

Johnson Bros. were granted a cross appeal, and, as we understand the argument of their counsel, who also represents the appellant on this appeal, that the judgment rendered in favor of Newton against them is erroneous, because the court erred in ascertaining the amount which Newton should pay Porter & Ellis by the judgment to which we have alluded. At the time that the judgment was rendered no issue had been formed between appellant

Newton and Johnson Bros. The appellant was only prejudiced by the judgment in favor of Porter & Ellis to the extent of \$50 and cost, because he ultimately recovered against Johnson Bros. all his claim. Johnson Bros. were not prejudiced by it at all. Therefore, the error which the court committed in the judgment in favor of Porter & Ellis did not affect the rights of Newton or Johnson Bros. In the adjudication between them, but it only prejudiced Newton to the extent of \$50, in that the court erroneously adjudged that he should pay Porter & Ellis that sum.

The motion of Porter & Ellis to dismiss the appeal is sustained and the judgment is affirmed on the original and cross appeal of Johnson Bros.

REID, &c. v. HARPER.

(Filed October 14, 1903—Not to be reported.)

Conveyance—Cancellation of deed—It appearing from the evidence that the contract for the sale of a tract of land contemplated the sale of the entire tract and not merely of the vendor's interest in it, it was proper to cancel a deed therefor containing only special warranty covenants.

Gus Thomas for appellants.

Shelbourne & Kane for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Reid, sold appellee a tract of land for \$700, and delivered him a deed therefor with covenants of special warranty. A day or so after it was made, it not being recorded, appellee, as he claims, discovered it was a special warranty deed, when it was to be one with covenants of general warranty. This action was brought to cancel it. The contract price was \$700. The evidence tends to show that the land was not worth more than that sum; much of the evidence tends to show that it was not worth more than \$600. The title to the land is defective, and there is no doubt from the evidence that the appellant knew it, and that the appellee did not know it. The appellant did not contract to sell "his interest" in the land, but the entire tract. This conclusion must be reached from the testimony of both parties, besides the deed purports to convey the entire tract, and the appellee understood he was, and had, the right to conclude he was buying the tract, not an interest in it. It is exceedingly strange that the appellant would have offered, as he says he did, to make appellee a deed with general warranty for a consideration of \$1,000 for the land, when he only asked him \$800 for it when the negotiations for the purchase began. It is wholly improbable that the appellee would agree to pay as much or more for the land than it was worth, and be willing to take a deed for only appellant's interest in it. We agree with the court below that the deed should be canceled.

The judgment is affirmed.

GREER v. GREER.

(Filed October 15, 1903—Not to be reported.)

Divorce—Setting aside decree—Upon due notice, at the term at which a decree of divorce is granted, and while the condition of the parties remains unchanged, the decree may be set aside by the chancellor on motion of the party against whom it was entered filed within the time allowed by law for filing motions for new trial.

F. Hagan for appellant.

Bennett H. Young and Marion W. Ripy for appellee.

Appeal from Jefferson Circuit Court, Chancery division, No. 2.

Opinion of the court by Judge Settle.

Three judgments of divorce were rendered in this case. The first granted appellee a divorce "a mensa et thoro," and weekly alimony. That judgment was, by consent of parties, set aside. The second decree dismissed appellee's petition and granted appellant a divorce upon his answer and counterclaim, and upon motion of appellee for a new trial, entered on the same day and shortly after the decree in appellant's favor was granted, the chancellor set the same aside, and thereafter entered the third and last decree, by which appellant's counterclaim was dismissed, and appellee was given a divorce, alimony in the sum of \$800, and allowed a fee of \$150 for her attorneys, and also given the custody of the infant child in controversy.

From the order granting the new trial and setting aside the second decree which granted appellant a divorce on his counterclaim, and from the final decree granting appellee alimony, the appellant has appealed, and from so much of the decree last named as limited alimony to \$800 appellee prosecutes a cross appeal.

The first question to be considered is: Had the chancellor the right to set aside the decree granting a divorce to appellant? As already observed, the motion for a new trial as to this decree was made on the same day it was granted, due notice of which was given the appellant before action was taken upon the motion by the court. It appears from the record that when the motion was made the condition of the parties was unchanged, and such was the situation when the motion was sustained by the court, and also at the date of the final decree in appellee's favor—neither party having again married. It also appears that the answer and counterclaim of the appellant upon which the decree in his favor was granted did not contain sufficient grounds for a divorce, as it relied on abandonment by the wife, without alleging that it had continued for one year, and alleged lewd and lascivious conduct on her part, without an averment that such conduct proved her to be unchaste.

The question of whether or not a trial court has jurisdiction to set aside its judgment in a divorce case seems to have been first passed on in this State in the case of *Meyer v. Meyer*, 3 Met., 301. In the opinion, per Stites, Judge, it is said: "The law does not favor divorces, and there is special reason for affording to courts having jurisdiction in such case every possible means of preventing frauds, and correcting any error or injustice committed in the judgment that may be complained of. No appeal lies from a judgment of divorce, and unless the wrong done can be righted by the court

committing it the party injured is without redress. In our judgment the section supra (426 Civil Code), was designed but for one end, and that was to prescribe a form of proceeding in cases where both parties desired the annulment of the divorce, so as to prevent any fraud or imposition on the court to which the application was made."

Later, in *Ficener v. Ficener*, 8 Ky. Law Rep., 867, the court, through Pryor, Judge, uses this language: "The grounds for setting aside ordinary judgments in law or in equity after the expiration of the term do not apply to judgments for divorce which became final. During the term, however, and while the condition of both parties remains unchanged, the judgment may be set aside at the instance of the plaintiff, but not without notice to the defendant."

The same rule would, of course, apply to the defendant if wronged by the judgment of divorce.

We regard the rule announced in these two decisions of this court to be sound in principle and consonant with justice. Moreover, it has recently been reaffirmed by this court in *Hendrix v. Hendrix*, ante, 632, and is certainly not in conflict with the section of the Code supra.

The motion for a new trial in the case at bar was made within the time fixed by law for the entering of such a motion in the court which rendered the judgment, and as the appellant had due notice thereof, and the action of the court in sustaining the motion was taken during the term at which the judgment set aside was rendered (that is, within the sixty days in which courts of continuous session retain control of their judgments), and was authorized by the state of the pleadings, we are unable, in view of the unchanged condition of the parties, to hold that any error was thereby committed.

We are not authorized to pass upon the correctness or incorrectness of the final judgment in so far as it grants the wife a divorce, but may consider the grounds of divorce relied on by her, and the evidence in the entire record, in determining the propriety of the judgment for alimony. This we have done, with the result that we find no error in the judgment, either in the matter of allowing alimony nor as to the amount thereof. We also regard the attorney's fee reasonable and proper.

For the reasons indicated the judgments appealed from are affirmed both on the original and cross appeal.

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[Reported by Walter G. Chapman, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

CREECH, &c. v. JOHNSON, &c.

(Filed October 14, 1903.)

Land patents—Location of boundary—Where the running of a survey of lands according to the courses and distances called for in the patent would include within the boundary lands lying in two adjoining States and would locate one of the corners thereof in an adjoining State, and to locate a corner, which calls for a point "near" a mountain gap, in the middle of the gap, would necessitate, in order to close the survey, the lengthening of the subsequent calls to such an extent that more than twice the number of acres called for would be embraced within the boundary, including therein the courthouse and county seat of the county, while on the other hand the reversing of the calls of the patent and the location of the questionable corner about five miles from the mountain gap called for would close the survey and embrace only a small quantity of land in excess of the amount called for, the court will adopt the latter method in arriving at the location.

Cook & Jones for appellants.

William Low and W. O. Harris for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Hobson.

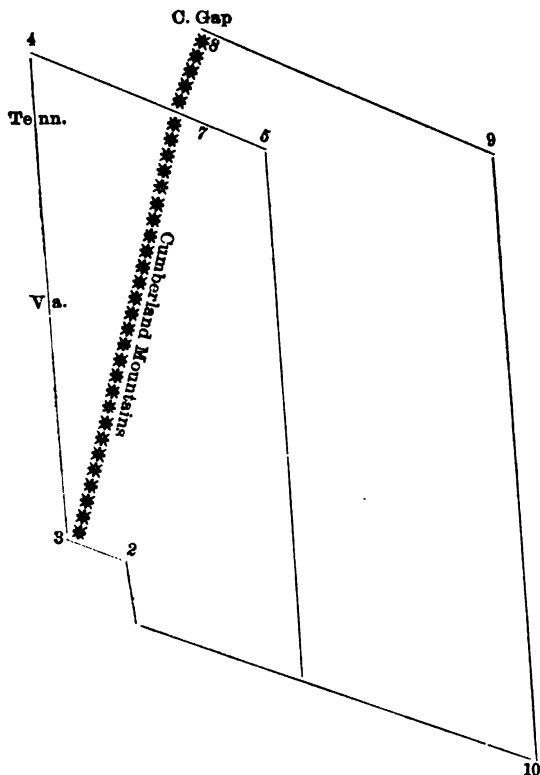
Appellees on August 21, 1902, obtained from the Commonwealth a patent to fifty acres of land in Bell county. The patent was issued on a survey bearing date of November 6, 1901. They filed this suit against appellants, charging that they had entered upon the land so patented and cut from it timber of the value of \$798.04. They prayed judgment for the specific recovery of the timber and \$400 in damages. The defendants pleaded that the patent referred to was void for the reason that none of the land covered by it was vacant or unappropriated at the time of the survey, but that all of it was embraced in a patent for 86,000 acres issued to Ledford, Skidmore & Smith on September 25, 1845, and also by a patent granted to Boyd Dickinson many years ago. The proof on the trial showed that only about 17 acres of land was vacant when the patent was issued if the patent for 86,000 acres.

to Ledford, Skidmore & Smith was left out of view, and that the defendants had cut on this 17 acres timber of the value of \$256. The court held, under the evidence, that this 17 acres was not included in the patent to Ledford, Skidmore & Smith, and was vacant when appellees' patent issued. He, therefore, gave judgment against appellants for the value of the timber cut, and they have appealed.

The patent to appellees was void if the land was not vacant. There was no attempt to show that the land was covered by any other patent than that of Ledford, Skidmore & Smith, and whether it was included in that patent is the only question to be determined on the appeal. The calls on the patent are as follows: "Beginning at Crank's creek, on two beeches and two sugar trees, beginning corner to said Smith 1,500-acre survey; thence S. 70 W. 664 poles to three beeches, beginning corner to Smith's 600-acre survey; thence S. 28 W. 400 poles to a stake on top of the Cumberland Mountains; thence S. 60 W. 8,320 poles to a stake near Cumberland Gap; thence N. 15 E. 3,200 poles to a stake; thence N. 55 E. 8,820 poles to a stake; thence S. 5 W. 3,150 poles to the beginning, with its appurtenances."

The beginning corner of the patent on two beeches and two sugar trees on Crank's creek, corner to Smith's 1,500-acre survey, is established and undisputed, so is the second corner at three beeches corner to Smith's 600-acre survey, and there is no difficulty as to the stake on the top of the Cumberland Mountains S. 28 W. 400 poles from the second corner, although the distances as run on the ground are longer than those called for in the patent, and in running from the first to the second corner there is some variation in the course called for to reach the corner. But the corners being established must control the course and distance. The trouble comes with the next call of the patent, "S. 60 W. 8,320 poles to a stake near Cumberland Gap." If this line is run on the course called for it strikes out through the States of Virginia and Tennessee and corners in Tennessee three and three-fourths miles south of Cumberland Gap. The State of Kentucky, it can not be presumed, undertook to patent land in Virginia and Tennessee; so it appears from an exhibit filed in the record the United States Circuit Court held in two cases before it that the course of the patent should be disregarded and the corner set in Cumberland Gap, the line running with the State line and following the meanders of the top of the mountain to a stake in the center of Cumberland Gap. If this point be taken as the corner and the next line is run N. 15 E. 3,200 poles to a stake, in order to make the patent close, the next line, which calls for 8,820 poles, has to be increased to 9,878 poles and the sixth line has to be increased from 3,150 poles to 4,990 poles. If the patent is thus run out it contains in Kentucky 182,184 acres, and will include the land in controversy. But if instead of thus extending the lines as indicated we begin at the beginning corner and reverse the calls of the patent, stopping when we get to the State line and then following the State line to the third corner, the patent will contain in Kentucky 93,552 acres, and will not include the land in controversy. The situation is roughly shown on the following map, on which the lines 1, 2, 3, 7, 8, 9, 10, 6, 1, indicate the location of the patent on the supposition that the fourth corner is in the center of the Cumberland Gap, and the lines 1, 6, 5, 7, 3, 2, 1 the location of the patent if its calls are reversed from the beginning corner and

the patent is closed by following the State line from the point where it reached 7, to the established corner at 8:



The point 7 is about five miles from Cumberland Gap. None of the lines in question have any marks on them. The circuit court accordingly adjudged in favor of the location of the patent by reversing its calls from the beginning corner, thus fixing its location as shown by the lines 1, 6, 5, 7, 8, 2, 1 on the map. The defendants appeal. The only question we deem it necessary to consider is whether this is the correct location of the patent, or whether the fourth corner should have been located in Cumberland Gap and the other lines run out from that corner as indicated by the lines 8, 9, 10, 1 on the map.

In *Asher v. Howard*, 24 Ky. Law Rep. 961, 2118, this court declined to determine the proper location of the patent in question because the record was not sufficiently prepared to furnish the court the necessary data. The record before us has been prepared with a view to present the question.

In *Thornbury v. Churchill*, 20 Ky., 29, the court said: "The order in which the surveyor gave the lines and corners in the certificate of survey is of no importance to find the position of the survey; by reversing the courses is as lawful and persuasive as by following the order in the certificate of

survey. The cases adjudged upon that point are conformable to reason and practical utility in guarding against mistakes and destruction of corners by fraud, accident and the elements."

Again, in *Pearson v. Baker*, 34 Ky., 331, the court said: "The beginning corner in the plot or certificate of survey is of no higher dignity or importance than any other corner of the survey. The order in which the surveyor gives the lines and corners in his certificate of survey is of no importance to find the true position of the survey. Reversing the courses is as lawful and persuasive as following the order of the certificate. That construction is to prevail which is most against the party claiming under an uncertain survey. It is his duty to show and establish his corners."

In issuing patents the government acts as trustee for the people. The survey is made by the patentee and the patent is issued on his application. The grant is, therefore, strictly construed against the grantee where its terms are uncertain or doubtful. (4 Am. & Eng. Ency. of Law, 801.)

"The calls may be reversed when by so doing the quantity of land embraced will more nearly harmonize with that called for in the grant; but the courses and distances, as given in the survey, should be followed when reversing the calls would not have that effect." (4 Am. & Eng. Ency. of Law, 789.)

"Quantity aids in ascertaining the premises granted when they are not described by known and established boundaries." (Ib., 790.)

It will be observed that the two first corners of the tract are corners of Smith's survey, and that all the other corners of the patent are located at stakes. The fact that no timber is called for at any of these corners and that the distances from the first corner to the second and from the second to the third, when run on the ground, exceed those given in the patent, would seem to indicate that this patent was perhaps laid out by protraction and that the surveyor did not in fact run the lines. But whether this is true or not, there is not enough in the patent to fix the fourth corner in the center of Cumberland Gap. The call of the patent is for a stake near Cumberland Gap. The language would indicate that the stake was not in Cumberland Gap, but near it, for that is a point so well known that it is reasonable the surveyor would have called for a stake in Cumberland Gap if that was in fact the location of the corner. If the corner is located here, it not only makes the patent contain more than 182,000 acres instead of 86,000 as called for; but it takes in the town of Harlan, with the county courthouse and other public grounds. The word "near" is too indefinite to justify a construction of the patent to sustain such a result under the rules above referred to. On the other hand, if we reverse the calls of the patent it includes about 98,000 acres of land, which is more than the quantity called for, and the fourth corner is located on Cumberland Mountain, near Cumberland Gap. Considering the length of the lines of the patent, and the notoriety of Cumberland Gap, we are of opinion that the location of the corner within five miles of Cumberland Gap might reasonably be spoken of in the survey as "near Cumberland Gap." It can not be presumed that a grant of 86,000 acres was intended as a grant of 182,000 acres. Nor can it be presumed that the fifth and sixth lines of the patent were intended to be extended so far beyond the patent calls as would be necessary to close the survey on the supposition

that the fourth corner is in Cumberland Gap. The patent calls for the land in Harlan county, Kentucky. It can not be presumed that it was intended to embrace land in Tennessee or Virginia, or to embrace the county seat of the county where the survey was recorded or the town about it. In the absence of marked lines or corners, or other evidences establishing the proper location of the grant, the circuit court construing the grant against the grantees where the descriptions are uncertain, properly adopted that location of the patent which gave about the quantity called for and preserved the courses and distances of the patent calls for the fifth and sixth lines of the survey by reversing the lines from the beginning corner. (*Harry v. Graham*, 27 Am. Dec., 226.)

Judgment affirmed.

BURRIER v. RICE, &c.

(Filed October 15, 1903—Not to be reported.)

Obstruction of public passway—In this action instituted by appellees to enforce the removal of fences and obstructions placed across an alleged public passway by the appellant there is sufficient evidence to sustain the judgment of the chancellor ordering the removal of the obstructions.

Breckinridge & Shelby and Geo. Denny for appellant.

H. E. Ross and J. Embry Allen for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Nunn

Appellee described in her petition a certain road or passway from her lands across South Elkhorn creek and thence with the creek, giving the courses and distances on the lands of appellants, which appellee claimed had been a public passway and used as such as a matter of right, and by and with the knowledge and approval of the prior owners of her land, for as long as seventy or eighty years; and she also alleged that appellant, without right, wrongfully and against her consent and the consent of the public, obstructed this passway by erecting wire fencing across it at several points, and she asked the court to make an order removing same. The court granted the prayer of her petition, and adjudged that it was a public passway, and that the same extends to, adjoins and is appurtenant to appellee's property, and that appellee and all persons claiming by or through her are entitled to the full, free, perpetual and uninterrupted use and enjoyment of the same as a passway, and directed the removal of the obstruction.

Many witnesses were introduced by the parties; many objections taken as to the relevancy and competency of the testimony; some of it was incompetent and irrelevant, but there was an abundance of competent testimony to sustain the judgment of the chancellor.

The same legal principles are involved in this case as in the case of *Larkin v. Ryan*, ante, 618.

Perceiving no error prejudicial to the substantial rights of appellant the judgment of the lower court is affirmed.

STEPHENS v. WILSON, &c.

(Filed October 15, 1908—Not to be reported.)

Preference of creditors—Where an insolvent person, whose property was under attachment of the Commonwealth, settled with the auditor for the indebtedness to the Commonwealth by borrowing the money from a bank, a deed of trust executed by him to the bank for the property to secure it in its loan can not be treated, at the instance of a general creditor, as a preference under the act of 1856.

S. D. Shouse and H. P. Stephens for appellant.

Hall & McLean for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge O'Rear.

The Commonwealth had instituted a suit upon the bond of a county court clerk to recover of him and his sureties about \$20,000 alleged to be due the State by the clerk for public revenues collected by him and not paid into the treasury. Attachments were procured against his property as well as of that of his sureties. These attachments were levied on all of the principal's property. He effected a settlement with the auditor for some \$17,000. To raise this sum he and his sureties executed their note to the Farmers and Traders National Bank of Covington. Simultaneously, the principal executed a deed of trust conveying to the president of the bank all of his property. Though not stated in the deed, it is admitted that its object was to secure the payment of the \$17,000. This suit is by a general creditor of the principal, seeking to have that transaction declared and adjudged an involuntary assignment by the debtor (who is conceded to have been then insolvent) for the benefit of all his creditors, under the statute (section 1910, Kentucky Statutes), commonly called the statute of 1856, against preferences by insolvent debtors. Without entering upon a discussion of other features of the transaction, we deem it enough to notice that at the time of the execution of the deed all the property covered by it was already in lien to the Commonwealth, by virtue of the attachment sued out by the auditor. Even if the sureties had then paid it off, they would have been entitled under a familiar principle of equity to be subrogated to the lien of the Commonwealth. (McCann v. Hill, 85 Ky., 547; Dawson v. Lee, 88 Ky., 49; Baker v. Fidelity, &c., Co., 84 Ky. Law Rep., 2196.) It was their credit with the bank that got the money to pay it. It was the same as if they had paid it, and was a simultaneous transaction with the execution of the deed of trust.

For these reasons we conclude that the condition of the sureties was not made better by the trust deed. The status was not changed to their advantage. (Meier v. Flinsback, 95 Ky., 189.) Hence it was not a preference within the terms of the statute. The judgment of the circuit court dismissing the bill of the creditor is consequently affirmed.

McCORMICK HARVESTING MACHINE CO. v. ARNOLD, &c.

(Filed October 21, 1903.)

¶ Sale of personal property—Approval by purchaser—Offer to return—Where personal property is sold subject to the approval of the purchaser and on the condition that upon its failure to perform the work which it is guaranteed to do the purchaser should notify the vendor, or his agent, of that fact and give an opportunity to have it put in order, and upon its continued failure to do the guaranteed quantity of work that the purchaser might return it and demand the surrender of his purchase-money notes, the failure of the purchaser to give notice of the failure of the machine to do the work or to offer to return it within a reasonable time after the discovery of its incapacity fixes his liability on the note, and the incapacity of the machine cannot be relied upon by way of defense to an action for recovery thereon.

J. E. Robinson for appellant.

J. M. Rothwell and William Herndon for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Settle.

The appellees, W. A. Arnold and J. I. Hamilton, were sued by the appellant, McCormick Harvesting Machine Co., upon three promissory notes of \$75 each of date November 11, 1901, and due December 1, 1901, June 1, 1902, and January 1, 1903, respectively.

The payment of the notes was resisted by appellees in the court below, the defense interposed by their answer being that they were executed for one "McCormick Husker and Shredder," which they received of appellant, and which its agent warranted would husk and shred 150 shocks of corn and fodder, or would shred 200 shocks of fodder per day, and that if upon a fair trial it failed to do so, appellant would return to appellees their notes and take back the machine; that the notes were executed upon that condition alone, and would not have been given but for the warranty mentioned. The answer further avers that the machine did not perform its work as warranted, though given a fair trial by the appellee, Arnold, but only had the capacity to husk and shred 100 shocks of corn, and shred a like quantity of fodder per day, and that by reason of the breach of warranty appellees are entitled to the return of their notes, and appellant to the return of the machine, and a tender of the return of the machine to appellant was made in the answer.

The action was upon all three of the notes, though instituted soon after the maturity of the first one, as it was stipulated in the contract between the parties that in the event appellees failed to pay any one of the notes within thirty days after its maturity, all should become due and payable.

In avoidance of the defense relied on by appellees the appellant, by reply, denied the warranty set up in the answer, or any agreement to return the notes or retake the machine by reason of its breach, and alleged that the only contract made between their agent and appellees in reference to the machine is contained in a writing signed by appellees and bearing date October 21, 1901, wherein, among other things, it is stipulated that the "McCormick Harvesting Machine Co. warrants this machine to be well made, of good material and durable, with proper care, and to do the work for

which it is intended when properly adjusted and operated (condition of fodder and corn being considered); if upon one day's trial the machine should not work well, the purchaser must give immediate notice to J. W. Lindley, general agent for the McCormick Harvesting Machine Co., at Louisville, Ky., and to the local agent from whom the machine was purchased, and allow a reasonable time to send a person to put it in order. If it can not be made to work well the purchaser must return it at once to the agent from whom he received it, and all cash, notes and securities received in settlement will be refunded, which when done shall constitute a settlement in full of the transaction. Three days' use of the machine, or continued possession, without notice of its failure to work properly, shall be considered an acceptance of the same, and a fulfillment of the warranty." * * *

The reply further avers that the foregoing stipulation contains the only warranty made in the sale of the machine, and that no breach of same has arisen, but that the stipulation providing for the trial of the machine and notice of its defects, if any, was violated by appellees, who gave appellant no notice of any defect therein, or of its failure to do the required amount of work, but continued to use the machine without complaint, by reason of which they are estopped to claim the return of the notes.

The rejoinder denies that the writing contains the contract between the parties, and avers that the contract as set forth in the answer was in parol and was made at a later date, to wit, at the time of the execution of the notes sued on.

We find that this contention of appellees is apparently sustained by the evidence; besides, the writing referred to shows that it was dated at a time anterior to the execution of the notes sued on, and it recites that two notes were given by appellees for the machine, one for \$112, due December 1, 1901, and the other for \$113, due December 1, 1902, and each bearing date October 21, 1901, whereas, the notes that were really executed for the machine were three in number, for \$75 each, and all bear date November 11, 1901.

It is patent, however, that the writing was signed by appellees as an order for the machine, that it might be procured for inspection or trial, though the real contract for its purchase was made by the parties when the notes were executed, and before any trial was made of the machine.

We are of opinion, however, that neither the pleadings nor evidence authorized the verdict or judgment rendered in the case, as according to the contract relied on by appellants it was their duty to have returned, or offered to return, the machine in a reasonable time after discovering that it would not perform the work as guaranteed by the agent of appellant.

In discussing sales "on trial," or "approval," and "sale or return," Mr. Benjamin in his admirable work on Sales, sections 595-6 (4th edition), says: "In the former class of cases there is no sale until approval is given, either expressly or by implication, resulting from keeping the goods beyond the time allowed for trial. In the latter case (sale or return) the same becomes absolute, and the property passes only after a reasonable time has elapsed without the return of the goods. In sales 'on trial' the mere failure to return the goods within the time specified for trial makes it absolute." * * *

In the case at bar it appears that appellees not only had ample time to try

the machine, but they used it for some time after discovering that it was incapable of doing the quantity of work which they claim appellant's agent warranted it to do, and that, too, without serious complaint to the agent, or an offer to return the machine. Indeed it appears from the record that no offer was ever made by the appellees to return it until the time of the filing of their answer, which was after the institution of the suit, and fully three months after the delivery of the machine to them. Upon such a state of case the appellees are, it seems to us, estopped to deny liability on the notes.

Ordinarily, in the sale of an article of personal property where there is a breach of warranty, the purchaser may return the property and recover the purchase price, or he may elect to retain it and recover damages for the breach of the warranty, in which case the measure of damages would be the difference in the value of the property in its condition at the time of the sale, and what it would have been worth if of the quality warranted; but that rule does not apply in this case, for here the contract was that appellees were to test or try the machine, and if it turned out that it did not perform the guaranteed work appellees were to be given back their notes, and the machine was to be returned to, or be retaken by, the appellant. It was the duty, therefore, of appellees to notify appellant's agent of the failure of the machine to do the guaranteed quantity of work within a reasonable time after ascertaining such failure, and in a like reasonable time to offer to return the machine, or, at any rate, to notify appellant's agent that it was subject to his order or right to retake it. But having failed to give such notice, or to offer to return the machine within a reasonable time after their discovery of its incapacity to perform its work according to the warranty, the sale became absolute and appellees' liability upon the notes fixed.

In this view of the law the instructions given by the lower court were altogether erroneous, for which reason the judgment is reversed and cause remanded, with directions to the lower court to grant appellant a new trial consistent with the opinion herein.

ODD FELLOWS' HALL ASSOCIATION OF DAYTON, KY. v. CITY OF DAYTON.

(Filed October 15, 1908—Not to be reported.)

Assessment for taxation—For a mere mistake in judgment of the assessing officers in fixing the assessed value of property the courts will not interfere.

Thos. P. Carothers for appellant.

C. J. Van Fleet for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant owned an improved lot in Dayton, a city of the fourth class. It was assessed for taxation for city purposes, being valued at \$14,250. Appellant resisted the collection of the tax under the allegation that the city authorities had fraudulently overvalued the lot at a sum greatly in excess of the real, or market, or cash value.

The proof showed a difference in the estimates of the value as fixed by the witnesses for appellant and those for appellee. The latter fix it at about the figure at which it was assessed. The former at about \$10,000. Even if the valuation fixed by appellant's witnesses should have been established as the true one, it does not follow that the assessment can be attacked for the mere mistake of the assessing officers. Although the statutes provide no means for reviewing the judgment and actions of these officials, yet there is provided an opportunity for the taxpayer to be heard before the board of supervisors. From their acquaintances with local values and conditions, as well as because of their exceptional opportunities for arriving at a correct appraisal, we can not say that the matter of ultimate judgment may not as well be lodged with them as with the courts. So, for mere mistake of judgment in fixing such assessed values, the courts will not, and ought not, to interfere. When, however, the assessing officers act from a malevolent purpose, and with the design to exact from a particular taxpayer an unjust sum as taxes, or act from any other corrupt motive, the courts are open to hear the complaint, and if established, to grant proper relief. The malicious motive of the assessing officer need not necessarily be expressed. It is enough if it can be established by relevant evidence as in other cases. And it may be that a flagrantly excessive valuation of one citizen's property over the basis adopted by the same officials for all other similar properties might be enough to satisfy the court that the motive of the taxing officers was a dishonest one, as, for example, when the citizen's property was assessed at four times its actual value, while in every other instance it was correctly valued. (*City of Covington v. Ludlow*, 8 Ky. Law Rep., 706.) But in this case there is no showing of how other similar property was valued; or that appellant was in anywise discriminated against; or that if there was error in fixing the valuation by the city officials, that the error was not merely an erroneous opinion, honestly entertained, and one, too, that was applied alike to all the taxpayers. Under such a showing there is no warrant for interfering with the collection of the tax upon the valuation as assessed. (*Cooley Taxation*, 784-785; *City of Covington v. Shinkle*, 25 Ky. Law Rep., 73.)

Judgment affirmed.

LOUISVILLE RAILWAY CO. v. ANDERSON.

(Filed October 15, 1903—Not to be reported.)

1. Contributory negligence—Instruction—In an action for damages for personal injuries sustained by the plaintiff, as alleged, by reason of the negligence of those in charge of a street car, resulting in a collision of the car with a cart in which the plaintiff was riding at the invitation of the driver, the court properly refused to give an instruction as to contributory negligence on the part of the driver of the cart in the absence of any proof showing such negligence.

2. Same—Fellow servants—Although the driver and the person injured were working at the same place, and at the time of the accident were going to their work, they can not be deemed fellow servants so as to allow the negligence of the driver, if any, to defeat the right of the plaintiff to recover for his injuries.

Fairleigh, Straus & Fairleigh for appellant.

Clayton B. Blakey for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 1.

Opinion of the court by Chief Justice Burnam.

The appellee, John Anderson, lived on Kentucky street, between Sixth and Seventh, in Louisville, Ky., in July, 1901, and had been employed for several weeks as a laborer at the waterworks. Fred Hood resided in the same neighborhood, and was employed as a teamster by Mrs. Clark to drive a team of two mules hitched tandem to a dump cart, and was engaged in hauling dirt from the waterworks. For several days before the injury sued for in this action, Anderson had ridden from Hood's home in the city to the waterworks in a cart driven by Hood, at his invitation. In making the trip they crossed the track of the Louisville Railway Co., at the intersection of Rogers street and Baxter avenue. On the morning of July 1, 1901, as they were crossing the track at a trot, one of appellant's cars coming at full speed struck the hind end of the cart, knocking it around and throwing the appellee, Anderson, upon his head on the ground. The accident resulted in the fracture of two of appellee's ribs, and was followed by "traumatic" pneumonia, which very nearly resulted in his death. He brought this suit for damages, alleging that appellant's agents and servants in charge of the car which inflicted the injury did not use proper care in approaching the crossing, or give the usual and customary signals of their approach. The railway company in its answer denied negligence, and plead contributory negligence on the part of appellee. The trial resulted in a verdict for \$800 for appellee, and the defendant has appealed.

Substantially the only ground relied on for reversal is the refusal of the trial court to instruct the jury that if they believe from the evidence that plaintiff's injury was caused or contributed to by the negligence of Hood, who was driving the cart, and the same would not have been received but for such negligence, they should find for the defendant.

This instruction was asked upon the theory that both Hood and Anderson were working for the water company, one shoveling dirt and the other carting it away, and that at the time of the injury they were going together to their place of labor, and were fellow servants and mutually responsible for each other's acts of negligence. We think this instruction was properly refused on two grounds: First, because the testimony in the case does not bear out the contention that Hood and Anderson were fellow servants engaged in a joint enterprise at the time the accident occurred. On the contrary, we think it clearly shows that Anderson was riding in the cart simply as a guest at the invitation of Hood. Second, the testimony in the case entirely fails to show any negligence either on the part of Hood or Anderson which contributed to the accident. The verdict of the jury barely compensated appellee for loss of wages and necessary expenses incurred in the treatment of his injuries. We think the trial court properly overruled appellant's motion for a new trial.

Judgment affirmed.

CLAY CITY LUMBER AND STAVE CO. v. NOE.

(Filed October 15, 1903—Not to be reported.)

Master and servant—When a master employs a servant to work for him he impliedly undertakes that the machinery and tools with which the servant is to work are in a reasonably safe condition, and to keep them in such condition, and it is the duty of the servant to use ordinary care to avoid injury from the use of defective tools, if such defects are patent or known to him, but no duty devolves upon him to make a critical examination of such tools; and for injuries resulting from the dangerous and unsafe condition of tools and machinery, of which he had no knowledge and could not have known of by the exercise of reasonable diligence, he is entitled to recover against the master.

Gowdy & Roberts for appellant.

O. H. Pollard, H. H. Harris and J. F. Sutton for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Lafayette Noe, an employe of the appellant, the Clay City Lumber and Stave Co., was injured while assisting to replace a car upon the track of their tramway which led from their mill to their lumber yard, which he alleges was due to the defective condition of the track and car, and which defect in the car was known to appellant, but not to him. It appears from the testimony that the tramway leading from the mill to the lumber yard was rotten at the point where the accident occurred, and very often when the car loaded with lumber reached this point the rails spread and let the car off the track. This had occurred so often that appellant's foreman had given a general order that when it occurred all the men who were at work in the neighborhood should assist to put the trucks back on the track. The tramway at this point was about twenty feet from the ground. While appellee was assisting a number of others to lift the car back on the tracks the bolts which held the cross beam of the car to the axle slipped out, for the reason that two taps which held them in place on the opposite side of the car from where he was lifting were not on the bolts, which resulted in tumbling the whole load of lumber on plaintiff. It also appears that these taps had been off the bolts for some time previous to the accident; and that this fact was well known to Mr. Rawl, the agent of the defendant company, whose business it was to look after the tools and machinery of the company. Appellee was employed as an offbearer of lumber in the mill, and his duties did not ordinarily require that he should have any connection with the tramway or cars; and he testifies, and is uncontradicted on this point, that he did not know of the defective condition of the car previous to his injury. His leg was caught between the T rail and the lumber, and the flesh crushed loose from the bone for about nine inches below the knee, and he was confined as a result of his injury for several months under the care of a doctor. A jury trial resulted in a verdict for plaintiff for \$500, and defendant has appealed.

The chief ground for reversal is that the trial court erred in its instruction to the jury. Only one was given, and it is as follows: "The court instructs the jury that it was the duty of the defendant to keep its trucks and cars on

which its lumber was carried from the mill to the lumber yard, and the tracks over which said cars ran, in reasonable repair; and if the jury believe from the evidence that defendant failed to keep its said cars and track in such state of repair that they were reasonably safe for the employes handling the cars and lumber, and the plaintiff while working for the defendant, and without the knowledge of the dangerous or unsafe condition of said track and cars, and when he could not, with reasonable diligence on his part, have known of the danger, was injured; and that the injury received by plaintiff was caused by the defects and unsafe condition of said track or cars, they will find for plaintiff such sum as they believe from the evidence will compensate him for the loss of time, pain and suffering endured and the necessary cost and expense for doctor bills and nursing caused by said injury, not exceeding in all the sum of \$5,000, and unless they so believe they will find for the defendant."

It is a well-settled rule of law that when a master employs a servant to work for him he impliedly undertakes with him that the tools and machinery with which he is to work are in a reasonably safe condition, and to keep them in such condition. This duty on the part of the master is primary and can not be delegated to another servant so as to exempt the master from liability for injury resulting therefrom. There is a corresponding duty on the part of the servant to use ordinary care to avoid injury from the use of defective tools, if such defects are patent or known to him, but no duty devolves upon him to make a critical examination of tools furnished for his use by the master. The instructions given by the court fully cover this view of the law, and we perceive no ground for reversal.

Judgment affirmed.

TRACY v. COMMONWEALTH.

(Filed October 15, 1903—Not to be reported.)

1. County school superintendent—Settlement of accounts—Under the provisions of section 4409 of the Kentucky Statutes, requiring a county school superintendent to make a settlement of his accounts as such officer with the county judge annually on or before the 1st day of August, such an officer, who disregards the statute and refuses to make a settlement until after that date for the reason, as alleged, that he has lost two receipts for money paid out and is waiting to obtain duplicates, is guilty of willfully failing to settle, and is liable to the penalty imposed by that statute.

2. Same—Evidence—It is competent on the trial of one charged with willfully failing to settle his accounts as county school superintendent for the county judge to state the steps which he has taken to induce a settlement, and the statements made by the accused with reference to his failure to settle.

3. Same—The fact that the accused had failed to pay two of his teachers until after the time for settlement had passed was competent in evidence.

W. D. Jackson and C. F. Spencer for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Settle.

The appellant is the county superintendent of common schools in the county of Powell. He was indicted in the circuit court of that county for willfully failing to settle, on or before August 1, 1902, with the county judge, his accounts as such superintendent, for the previous school year.

The trial, notwithstanding his plea of not guilty, resulted in his conviction at the hands of the jury and the fixing of his punishment at a fine of \$150. He now in this court complains of the ruling of the trial court in refusing to peremptorily instruct the jury to acquit him, and in refusing him a new trial.

The indictment was found under and by virtue of section 4409, Kentucky Statutes, which directs that "each county superintendent shall, on or before the 1st day of August, annually settle his accounts for the previous school year with the county judge of his county, and forward a copy of said settlement, certified by the clerk of said court to be correct, to the superintendent of public instruction. Said settlement shall embrace all sums received since the date of his last settlement by said county superintendent for the benefit of common schools taught during the school year; a full statement of all sums paid out by him, for what, to whom and when paid. For his willful failure to pay out to those entitled thereto any money in his hands for the space of thirty days after the same shall be received by him, or for his willful failure to make the aforesaid settlement by the time required by law, the county superintendent shall be guilty of a misdemeanor, and being indicted and convicted thereof, he shall be fined in a sum not less than \$100, nor more than \$500, as well as remain liable on his official bond, and may be removed from office."

It will be observed that the section supra requires the county superintendent to make his settlement with the county judge on or before the 1st day of August annually. This provision is mandatory. Yet it was disregarded by the appellant, who, instead of making his settlement with the county judge on or before August 1, 1902, did not do so until some time in March, 1903, his only excuse being that two of his receipts for school money paid to teachers had been destroyed, and that it was his purpose to make the settlement as soon as he could get from the proper parties other duplicate receipts.

It is contended for the appellant that the evidence did not show that his failure to settle within the required time was willful, and, therefore, the peremptory instruction asked by him at the conclusion of the Commonwealth's evidence should have been given by the court. We are unable to adopt this view. In the case of the Louisville and Jeffersonville Ferry Co. v. Commonwealth, 104 Ky., 726, the defendant was indicted and convicted for willfully failing to file with the auditor a verified statement of its capital stock, place of business, etc., as required by sections 4078 and 4087, Kentucky Statutes, in construing the words willful used in the statute this court, in the opinion in that case, said: "The term willful, as used in the statute, simply means the voluntary act of a party, as distinguished from coercion, or, in other words, that he was free to report or not to report; and the term 'willfully fail' can, as we think, have no other rational construction. It may be that a party in fact believed that the report had been forwarded to the proper officer, or in fact it might have been sent and by accident failed to reach its destination, in which event it would be a failure to report, but

would not be willful, or intentional for the reason that the party had, in good faith, attempted to comply with the statute."

We are of the opinion that the appellant's failure to comply with the statute was willful because it was a voluntary omission of a well-known duty, the performance of which was made imperative by the statute. It follows, therefore, that he was guilty of a violation of the provisions of the statute, for which he became liable to indictment, and punishment as therein prescribed.

We find no error in the admission of evidence. It was competent for the county judge to state all that was related by him as to the failure of appellant to make settlement, and the steps taken by the judge in the effort to procure the settlement.

We also think the evidence introduced by the Commonwealth, to the effect that appellant failed to pay two of the teachers until after the time for making the settlement had passed was competent, as was the evidence conducing to show confusion in his accounts as superintendent, for while not obliged to prove a motive on the part of the appellant for failing to make settlement, it was competent for the Commonwealth to do so in aggravation of the offense. The conviction of appellant being, in our opinion, proper, the judgment is affirmed.

WILMUTH'S ADM'R v. ILLINOIS CENTRAL R. R. CO.

(Filed October 15, 1908—Not to be reported.)

1. Railroads—Peremptory instruction—In an action for damages against a railroad company the testimony for the plaintiff that the decedent was killed by a passenger train while he was standing on one track awaiting the passing of a freight train on a parallel track going in the opposite direction to that of the passenger train by which he was killed; that there was a straight track from the point at which he was killed in the direction from which the train was coming for nearly five hundred yards; that no signals of the train's approach were given until decedent was struck, taken in connection with the admission of the engineer of the train that he had seen decedent on the track when the train was about two hundred feet from him, presented a state of facts from which negligence on the part of the servants of the company might be inferred, and authorized a submission of the case to the jury.

2. Private crossing—Trespasser—In the absence of proof that a private crossing existed at the point where the decedent was killed he was a trespasser on the company's property, and the only duty which it owed to him was to exercise ordinary care to avoid injuring him after discovering his peril, by giving the usual signals of approach, and, if necessary and practicable, by slackening the speed of the train or stopping it altogether.

8. Same—Signals—The permissive use of a place for crossing a railroad track does not confer any authority or right to use same, nor amount to its establishment as a private crossing; and one so using it is not entitled to rely upon signals for a public crossing not far distant, so that the failure to give the signals for the public crossing would amount to negligence to those so using such private crossing.

R. B. Flatt and J. C. Dean for appellant.

Pirtle & Trabue, N. P. Moss and J. M. Dickinson for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Settle.

The appellant, as administrator of his infant son, J. W. Wilmuth, sued the appellee, Illinois Central R. R. Co., in the lower court to recover damages for the death of the intestate, caused by the alleged negligence of its servants in running a passenger train of which they were in charge against or over him. After the proof of both appellant and appellee had been introduced, the jury, in obedience to a peremptory instruction from the court to that effect, returned a verdict for the appellee, and the petition was thereupon dismissed at appellant's cost. Of that judgment, and the further judgment of the lower court overruling his motion for a new trial, appellant complains, and insists that a reversal should be granted by this court.

It appears from the record that the intestate was eleven years of age; that he had been plowing in a field on the opposite side of the railroad from his father's house, and that in returning from the house, whither he had gone, probably for water, to where the horse and plow had been left by him in the field, he found, upon reaching the railroad, which contained a double track, that one of the tracks was occupied by a passing freight train. While on the cross-ties of the track running parallel with the one occupied by the moving freight train, waiting for that train to pass out of the way, the passenger train, which he doubtless did not see or hear, owing to the noise made by the freight train, approached at great speed in his rear, and the pilot beam of its locomotive striking him on the back of the head, produced sudden death.

The appellant introduced ten or more witnesses, not fewer than six of whom, among them J. A. Porter, surveyor of Hickman county, testified that from the point of the injury north, the direction from which the passenger train approached, the track was straight and unobstructed for 1,440 feet or more, 1,440 being the measurement of the county surveyor.

Wes Carter testified that he was in thirty yards of the railroad track, and at a point midway between the boy and the public crossing, which was about 1,800 feet from the latter; that he was watching the passenger train by which the boy was killed, and that it gave no alarm, either by blowing its whistle or ringing its bell, as it approached the boy, or before striking him, and that he saw the fireman looking out ahead in the direction of the boy when as much as 1,800 feet (600 yards) away from the place of the injury. Five other witnesses besides Carter testified that the train gave no alarm at any time in approaching the boy, and Hardy Beasley, a former locomotive fireman, of experience, testified that this passenger train could have been stopped within 250 yards. George Muscovally testified that he was on the train by which the boy was killed, and that after the train had stopped and backed up to where the body of the boy lay, he heard the engineer say that he saw the boy on the west side of the track sitting on the end of the cross-ties looking under the northbound passing freight at his horse running away in a field east of the railroad. Two other witnesses, Joe Wilmuth and Sid Willet, testified that the fireman told them that he saw the boy as soon as the train rounded the curve, which was 1,440 feet distant, and that he thought him a man until they backed up to where he was killed.

It is true that the engineer in charge of the passenger train testified in

substance that the locomotive whistle was blown for the public crossing, which is 1,800 feet north of where the boy was killed, and again just south of the crossing where is located a station board marked "Thurmond," and in addition that the engine bell was rung at the crossing and station board; that after rounding the curve south of the crossing he saw the freight train of thirty cars on the other track going north, and, therefore, meeting him, and that when he got, as he supposed, in 200 feet of where the boy was killed he saw, to use his language, an "object on the outside of the rail, crouched close to the rail; couldn't tell hardly what this object was, because I noticed, as he raised up he had his back to me." He further said that the bell was still ringing, and he then gave the stock alarm with the whistle, and as the boy raised he pulled the whistle "wide open" to attract his attention, put on the air brakes and used every effort to stop the train, but the boy, without moving further, except to raise himself in a half stooping position, was struck by the pilot.

The engineer also testified that after leaving the curve the fireman was engaged in replenishing the fire, and he was not, therefore, on the lookout ahead, as was the engineer, at the time of striking the boy. The fireman corroborated the engineer in the matter of the signals, but said he did not see the boy before he was struck by the train, as he was engaged at the time in replenishing the locomotive fire.

The engineer was likewise corroborated, in the main, by the conductor, and a brakeman as to the giving of the signals, though they did not see the boy until after he was killed. It will be readily seen that the evidence is conflicting, but it can not be said that there is no evidence tending to show negligence upon the part of appellee's servants in charge of the train by which appellant's intestate was killed. Clearly the intestate was a trespasser upon appellee's track; appellee's servants, the engineer and fireman were under no obligation to be on the lookout to discover his presence on the track. The only duty they owed him after becoming aware of his presence and peril was to exercise ordinary care to avoid injuring him, by giving the customary signals to warn him of the approach of the train, and of his danger therefrom, and if practicable, and necessary to avoid striking him, to slacken the speed and stop the train. The engineer admits that he saw the intestate on the track, but says the train was within 200 feet of him when his presence was discovered, and that he gave the alarm signal at once; the appellant's witnesses testify, however, that no signal was given at all until after the train struck the intestate. It may be true that the intestate was not seen by the engineer or fireman until the locomotive was in 200 feet of him, yet the immediate giving of the alarm signal might have warned him of the nearness of the train, and afforded him the opportunity to take the one step necessary to remove his person from the end of the cross-tie upon which he was standing, and thereby have prevented contact with the train. If, therefore, under these circumstances, no signals were given by the engineer, would not the failure to do so constitute negligence?

Upon the other hand, if, as testified by appellant's witnesses, the view of the track from the engine of the approaching train was unobstructed for a distance of from 480 to 600 yards to where the intestate was located, would it do violence to the evidence to indulge the inference that his presence and

peril were in fact known to the engineer and fireman in time to have prevented his death by the giving of the proper signals, or the stopping of the train?

Undoubtedly the situation was one of peril to the intestate. If he was watching the horse left at the plow, it had to be done by looking under the moving freight train as it passed between him and the horse, and to thus look, it was doubtless necessary for him to stoop or bend his body, which he seems to have done, with his back towards the approaching passenger train; and if this was his position when discovered by appellee's engineer, the latter must have known that the noise of the moving freight train would render it difficult for the intestate to hear the signals of alarm from the passenger train, customarily made by the blowing of the whistle and the ringing of the bell, and it was, therefore, incumbent on the engineer not only to give the customary alarm signals, but if practicable and necessary, to slacken the speed of, and even stop, the train, provided that in the exercise of ordinary care such precautions could have been taken by him after the discovery of the intestate's peril, and before the train struck him.

As before stated, the evidence is conflicting as to the appellee's negligence, but the well-settled rule in this State is that where the evidence conduces in any degree to establish the right of recovery, a peremptory instruction will be unauthorized, as it is the province of the juries to pass upon questions of negligence in such cases.

We are of opinion that the evidence of appellant presents a state of facts from which negligence on the part of appellee's servants may be inferred. Whether these facts are of sufficient weight to influence a verdict in his behalf must be determined by a jury. Upon the other hand, if they are outweighed, or discredited, by the evidence furnished by the witnesses of the appellee, the verdict of the jury must so declare.

For the reasons indicated we are constrained to hold that the lower court should have refused the peremptory instruction. We are unable to agree with appellant's counsel that this case comes within the rule stated in *Cabill v. Cincinnati, &c., Ry. Co.*, 92 Ky., 345, which holds that while the failure of those in charge of a railroad train to give signals of its approach to a private crossing is not generally regarded as negligence, yet where a signal which it is the duty of the company to give, and which is usually given, at a public crossing, may be heard at a private crossing by those entitled to use the private crossing, they have the right to rely upon the signals being given, and the failure to give it is negligence as to them as well as to persons traveling on the public highway.

The proof in this case does not show that a private crossing exists on the appellee's track at the point claimed by appellant, or that the intestate was killed just at that point; at most the use that was made of the alleged crossing by appellant and his landlord was merely permissive so far as appellee is concerned; besides, it was not shown in evidence that appellant or others had been accustomed to rely upon any signal given at the public crossing.

There is no claim set up in the pleadings of the existence of a private crossing, or of the right of the intestate to its use, and it is well settled that the mere acquiescence on the part of a railroad company in the use of the track by the public does not confer any authority or right, or amount to a

license to use the same. (Brown's Adm'r v. L. & N. R. R. Co., 17 Ky. Law Rep., 145; Emlery v. L. & N. R. R. Co., 18 Ky. Law Rep., 484; Dillas, Adm'r v. C. & O. Ry. Co., 24 Ky. Law Rep. (part II), 1847.)

We think the facts of this case come within the rule announced in *I. C. R. R. Co. v. Hoeker*, 21 Ky. Law Rep., 1398; *L. & N. R. R. Co. v. Tinkhom's Adm'r*, 19 Ky. Law Rep., 1784; *Newport News & M. V. Co. v. Deuser*, 97 Ky., 92.

For the error of the lower court in giving the peremptory instruction and refusing a new trial the judgment is reversed and cause remanded for a new trial, and for proceedings consistent with the opinion herein.

HONAKER v. COMMONWEALTH.

(Filed October 15, 1903—Not to be reported.)

1. Criminal law—Malicious striking with intent to kill—On the trial of an indictment, under section 1166 of the Kentucky Statutes, charging the accused with having willfully and maliciously, and with intent to kill, struck, beat and wounded his wife, it was error to give an instruction, under section 1242 of the Kentucky Statutes, as to striking in sudden affray and in sudden heat and passion, as the last-mentioned section applies only to cases of shooting, cutting, thrusting or stabbing, and does not embrace a wound inflicted by a wooden stick or club, as was used by the accused, and also for the further reason that there was no evidence to show that the case was a sudden affray.

2. Deadly weapon—Instruction—An instruction upon the question of whether the club or stick used by the accused was a deadly weapon was erroneous in that it only required the jury to believe that death could have been produced with it by the accused without regard to the manner of its use; the jury should have been required to believe that it was reasonably calculated to produce death when used by a person of defendant's physical strength and in the manner in which it was used on the occasion mentioned in the indictment.

Will D. Jesse for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Nunn.

On May 30, 1902, the appellant was indicted by the grand jury of Woodford county, charging that the appellant did, on the 26th of May, 1902, unlawfully, willfully, maliciously and feloniously, and with intent to kill, strike, beat and wound his wife, Josie Honaker, but of which wounds she did not die. The indictment also charged that the appellant had, prior to the commission of this offense, been twice convicted of felonies and punished by confinement in the penitentiary in each case, the indictment being specific as to each previous charge and conviction. At the October term of that court he was tried and convicted and sentenced to the penitentiary for life, and he has appealed from that sentence. He assigns many alleged errors committed by the trial court as reasons for a reversal.

The evidence proved this state of fact: That the appellant and his wife had some harsh words, and he left the house, going to a neighbors; then she

got upon their horse and went to Versailles and bought a railroad ticket, intending to go to her parents' home in Bourbon county. Soon after appellant left the house he was informed that his wife had left home, and he then saw her traveling up the road in the direction of Versailles. He immediately returned to his house and found their child fastened up in the house, crying; he took it to a neighbor's and left it, borrowed a horse from another neighbor, and started on after his wife. When he arrived at the suburbs of Versailles he found his wife's horse hitched. He left his horse at the same place, went into the town and took two or three drinks of liquor, and then out to the depot where he found his wife, and began trying to persuade her to return, she refusing. Then he told her that their child had choked to death, which was false. She then consented to return. She had her ticket redeemed by the agent, and they started for their horses. He then prevailed upon her to let him have a quarter, which she did, and he went into town and bought whisky with it, and met her at the place where their horses were hitched. They then started in the direction of their home, the husband riding by her side. He unbuckled one of the reins of her bridle, and began hitting her with one end of the bridle rein repeatedly as they rode along, and once or twice with his fist. When they arrived at the place where he borrowed the horse he left it, and they both rode her horse home, she riding behind. Shortly after they both got on her horse he broke off one end of a fence stake and would hit her over his shoulder as they rode along. She fell off twice, once in a pile of rocks, and when they arrived home he struck her twice with this stick, one time knocking her down. He then went into the house and got him a pillow, went out into the yard under a tree and slept all night, and was arrested there the next morning.

The court gave an instruction on the indictment for malicious striking with intent to kill, and also gave an instruction under section 1242 of the statutes for striking in sudden heat and passion. He also gave the proper instruction on the previous convictions of appellant, and also an instruction leaving it to the jury to determine whether or not the stick used by the appellant in the striking was a deadly weapon, and a proper instruction on reasonable doubt.

We find no error prejudicial to the substantial rights of appellant except two. One was in giving the instruction under section 1243 of the statutes, in striking in sudden affray and in sudden heat and passion. The other was in the manner in which the court submitted to the jury the question as to whether or not the stick was a deadly weapon. Many cases have been decided by this court in which it has been determined that section 1243 has no application to a case like this. That section applies only to cases of shooting, cutting, thrusting or stabbing, and does not embrace a wound inflicted by striking with a wooden stick or club, blacksmith tongs, sledge hammer, or other like weapons. The indictment in this case was under section 1166, Kentucky Statutes. Under this section it is an offense to willfully and maliciously cut, strike or stab another with a knife, sword or other deadly weapon with intent to kill, and a party can be properly convicted under this section with use of a stick, club, or any deadly weapon. But under section 1242 the conviction can only be had where there was a shooting, cutting, thrusting or stabbing. The word strike in that section does

not appear. (11 Bush, 608; 17 Ky. Law Rep., 1015; 20 Ky. Law Rep., 368, 761.)

In a case like the one at bar, where the striking was done with a stick, club, hammer, tongs, or other like weapons, the court should give an instruction under section 1166 of the statutes, and if the evidence warrants it, give an instruction on assault and battery as the next lower degree of such an offense. This court has, in one or two cases where the lower court has failed to give such an instruction, refused to reverse for that reason, stating that the error was harmless and not prejudicial to the substantial rights of the defendant; but they were cases where the difficulties or affrays arose suddenly, and apparently without previous thought or reflection, and the court said in such cases that an instruction on sudden affray, or in sudden heat and passion, under section 1242, was not prejudicial for the reason that the jury might have found the defendant guilty under such an instruction. But such is not the case before us. Here the appellant left his home, went to town, met his wife, returned home, beat his wife on the road, and knocked her down with a stick after they arrived at home, and was enraged or mad from the time he started from home until he returned. The jury under the evidence in this case could not possibly have found the appellant guilty of striking in sudden affray or in sudden heat and passion. It was a case in which the jury was compelled, under the instructions of the court, to find the appellant guilty of willful and malicious striking and wounding with intent to kill, or a verdict of acquittal. It was a case, under the evidence, of either willful and malicious striking with intent to kill, or it was a willful beating and bruising, not with intent to kill, and it was error in the court not to have so submitted the case to the jury. As to the error of the court in the manner of submitting to the jury the question of whether the stick used was a deadly weapon, this court has recently, in the case of *Cosby v. Commonwealth*, 24 Ky. Law Rep., 2050, passed upon this question.

In this case the court said: "We are of the opinion that the lower court should have given the instruction on this point as follows: 'If the jury believe from the evidence, beyond a reasonable doubt, that the club or rock, or either, with which the defendant struck and wounded Gilky, if he did so strike and wound him with a club and rock, or either, were such instruments as were reasonably calculated to produce death, when used by a person of defendant's physical strength, and in the manner in which they, or either of them, were used by him on the occasion mentioned in the indictment, they will, in that event, be authorized to find that such a club and rock, or either, are deadly weapons within the meaning of the law.'"

The jury, under the court's instruction in this case were only required to merely believe that death could be produced with the club or stick used by appellant, and that without regard to the manner of its use.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

STRULL v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed October 15, 1908—Not to be reported.)

1. Railroads—Wrongful collection of fare from passenger—Where it appeared from the testimony on behalf of the plaintiff in an action for damages against a railroad company that the conductor of the train, after having been told by a passenger that he had paid his fare and had surrendered his ticket, accused the passenger with attempting to cheat and defraud the company and threatened to put him off the train, and by means of such threats and oppression wrongfully obtained the fare, it was error for the court to take the case from the jury, the passenger having the right to a recovery of damages commensurate with the injury if such a state of case was true.

2. Final judgment—The jury having returned a verdict in favor of the plaintiff for the amount of the fare wrongfully obtained from him, pursuant to the peremptory instruction of the court, a judgment entered by the court adjudging to plaintiff his costs up to the time of the filing of defendant's answer and to the defendant its costs accrued after the filing of the answer was a final order from which an appeal could be taken.

Noggle & Graham for appellant.

W. C. McChord and Edward W. Hines for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Judge Nunn.

The appellant sued the appellee for damages in the sum of \$500, alleging, in substance, that he purchased a round trip ticket which entitled him to a passage from Greensburg, Ky., to Louisville, Ky., and return; that he made the trip on the ticket to Louisville and returned as far as Lebanon Junction, and there took another train of the appellee for his home in Greensburg, and on that train the conductor took up his ticket which entitled him passage to Greensburg, and after passing the station of Campbellsville the appellee, by its agent and servant, the conductor, willfully, unlawfully and wantonly demanded of the appellant further and additional fare before it would carry appellant to Greensburg, Ky., as it had contracted and agreed to do; that he notified the conductor that he had once paid his fare, and that he had surrendered his ticket to him after leaving Lebanon Junction, and refused to pay any further or additional fare, and appellee's conductor became abusive and insulting, accusing appellant, in the presence and hearing of other passengers on the train, of trying to cheat and defraud the appellee out of a fare from Campbellsville to Greensburg, and threatened to stop the train and put the appellant off; that in order to prevent being further abused and insulted, in the presence and hearing of other passengers on the train, and to prevent being put off of the train, he did, under protest, pay the conductor the further and additional fare to Greensburg, Ky.; that he was greatly insulted and humiliated by the unlawful, willful and wanton conduct of appellee's conductor in charging him, in the hearing and presence of other passengers, with trying to cheat and defraud appellee out of a fare.

The appellee answered, in the first paragraph alleging that appellant was not a resident of Green county, Kentucky, and that he resided in Jefferson county, and that the injuries complained of, if any, were received in Taylor

county, and asked that appellant's action be dismissed. By the second paragraph of its answer it denied that its conductor charged the appellant with any intent to cheat or defraud the company out of a fare, or that its conductor abused him or wronged him in any way, but alleged that its conductor had made a mistake, for reasons set forth in its answer, and improperly collected the fare from appellant, and tendered the amount to the appellant in its answer.

The issues were completed, the trial was had, and the evidence heard; whereupon the appellee moved the court to give a peremptory instruction to find for appellant 36 cents, the amount of the fare, and the court gave the instruction, and the jury returned a verdict in accordance therewith. The court thereupon rendered the following judgment: "It appearing to the court before the institution of this action defendant attempted to tender plaintiff 36 cents in full of his demands herein, and the court is of the opinion that the tender was not directed to plaintiff and, therefore, not in fact a legal tender. but with the filing of its answer herein defendant tendered in court 36 cents in full of demand sued for, which plaintiff refused to accept. It is, therefore, adjudged that plaintiff recover of defendant his cost accrued up to the filing of defendant's answer, and it is adjudged that defendant recover of plaintiff its costs herein expended after the filing of its answer herein."

From this judgment appellant has appealed. As appears from the record the evidence of appellant conduced to prove the allegations of his petition, and that he was a resident of Greensburg, Ky., and that the conductor, in the presence of other passengers on the train, accused appellant of trying to cheat the appellee out of a fare and was trying to beat his way, and threatened to put him off; that appellant, in order to stop the abuse, and in fear that he would be put off, and under protest, paid the fare; that he was very much humiliated, and the conductor appeared to be mad. The appellee's evidence contradicted all this, except the collection of the fare, and this was done without insult or oppression, and under a mistake.

There was no contradiction in the evidence concerning appellant's residence in Greensburg, consequently the court was right in not sustaining the first paragraph of appellee's answer. The court erred in giving the peremptory instruction. This court has repeatedly decided that where there is any testimony sustaining a cause of action, a peremptory instruction is improper.

The appellee is a common carrier of passengers, and its agents and servants whom it places in charge of its trains are required to behave towards its passengers with civility and propriety, and to save and protect them from insult, oppression and injury so far as possible, exercising the highest degree of care, and for a violation of these duties it is directly responsible. Without intending to express any opinion as to the truth or falsity of appellant's evidence as appears in the record, if the conductor did approach appellant, and demand fare, and after being told by appellant that he had paid his fare, and that his ticket had been surrendered to him, the conductor then, in the presence of other passengers, charged the appellant with attempting to cheat the company and beat it out of a fare, and threatened to put him off of the train, and in this way put him in fear, oppressed and humiliated

him, and wrongfully obtained the fare, the appellant was entitled to damages commensurate with the injury. (85 Ky., 307, 553; 6 Ky. Law Rep., 669; 8 Bush, 152; 21 Ky. Law Rep., 1880, and other cases unnecessary to mention.)

Appellee refers to the case of L. & N. R. R. Co. v. Champion, 24 Ky. Law Rep., 87. That case is unlike the one at bar. There was no evidence that the passenger was insulted, oppressed, put in fear or humiliated. And also refers to 18 Ky. Law Rep., 415. Instead of this case supporting the action of the lower court it supports the view contended for by appellant. In that case the court said: "There was not anything showing that he (conductor) acted arbitrarily or in an insulting or abusive manner, or in such way as to harass or humiliate the appellant, upon which to base a recovery of any more than actual damages."

Appellee also quotes from Sutherland on Damages, section 391, as follows: "There is much authority for allowing damages for torts beyond compensation. Whenever a case shows a wanton invasion of the plaintiff's rights, or any circumstances of outrage or insult, or whenever there has been oppression or vindictiveness on the part of the wrongdoer, or whenever there is a willful, malicious or reckless tort to persons or property, exemplary or punitive damages should be allowed."

If appellant's theory of the case as appears from the record be true the appellee's agent made this demand of appellant for fare under circumstances which made his manner insulting, oppressive and vindictive.

Appellee contends that the judgment of the lower court was not final, and that, therefore, the appellant had no right to prosecute this appeal. In our opinion it was final. It was intended by the court rendering it as a final judgment in that case; it terminated the action, and it decided the matter litigated by the parties. A final order is one that either terminated the action itself or decides some matter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original condition. (102 Ky., 370.)

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent with this opinion.

CITY OF OWENSBORO v. KNOX'S ADM'R.

(Filed October 15, 1908.)

1. Electricity—Duty of owner with reference to—A municipality, which owns an electric light plant for the purpose of furnishing public and commercial lighting, owes to the public the duty of having and keeping its poles and wires used for conducting the electricity safe and properly constructed, and to employ such skill and knowledge in the operation of its plant and in the construction of its poles and wires as are ordinarily possessed and exercised by those experienced in the nature of the element and the probable consequences of its application for the purposes for which it was used, and its failure to perform that duty renders it liable for injuries resulting therefrom, notwithstanding it may not have had notice of a defect a sufficient length of time to remedy it.

2. Improper statements of counsel—Error—Where the testimony of a witness could not have affected the finding of the jury improper criticisms of his evidence by an attorney in argument to the jury were at most harmless error.

Geo. W. Jolly for appellant.

J. D. Atchison and C. S. Walker for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge O'Rear.

The city of Owensboro owns and operates its own electric light plant, conducted both for public and commercial lighting. Appellee's intestate, a child some fourteen years of age, while passing along one of appellant's streets, inadvertently and innocently come in contact with a guy wire, running from the top of a pole, along which was strung the wires for conducting the electric current, to a short post set near the sidewalk. By reason either of imperfect insulation, or other improper and neglectful failure to keep the wires from coming in contact, the guy wire had become charged with a heavy current of electricity. The child was severely shocked and burned.

In this suit to recover damages for appellant's negligence in suffering the guy wire to become in this dangerous condition the court charged the jury as to the law governing this case, which charge is the principal point of objection on this appeal. The verdict was for appellee's intestate, and the city appeals. The instruction most complained of, and the only one of enough novelty presumably to have engaged the serious attention of learned counsel, is this: "The court instructs the jury that defendant was required to have and keep safe and properly constructed wires and poles at the place where plaintiff was injured; and that it was its duty in using electricity, at the place and manner shown in the evidence, to use such care as was commensurate with the danger, and to employ such skill and knowledge as are ordinarily possessed and exercised by those experienced in the nature of the element and probable consequences of its application for the purpose it was used, and that if they believe from the evidence the defendant failed to have there such wires and poles, or to employ such skill and knowledge, in consequence of which plaintiff was injured, it was negligent, and they should find for the plaintiff."

The criticism leveled against this instruction is that it imposes an absolute duty upon the city. Whereas, it is argued that the law requires merely, as to keeping the city's streets in a safe condition, that the city shall be liable only if it had notice of the defect a sufficient length of time to remedy it, or might have had such notice by the exercise of reasonable care on the part of its governing officials. This action is not to charge the city for neglecting to keep its streets in safe condition. The city, as a body corporate, has become the owner and operator of a plant for the generation and distribution of a most subtle and dangerous agency. The degree of care, prudence and oversight required of it in the operation of the plant ought to be the same as if it were operated by an individual. The law in allowing damages for a neglect of such duties is not primarily to punish the negligent operator, but to protect and to compensate the injured person. If the corporation, whether municipal or private, embarks in a business so menacing

to life and safety, it ought to use that degree of care that is commensurate with the danger it creates. It must know whether its appliances are reasonably safe and in order. It will not be allowed to turn loose in a populous community such a deadly agency without first taking every reasonable precaution to prevent its injuring those unawares among whom it is sent, or else it must bear the consequences of such failure. When the circumstances of the injury show that a "live wire," one charged with a deadly current of electricity, has been allowed to be at a place where the public have a right to be and are without reason to suspect the dangerous condition of the wire, a *prima facie* case of negligence will have been established. In such a state of case the risk of assuming that the wires and other appliances are in a safe condition is not that of the public, but of the operator of the plant. The operator has the better means of knowing. It is his duty both to provide such appliances as are reasonably safe, and by proper inspection and oversight to keep himself informed as to whether they are safe. Until the public has knowledge or notice to the contrary, they may assume that the operator has properly discharged his duties in these respects. It is not contended that the trial court's instructions placed too high a degree of care upon appellant, if it had been a private instead of a public corporation. The degree of care required is in conformity to this court's rulings in *McLaughlin v. Louisville Electric Light Co.*, 100 Ky., 189; 18 Ky. Law Rep., 693, and *Lexington Ry. Co. v. Fain's Adm'r*, 24 Ky. Law Rep., 1443.

Another objection urged against the verdict is that in the concluding argument to the jury counsel for plaintiff indulged in improper criticisms of one of appellant's witnesses, going so far as to detail an event concerning the witness which was nowise connected with the record. The matter as used was improper, but it was of too slight significance to have at all influenced the jury, in any probability. Even if the whole effect of this witness's testimony be eliminated from the record, it could not have affected the verdict. The testimony of this witness went solely to reduce the recovery for a certain feature of suffering after the shock. It tended to show that the suffering complained of was not the result of the shock. Be that so, the verdict of the jury barely compensated for what had gone before. We concur in the trial judge's opinion that the remark of counsel complained of was at most but a harmless error.

Perceiving no error prejudicial to appellant's substantial right the judgment must be affirmed, with damages.

UNION CENTRAL LIFE INS. CO. v. JOHNSON'S ADM'X.

(Filed October 16, 1903—Not to be reported.)

Notes—Validity of execution—Estoppel—Where a person, whose name has been signed to a note by another without authority in writing to do so, subsequently by writing agrees not to contest the validity of the note or to authorize any other person to do so, and thereby induces the payee to accept the note, he is estopped to deny that he signed it.

Gus Thomas for appellant.

Shelbourne & Kane, J. M. Brummel & Son and Hazelrigg & Chenault for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Hobson.

Robert Johnson died resident of Hickman county, and this suit was filed by his administratrix to settle his estate. The case being referred to a commissioner to report the debts, appellant filed before him, properly proven up, a note for \$2,486.47, dated October 15, 1898, and due in one year, which purported to be signed by D. Johnson and Robert Johnson. The claim was allowed by the commissioner and thereupon exceptions were filed to it by the administratrix, to the effect that the decedent had not signed the note or authorized any one to sign his name to it. In amended exceptions it was pleaded that D. Johnson was the principal in the note and Robert Johnson, his surety, and that Robert Johnson did not authorize any one in writing to sign his name to it. In response to the exceptions appellant pleaded that after the note had been delivered to it, and before it was accepted, appellant sent its agent to the town of Clinton to see Robert Johnson concerning the note; that the agent saw Johnson and was told by him that the note had been executed by him; that he was financially good, and that the company need not hesitate to accept the note; that upon receipt of this information, and acting upon it, it accepted the note, which it would not have done except for the representations of Johnson, and that thereby he was estopped to plead that he did not sign the note. The court declined to allow the response to be filed as it would seem upon the idea that further pleadings were unnecessary. The case was by the court submitted to a jury. The court asked the jury this question: "Did the decedent, Robert Johnson, sign his name to the note in controversy." The jury made the following answer: "We, nine of the jury say, no," and thereupon the court entered a judgment disallowing the claim.

The proof was conflicting as to whether Robert Johnson signed the note. It left no doubt that B. Johnson, who was his son, was the principal in the note and Robert Johnson the surety. The proof did not show how or by whom Robert Johnson's name was placed to the note, if he did not sign it himself. S. Y. Rodman, the agent of the insurance company, among other things, testified as follows: "I came here along in October or November, 1898, after this note was executed. I came down here to find out whether Mr. Johnson had signed this note or not. I met Mr. Johnson out in the street in front of those stores out there. I was acquainted with him, and had been for two years, and after passing the compliments of the day, he asked me if the company had accepted the note that he and Dave had executed for his indebtedness, and I told him that I didn't know whether they had taken action on it or not, and he said he thought they were a little long, and I says they always take their time to look into matters of that kind. and I presume they are investigating your financial ability. Now then that was about all that passed between him and me about it, but he introduced the subject himself, and saved me the trouble of doing so, and I had intended to do it myself."

He also testified that at the time of this conversation the company had not accepted the note, and made this statement: "He asked me if the company

had accepted the note that he and Dave had executed. He hadn't heard from the company as to whether they had accepted it or not, and he asked me if they had, and why they were so long about it." The witness said that it was customary for the company to investigate notes for such an amount as this before accepting them, and that Johnson made to him during the conversation this statement: "It is perfectly right to investigate my property; you will find that the titles are all right, and I have no objections to your investigating."

The defendant also showed that Johnson afterwards signed and sent to it the following writing:

"Clinton, Ky., November 23, 1900.

"E. P. Marshall, Secretary,

"Cincinnati, O. :

"Dear sir—Regarding the note of D. Johnson for \$2,436.47, dated October 15, 1898, and payable to the Union Central Life Insurance Co., per agreement, and signed D. Johnson and Robt. Johnson.

"I hereby certify to the said company that no other person has, or will have, any authority to contest the payment or collection of the said note without my consent; and that I have not, and will not, contest its validity, nor authorize any person to do so for me.

"ROBT. JOHNSON.

"Witness: WILLIAM BAYSSEE."

It appears from the evidence that about the time that this paper was gotten up the company was pressing D. Johnson for money on the note, and he was begging time. He seems to have gotten up this paper, or had it gotten up. His two sisters made some question about the genuineness of the father's signature to the note, and there was some discussion about it in the family. Appellant proved by several witnesses that Robert Johnson said he signed the note. Appellees proved by a number of witnesses that the signature was not, in their judgment, in his handwriting, and by the two daughters that he said that he had not signed it, this evidence not being objected to.

It is insisted for appellant that Robert Johnson induced it to accept the note by his assurance that he had signed it, and made the note all right, and that, therefore, he is estopped to say that he had not signed the note. Moreover, it is urged that he, by the writing above quoted, ratified the signature to the note, thus in writing acknowledging it as his note, and thereby took the case out of the operation of the statute.

By section 470, Kentucky Statutes, no action shall be brought against one upon a promise to answer for the debt of another, unless the promise is in writing signed by him. By section 483 no person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing, signed by the principal. Under these statutes it has been held that the surety is not bound, although his name is signed to the paper by another in his presence and by his direction. (*Billington v. Commonwealth*, 79 Ky., 400; *Wilson v. Lindell*, 96 Ky., 50.) It has also been held that a subsequent parol ratification by the principal of the act of his agent in thus signing his name can not make the original signing effective on the ground that the subsequent admission not in writing is as much within the mischief of the statute as the parol authority given when the note was signed.

(Ragan v. Chenault, 78 Ky., 545.) But in *Riggin v. Crain*, 86 Ky., 249, where the surety's name has been signed in this way to an injunction bond, the surety executed a writing ratifying and confirming the signing of his name to the paper and acknowledging himself as firmly bound by it as if he had signed it in person. He was held bound on the bond, although no new consideration was given. The court said: "If the surety induces one to loan his money to another upon a verbal authority to a third person to sign his name as surety, and the money is thus loaned, and the surety afterwards ratifies the act in writing, or signs his name, it seems to us the original consideration becomes a part of the subsequent ratification or act of the surety, and it is as much binding on him as if he had signed the paper in the first place."

But for section 482, Kentucky Statutes, the authority of the agent to sign the surety's name might be conferred by parol, and though the agent had no authority when he signed the paper, it would be valid if subsequently acknowledged by the surety. (Brant on Sureties, section 90; Stearn on Sureties, sections 30, 140.) It was so held by this court before the statute was enacted. (Forsythe v. Bonta, 5 Bush, 547.) And since its enactment it had been held that the surety who acknowledges the instrument, and thereby leads the obligee to his prejudice to take action he otherwise would not have taken, or omit action he otherwise would have taken, will be estopped to rely on the invalidity of the paper, although the surety was innocent of intention to mislead. (Rudd v. Mathews, 79 Ky., 479.)

Under these principles the special verdict of the jury did not warrant the judgment disallowing the claim. There was no conflict of proof as to the facts making out the estoppel. To allow a surety who induces the obligee to accept a note by assuring him that it is all right, to defeat a recovery when sued on the note by showing he did not sign it, would be to violate the well-settled principles of estoppel. Thus it has been often held that an obligee inducing the assignee to purchase a note by assurance that it was valid would not be allowed to plead its invalidity. The reasons upon which this rule is based apply equally to the surety or principal who makes the assurance, and thus induce the purchase; and in reason the same principle must be applied where the surety in the note by this means induces the obligee to accept it. After he has done this he can not be heard to say he did not sign the note. Under the evidence the court should have overruled the exceptions and allowed the claim.

Judgment reversed and cause remanded for further proceedings consistent herewith.

PEAL, &c. v. CITIZENS BUILDING AND LOAN ASSOCIATION'S ASS'EE.

(Filed October 16, 1908—Not to be reported.)

Building and loan association—A borrowing member of an insolvent building and loan association is not entitled to have the payments made by him as dues on stock deducted from his indebtedness to the association after it has gone into the hands of an assignee for the purpose of winding up its affairs, but must, after deducting payments of premiums and interest, discharge the balance remaining on his indebtedness.

Hendrick & Miller for appellants.

Bloomfield & Crice for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was brought by the appellee, T. J. Flourney, as assignee of the Citizens Building and Loan Association, of Paducah, Ky., an alleged insolvent corporation, against W. R. Peal and Lucy Peal, the parents and only heirs at law of J. C. Peal, deceased, to enforce a mortgage lien for a balance of \$487.88, with interest thereon at 6 per cent. from October 17, 1900, until paid, upon a house and lot in Paducah, Ky., which was executed to them by J. E. Peal during his lifetime. Flournoy alleges that J. E. Peal, on the first day of March, 1890, subscribed for five shares of the capital stock of the building association at the par value of \$200 per share, on which he agreed to pay \$1 per share each month until it matured to its par value; that on the 29th of August, 1890, he borrowed from the association \$1,000, for which he executed his note, and to secure its payment executed a mortgage on the house and lot sought to be subjected, and delivered to the association his certificate for five shares of stock as additional security; that he agreed to pay 6 per cent. interest on the loan of \$1,000, \$5 per month dues, and also \$3.50 per month premium; making in the aggregate \$13.50 per month; and that he paid this amount from the time of the loan on the 29th of August, 1890, until the 16th day of March, 1897, at which time he made a written application to the association, requesting that he be allowed to surrender his five shares of stock at its surrender value, and that it should be credited on his note; and that the association should issue to him in lieu thereof three shares of stock; that pursuant to this request it was ascertained and agreed by him and the association that the surrender value of his five shares of stock, on that date, amounted to \$569.90, which was made up of payments by him for dues on stock and premiums on loans, the interest in the meantime having been kept up; that the certificate for five shares was surrendered, and Peal subscribed for three other shares of stock, which were issued and delivered to him, and for which he promised and agreed to pay \$1 each per month until it matured, and he also paid on the balance due on his note, after it had been credited with \$569.90, \$4 per month as premium and interest until December, 1898, leaving due on the 17th of October, after crediting him with all payments made by him, a balance upon his obligation to the company of \$435.

The defendant answered, denying the insolvency of the association, admitting the execution of the note and mortgage, and the various payments recited in plaintiffs' petition; and alleges that J. E. Peal had made certain payments to T. J. Flournoy prior to the time when he borrowed the \$1,000 from the association upon the house and lot mortgaged to the company as purchase money thereon, which should be credited upon the debt. They controvert the allegation that J. E. Peal agreed with the association on the 27th of March, 1897, that the surrender value of his stock in the association amounted to \$569.90, and left unpaid at that time \$435, and allege that the payments made by J. E. Peal to the company on the note, whether paid as interest, premiums or dues, should be credited at the date of their payment,

and interest calculated at 6 per cent. and that this would leave nothing due upon the debt sued on. The pleadings were made up by reply.

Flournoy, the secretary of the association while it was a going concern, and who represented it in this transaction with J. E. Peal from the beginning, proves the transaction as claimed by the association in every particular, and his testimony is not successfully contradicted in any particular. Nor is there any evidence in the record conducing to show that Peal did not fully understand the situation at the time he agreed that \$569.90 was the full surrender value of his stock in the association, less his pro rata of the expenses and losses which had been incurred by the association. It appears from the testimony that the only source of income of the association was dues on stock, and interest and premiums paid by its members, and that it necessarily incurred expenses for rent, salaries, taxes, etc., and incurred, besides, losses; and that after the decision by this court, that the collection of dues in addition to interest was usurious, that the borrowing members of the association refused to continue their payments, and the investing members immediately demanded their principal and interest; and that as a result of the situation the company at once became unable to meet its obligations, and on the 17th of October, 1900, made a general deed of assignment for the benefit of its creditors equally, and that the affairs of the company were then in process of liquidation.

J. E. Peal continued to fulfill the conditions of his contract with the association until his death on the 29th day of January, 1899; nothing was paid after his death until the institution of this suit. There is testimony in the record to the effect that appellant, W. R. Peal, notified the secretary of the association that he wanted to surrender his stock, and inquired the balance due to the association; and that upon being informed of the amount, that he refused to pay, and claimed that it was entirely made up of usury. In numerous decisions this court has held that a borrowing member in a building and loan association which was a going concern was only chargeable with his loan and legal interest, and was entitled to be credited with all payments, whether as dues, premiums or interest, upon the theory that the profits of the concern were sufficient to pay its losses and expenses. But a wholly different rule prevails in winding up an insolvent association. In this class of cases this court has uniformly held that borrowing members were not entitled to have deducted from their indebtedness to the association payments made by them as dues on stock, but must, after deducting payments of premiums and interest, discharge any balance remaining upon their indebtedness. (*Rogers, Receiver v. Raines*, 18 Ky. Law Rep., 768; *Columbia Finance and Trust Co., Assignee v. Swartz*, 28 Ky. Law Rep., 1097; *U. S. B. & L. Ass'n's Ass'ee v. Green*, 28 Ky. Law Rep., 1189; *U. S. B. & L. Ass'n's Ass'ee v. Brunner*, 28 Ky. Law Rep., 1253; *Catlett v. U. S. B. & L. Ass'n's Ass'ee*, 24 Ky. Law Rep., 200; *U. S. B. & L. Ass'n's Ass'ee v. Fitzpatrick*, 24 Ky. Law Rep., 220; *Wills v. Paducah B. & L. Ass'n's Ass'ee*, 24 Ky. Law Rep., 21; *Steele, &c. v. Newport City B. & L. Ass'n's Ass'ee*, 24 Ky. Law Rep., 2838.) And it was held in *U. S. B. & L. Ass'n's Ass'ee v. Reed's Ass'ee*, 28 Ky. Law Rep., 342, that after the association had made an assignment for the benefit of its creditors, that it was too late for the borrowing stockholder to have payments made by him on his stock sub-

scription applied as a credit. In the *Globe B. & L. Ass'n's Ass'ee v. Spillman*, 23 Ky. Law Rep., 23, it was held that a mere offer on the part of the borrower to pay his indebtedness to the association while it was a going concern does not amount to a tender of payment, and that after it had gone into the hands of a receiver it was too late to do so. The principle announced in these cases was followed in the *National B. & L. Ass'n v. Frisby*, 25 Ky. Law Rep., 449. As the ground upon which these various decisions rest are so fully set out in the opinions referred to, it would be an unnecessary task for us to again discuss them.

There is nothing in this case to distinguish the settlement made by the association with Peal from those decided in these various cases, and as the opinion of the circuit judge is in strict conformity with the law as laid down by this court in cases like this, the judgment appealed from is affirmed.

CARTER v. COMMONWEALTH.

(Filed October 16, 1903—Not to be reported.)

Criminal law—Former jeopardy—Where an indictment for hog stealing contained no description of the hogs stolen, except to allege that they were the property of a certain person, and upon the trial it developed that they were not his property, but of another, and the court gave a peremptory instruction to find for the defendant, the acquittal under such instruction could not be plead as a bar to a subsequent indictment which charged the offense of stealing the same hogs, but alleging them to be the property of the real owner.

J. B. Wickliffe and B. S. Bailey for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Barker.

The appellant, William Carter, was indicted by the grand jury of Ballard county, charged with the offense of stealing eight hogs, the property of Perry Newman. To this indictment a plea of not guilty was entered by the accused, and, pending the trial, it developed that the hogs, which the accused was charged with stealing, were the property of Marion Buchanan; whereupon the court gave a peremptory instruction to the jury to find the defendant not guilty, which was done, and the prisoner discharged. On motion of the attorney for the Commonwealth, however, it was ordered that he be held to await a resubmission of the facts to the grand jury, which was then in session, which was also done.

Afterwards the grand jury returned another indictment against appellant, charging him with stealing eight hogs, the property of Marion Buchanan. To this the accused entered a plea of not guilty, and also pleaded the former acquittal in bar of the second prosecution.

A demurrer by the Commonwealth to the plea of former acquittal was sustained by the court, and a trial being had on the plea of not guilty, the appellant was convicted of the crime with which he stood charged, and his punishment fixed at confinement in the penitentiary for the term of five

years. His motion for a new trial having been overruled, he is here on appeal from the judgment against him.

Appellant urges, as a ground for reversal, only the error of the trial court in sustaining the demurrer to his plea of former acquittal. There was no description in the first indictment of the hogs which appellant was charged with stealing, beyond the fact that they were the property of Perry Newman, and as the evidence on the first trial clearly showed that they were not the property of Perry Newman, the court gave a peremptory instruction to the jury to find the accused not guilty; but it is evident that this was no trial of the crime of stealing the hogs of Marion Buchanan, and, therefore, the court correctly, as we deem it, sustained the Commonwealth's demurrer to the plea.

This precise question was decided by this court in the case of *Riffe v. Commonwealth*, 21 Ky. Law Rep., 1331). In that case the accused was indicted, first, for stealing cattle, the property of George W. Calvin. Pending the trial on this indictment it developed that the cattle did not belong to George W. Calvin, whereupon the indictment was dismissed, and the jury discharged, without appellant's consent, and against his will. Subsequently he was indicted for stealing the same cattle, the second indictment alleging the ownership to be in George A. Baker and Fleming Wireman. The defendant's plea of former acquittal was overruled, and he was convicted. Upon appeal to this court it was said: "It will be noticed that the difference in the two indictments are in the alleged ownership of the cattle, and that the last describes them, the first stating that they were three head. Mr. Cooley, in *Constitutional Limitations*, page 401, lays down this rule: 'If the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against a trial on the second.' This was approved in the case of *Williams v. Commonwealth*, 78 Ky., 93. In the case of *Hensley v. Commonwealth*, 1 Bush, 11, this court held that on an indictment for stealing Stephen Daniel's hog, a defendant could not be convicted for stealing Philip Daniel's hog, even though the same hog and the same offense. In the *McBride* case, 13 Bush, 337, it was held that on an indictment for stealing the horse of W. F. Watson, proof that the horse belonged to Cassam Watson was not admissible 'unless there is some such description of the property in the indictment as would enable the court to know, upon a plea of former conviction or acquittal, that the party had been once in jeopardy for the same offense. A conviction for stealing the horse of W. F. Watson would not bar a prosecution for stealing the horse of Cassam Watson.' In the case at bar, by the plea the first indictment charged that the three cattle were the property of Geo. W. Calvin, without any description of the cattle. Under this first indictment a conviction could not have been had on proof of the theft of three cattle, two being those of George A. Baker, and the other that of Fleming Wireman. * * * There was, therefore, no error in sustaining the demurrer to the plea, nor in refusing to permit testimony to support same."

Upon the authority of the case cited we hold that the trial court did not err in sustaining the Commonwealth's demurrer to the plea of former acquittal in this case.

For the reason indicated the judgment is affirmed.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v.
MALEY'S ADM'R.

(Filed October 16, 1903—Not to be reported.)

1. Railroad—Negligence—Where the conductor of a freight train uncoupled the two engines therefrom for the purpose of replenishing their water supply and in the meantime left the remainder of the train, which was heavily loaded on a down grade with the air brakes set, the company is liable in damages for the death of a fireman resulting from the train rushing down the grade onto the engines as they were standing at the water tanks, the act of the engineer in leaving the train on the grade with only the air brakes set being an act of negligence. And its liability exists regardless of the acts of the brakeman who was left in charge of that part of the train.

2. Evidence—It being alleged that the brakes were insufficient to hold the train, it was competent to introduce proof to show that air brakes will not hold a train for any length of time when disconnected from the engine.

3. Same—Evidence with reference to an order of the company against leaving a train on the particular grade on which the accident occurred was immaterial in view of the fact that it was negligence to leave it there insecurely braked.

4. Master and servant—The fact that the deceased knew of the custom to separate the engine from the train for the purpose of taking water does not affect the right of recovery, as he had the right to presume that the train would be secured in its place.

Gaither & Vanarsdall and John Galvin for appellants.

Robert Harding, Shay & Cogan and E. M. Hardin for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hobson.

On April 26, 1901, a freight train left Somerset, Ky., going north. It had thirty-five or forty loaded cars, and was drawn by two engines. There were three loaded cars between the two engines. The train reached Burgin about 10 o'clock at night. It was desired by the conductor to go on to High Bridge, the next station, before a passenger train came. He had to take water at Burgin. There were two water tanks there, but both the engines could not be watered at the same time if attached to the train. He did not wish to pull in on the side track, and thus lose time, so when the train was something over a quarter of a mile from the station, and on a down grade, he stopped it and cut loose the two engines with the three cars between them from the hinder part of the train, and leaving it standing there on the track, went on up to the station, stopping the rear engine at the first tank to take water, and placing the other engine, with the three loaded cars attached to it, at the further tank. While the engines were taking water in this way the dead part of the train, which the conductor had left standing on the grades with insufficient brakes to hold it there, began silently moving down the grade, and gathering momentum as it came, crushed into the rear engine, and jammed it against the loaded cars in front, thus wrecking it and killing the engineer and fireman. This action was brought to recover for the death of the fireman. On the first trial the jury found a verdict for the plaintiff in the sum of \$6,000, and that being set aside on motion for a new trial, a verdict for a like amount was rendered on the second trial, on which the court entered judgment.

The crew of the train consisted of the engineers and fireman on the two engines, a conductor, who was in charge of it, a head brakeman and a rear brakeman. The conductor was not riding in the caboose, but at the station below had gotten on the front engine, evidently with the view of losing no time at Burgin in going to the station for orders. The head brakeman, when the train was stopped on the grade, cut off the rear engine from the hinder part of the train, and then went on up to the station with this part of the train, with the conductor, for the purpose, as he says, of uncoupling the hinder engine so that it could take water. The train was stopped on the grade by the application of the air brakes. No hand brakes were set, and the reason the train moved was that the air escaped from the pipes. After the engines were moved the brakes were insufficient to hold the wheels. When they got up to the water tank the conductor went to get his orders, and the head brakeman uncoupled the rear engine from the cars in front. Where the rear brakeman was, or what he was doing, is not shown by the evidence, but while the intestate, the fireman on the rear engine, was at his post in the discharge of his duty, he was killed without fault on his part by the sudden collision of the dead part of the train running down in the dark against his engine, by reason of the fact that it had been left standing upon the grade with insufficient brakes to hold it there.

It is urged for the defendants that the negligence of the brakeman was the cause of the accident. This we can not see. The conductor had charge of the train. He stopped it on a grade for the purpose of taking the engines down to the tanks in front, and taking water. He knew that the dead part of the train would run down the grade on the engines if the brakes were insufficient to hold it, and it was incumbent on him before leaving this dead part of the train on the track to exercise proper care to make it secure. It was his duty to see this done, and his failure to do it was the cause of the catastrophe. The proof for the plaintiff showed that air brakes can not be relied on to hold a train on a grade for any length of time; that they will stop a train, but will not hold it beyond about five minutes. The air was applied from the front engine, where the conductor was. The conductor knew how the train had been stopped, and knowing what was holding it on the grade, went off and left it there, when under the evidence he should reasonably have anticipated what ensued.

Regardless of what the brakeman did or didn't do, the conductor was negligent in leaving the dead part of his train on the grade improperly secured, when from the circumstances he knew, or ought to have known, the danger. The charge in the petition that the brakes on the dead part of the train were insufficient to hold it, or defective, seems to us to present the plaintiff's cause of action, for if the brakes had been sufficient the dead part of the train could not have moved. The moving of the train was due to the insufficiency of the brakes. The defendant was not prejudiced by the form of the averment, and under the Code matters not affecting the substantial rights of the parties are not grounds for reversal.

The evidence that the conductor was not in his proper place went to show how the collision occurred, and the negligence on his part in bringing it about. The allegation that the brakes were insufficient was equivalent to an allegation that the train was not properly secured on the grade, and, therefore, the evidence was properly admitted as to the air brakes not hold-

ing a train. The evidence of Oldham as to the order against leaving a train on this grade was immaterial, for whether there was such an order or not, it was negligence to leave it there insufficiently braked, and that was the gist of the case. Besides, the subsequent evidence clearly showed that there had been no such order at the time of the accident. We see no error in the giving or refusing of instructions. Although the deceased knew it was a custom to stop trains in this way and separate the engines from the train to take water, his right to recover would not be affected, for it would hardly be urged that there was a custom to leave trains on the grade unsecured to run down on the engines in front. Although Malley knew of such a custom, he had a right to presume that proper care was used, and would be used, in securing the dead part of the train. The verdict is not excessive, and on the whole case we see no grounds for a new trial.

Judgment affirmed.

LEONARD v. WELCH, &c.

(Filed October 16, 1908—Not to be reported.)

1. Conveyance—Credits on purchase price—The action of the chancellor in fixing the amount by which the vendee of lands was entitled to be credited on his purchase-money notes by reason of the loss to him of a part of the boundary on account of title in a third person superior to that of the vendor will not be disturbed where the allowance was at a greater rate per acre than the whole tract had sold for, although the character of the lands was practically the same. Neither will the court's refusal to allow vendee anything in the way of damages to his tract be disturbed where it appears that no damage could have arisen by the slight change in boundary.

2. Enforcement of liens—Parties to action—The plaintiff in an action to enforce a purchase-money lien on lands having made a mortgagee of the vendee a party to the suit by amended petition, the trial court erred in entering a judgment of sale before the mortgagee was brought before the court by summons.

T. J. Watkins for appellant.

Wilson & James for appellees.

Appeal from Lyon Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, Mrs. Welch, sold to the appellant, S. N. Leonard, on June 30, 1898, a tract of nine hundred and twenty-five acres of land, lying on the waters of the Cumberland river, in Lyon county, for the consideration of \$8,000, \$4,000 of which was paid in cash, and for the balance the vendee executed his two promissory notes for \$2,000 each, due respectively in twelve and eighteen months from the date of sale, and for the payment of which a lien was reserved in the deed made to Leonard. He paid the note due in twelve months, but failed to pay the note which fell due in eighteen months. On the first day of August, 1901, Mrs. Welch, her husband uniting, brought this suit, in which she asked a personal judgment against Leonard for the balance of the purchase money, and for a sale of a sufficient quantity of the land conveyed to pay the balance alleged to be due. Before answer they filed an amended petition, in which they allege that since the institution of

their suit they had learned that the defendant, Leonard, had on the third day of May, 1900, mortgaged the tract of land sold him to the Fidelity Trust and Safety Vault Co. of Louisville to secure the payment of \$8,000, which would be due and payable in two years from that date; and that the trust company was a necessary party to the proceeding, and asked that summons issue against the company, and that it be required to answer and set out the amount of its debt in detail. The defendant, Leonard, filed an answer and cross petition, in which he alleged that twelve acres of the nine hundred and twenty-five purchased by him from the plaintiff had been recovered from him by R. H. Jones and others, in consequence of a superior title in them; that these twelve acres were reasonably worth \$600; and that the loss of this land in addition to its intrinsic value damaged the residue of his tract \$500, for which he asked credit. Plaintiffs replied, admitting the loss of the twelve acres of land, but alleged that it was not worth exceeding \$166.25, and denied that any injury resulted to the residue of the tract. Upon the issues raised by the pleadings a great deal of proof was taken, pro and con, and the case was finally submitted by agreement to the chancellor, who adjudged defendant entitled to a credit of \$206.50 as compensation for the loss of the twelve acres of land, and \$50 claimed by him in an amended answer. From this judgment of the chancellor the defendant appeals, and asked a reversal on three grounds: First, because the valuation fixed upon the twelve acres is too small; second, because of the refusal of the chancellor to allow anything by way of damages to the residue of the tract; third, because the plaintiff failed to have summons issue upon their amended petition bringing the Fidelity Trust and Safety Vault Co. before the court, as required by subsection 3 of section 694 of the Civil Code.

After a careful reading of the evidence we have reached the conclusion that we would not be warranted in disturbing the judgment of the chancellor, either as to the valuation placed by him upon the twelve acres of land which was lost to appellant, or the alleged injury to the residue of the tract of land in consequence thereof. The land was sold to appellant at the average price of \$8.65 per acre; the allowance for the twelve acres lost is at the rate of \$17.50 per acre. While it is shown that four and one-half acres of this tract, which is river bottom, is quite valuable, it is also clearly shown that the remaining seven and one-half acres does not exceed in value the average of the entire tract. It also appears from the map filed in the case that the twelve acres recovered by Jones is a narrow strip, nine poles in width, at the mouth of Poplar creek, and extends back in the hills a distance of three hundred and sixty poles. It seems wholly improbable that this slight change in the boundary line could materially affect the salable value of so large a tract after it had been cut off. Nor does the proof justify such a conclusion. To the extent that the judgment appealed from determined the rights of the parties upon these issues it is affirmed.

But appellant's last contention presents a more serious question. Subsection 3 of section 694 of the Civil Code provides: "The plaintiff in an action to enforce a lien on real property shall state in his petition the liens, if any, which are held thereon by others, and make the holders defendants; and no sale of the property shall be ordered by the court prejudicial to the rights of the holders of any of the liens."

This provision of the Code was intended as a protection to the debtor, to prevent a multiplicity of suits, and the sacrifice of his property; and as a general rule judicial sales ought, when practicable, to be made so as to pass to the purchaser a complete unencumbered title, as this mode is best calculated to insure fairness in the sale and invite competition in bidding, and prevent a sacrifice of the property, and consequent injury often to both the debtor and creditor. In *Burton v. McKiney*, 6 Bush, 428, it was held error to decree a sale of land for the payment of notes not due, although plaintiff alleged that the sale of the entire tract was necessary to prevent loss to him. In *Emison v. Risk*, 72 Ky., 24, it was adjudged erroneous, in a suit to foreclose a vendor's lien securing two notes, both owned by the plaintiff, one of which was not due, to decree a sale subject to a lien for the second note. And in *Faught v. Henry*, 76 Ky., 471, and in *Leopold v. Fubor*, 84 Ky., 214, it was held erroneous to order the sale of land, which could not be advantageously divided, or so much thereof as may be necessary to pay notes which are due at a time when part of them were not due. We are, therefore, of the opinion that the trial court erred in entering so much of the judgment appealed from as directed a sale of the real estate without bringing the trust company before the court.

For this reason alone the judgment is reversed and cause remanded for proceedings consistent with this opinion.

COVINGTON SAWMILL AND MANUFACTURING CO. v. CLARK.

(Filed October 16, 1903.)

1. Fellow servants—Negligence—An inspector of saw logs, whose duty it is to examine saw logs preparatory to their being sawed into lumber for the purpose of ascertaining the location of and removing iron spikes placed therein in rafting, is not a fellow servant with an employee of the owner of the logs engaged in the operation of sawing the logs into lumber at the employer's mill so as to preclude the latter from recovering damages against the common employer for personal injuries resulting from the negligence of the former in failing to remove a spike.

2. Pleading in alternative—In an action for damages for personal injuries sustained in a sawmill it was not improper for the plaintiff to allege in the alternative the several causes which might have resulted in the injury, alleging that one of said causes was true, but which one he was unable to state.

3. Defective pleading cured by verdict—Defects and imperfections in a pleading are cured by the verdict where the issue raised requires on the trial proof of the facts defectively or imperfectly pleaded, and without which it is not reasonable to presume that the jury would have given a verdict for the party.

4. Instruction—In instructing the jury the court correctly held the employer liable in the event its inspector failed to exercise "such care as is ordinarily exercised by ordinarily careful and prudent persons, under the same or similar circumstances."

Robertson & Buckwalter, J. W. Bryan and S. D. Rouse for appellant.

H. D. Gregory and B. F. Graziani for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

The appellee, Albert R. Clark, recovered a judgment in the Kenton Circuit Court against the appellant, the Covington Sawmill and Manufacturing Co., for the sum of \$5,000, as damages for the loss of a leg, caused by the breaking of a saw in appellant's mill.

Appellee was in the employ of appellant, occupying the position of "dog setter," whose duties consisted in adjusting the "dogs," which were iron hooks, or braces, fastened in the log after it had been put upon the saw-carriage, for the purpose of holding it firmly in position as the carriage conveyed it to the saw. There is little or no contrariety in the evidence as to how the accident occurred. At the time of the injury a log had been placed upon the carriage, "the dogs" had been set by appellee, and while it was in process of being run through the mill, the band-saw struck a piece of iron, which was concealed in the log, with such force as to break the saw, which, being rapidly whirled around by the moving machinery, struck appellee, who was standing near by, upon the leg, completely severing that member.

It seems that the logs, which were being sawed by appellee, had been rafted down the Big Sandy and Ohio rivers. Logs in raft are held together by means of ropes and chains fastened to iron spikes or staples driven into them. When the raft is broken up for the purpose of manufacturing lumber it is necessary, for the safety of those engaged in sawing, as well as for the protection of the machinery, that a careful search be made by an inspector, who is called an "iron hunter," in order to locate and remove any iron spikes left in the logs. For this purpose "the iron hunter" goes over the logs with a pick, in appearance and size resembling an ordinary ice pick. Wherever there is a bruise, or scar, or a spike hole visible, the inspector feels with his pick for iron, and if he finds any, immediately cuts it out, before the log is turned over to the saw crew.

It sometimes happens that after a spike has been broken off in the log the hole closes over it, under the influence of the water, making its discovery difficult. Should the inspector fail to discover a concealed spike, and the log is put upon the carriage to be sawed, there is always danger of breakage to the saw, and to the lives of those in charge. At the time of the accident to appellee the saw struck a piece of iron spike, which the inspector had failed to discover, with the result, as said before, of the loss of his leg.

Upon the first trial of this case the court gave a peremptory instruction to the jury to find for the defendant. Afterwards, upon motion of appellee, a new trial was awarded, and on the second trial the jury rendered a verdict in favor of appellee, awarding him damages in the sum of \$5,000, of which the appellant now complains. The peremptory instruction given by the trial judge was evidently based upon the theory that the "iron hunter" and the "dog setter" were fellow servants. Upon a reconsideration of this proposition, however, he seems to have changed his opinion, and consequently awarded appellee a new trial. The iron hunter, or inspector, was not a fellow servant with appellee in the sense that precludes the latter recovering damages from their common employer for the negligence of the former.

Shearman & Redfield, in their work on the Law of Negligence, 5th edition, section 194, say: "The master personally owes to his servants the duty of

using ordinary care and diligence to provide for their use reasonably safe instrumentalities of service. Among these are a reasonably safe place in which to do their work or to stay while waiting orders; reasonably safe ways of entrance and departure; an adequate supply of sound and safe materials, implements and accommodations, with such other appliances as may reasonably be required to insure their safety while at their work, or passing over his premises to or from their work. These things must, moreover, be adapted to the work in hand. It is not enough that they should be good, under ordinary conditions. They must be suitable to the work to which they are applied by the master, and properly adjusted to each other. If, therefore, the master knows, or could have known if he had used ordinary care to ascertain the facts, that the buildings, ways, machinery, tools or materials which he provides for the use of his servants are unsafe, and a servant without contributory fault suffers injury thereby, the master is liable therefor, although he is not thus liable in the absence of actual or constructive notice. The master is not entitled to time to discover defects in things which are defective when put in use. He can not evade his responsibility in these respects by simply giving general orders that servants shall examine for themselves before using the place, materials, etc., furnished by him." * * *

"Section 194a. The master is also personally bound, from time to time, to inspect and examine all instrumentalities furnished by him, and to use ordinary care, diligence and skill to keep them in good and safe condition. The duty of inspection is affirmative and must be continuously fulfilled and positively performed. Such duty is not discharged by giving directions for its performance, or by promulgating rules requiring it to be performed, or by employing competent and careful persons for that purpose. * * *

"Section 204. None of the duties which have been previously stated as devolving upon the master personally can be by him delegated to any agent so as to relieve him from personal responsibility. He may, and often must, delegate the performance of such duties to subordinates; but he remains responsible to all his servants for the acts of these subordinates, in that particular capacity, to the same extent as if those acts were literally his own. This has been repeatedly adjudged as to his duty in the selection and dismissal of servants, in providing, inspecting and repairing materials and appliances, in warning servants of special dangers, and in framing rules."

The same doctrine is held in an admirably reasoned opinion in the case of *Neveu v. Sears*, 155 Mass. 303. In that case the plaintiff was engaged in building for the defendant a wall, using large blocks of granite furnished by the latter, and which had been quarried by the use of dynamite. On the occasion of the plaintiff's injury a dynamite cartridge, by oversight, had been left buried in a block of the granite, and the plaintiff in preparing it for use in the wall struck it with a hammer, whereby the cartridge was exploded, seriously injuring him. The court said: "We see no error in the instructions given to the jury, and they sufficiently cover the requests asked by the defendant, so far as those requests were correct in principle. All the things which it was necessary for the plaintiff to establish were stated, and the rules which define the defendant's duty to the plaintiff were correctly given. The defendant must be charged with knowledge of those facts as to the use of dynamite in his quarry which he either knew or ought to have

known. (*Gilman v. Eastern Railroad Co.*, 13 Allen, 438, 440; *French v. Vining*, 102 Mass., 132, 137; *Commonwealth v. Pierce*, 138 Mass., 165, 179, 180.) His employment of competent quarrymen, and his furnishing them with proper means of preventing any dangers consequent upon the use of dynamite, would not justify him in relying upon an actual want of knowledge that there had been carelessness at the quarry as an excuse for furnishing dangerous stone for the plaintiff's use, if, knowing all that had happened at the quarry, he would then have had reason to believe that unexploded cartridges might remain in the blocks removed to the storage ground, and in the stones split from them."

In the case of *Louisville & Nashville R. R. Co. v. Semones*, 21 Ky. Law Rep., 444, which was an action for personal injury by a servant against his employer, the following instruction given by the court below was approved by this court: "The court instructs the jury that it was the duty of the defendant to furnish the plaintiff and his co-laborers, who were then and there engaged with him in putting the timber in the trestle at washout No. 1, with timber suitable to be handled by its employes, and to use reasonable care to see that it was free from such defects as would make the handling of the same, with ordinary care, free from danger; and if they believe from the evidence that the defendant, its agents and servants, then in charge of said work, knew, or by the exercise of ordinary care could have known, that the timber which was put in said trestle was in such a defective and dangerous condition as to make its handling by the plaintiff hazardous and dangerous, and that the injury to the plaintiff was caused by the failure of the defendant to furnish timber reasonably free from such defects as would make the handling of same reasonably safe, considering the circumstances under which it was being handled, the law is for the plaintiff." * * *

In the case at bar the employer knew that the logs furnished by it to its employes were liable to have concealed in them iron spikes, the existence of which made their handling during the process of being sawed extremely hazardous, and recognizing this danger, it employed an inspector, whose duty it was to examine the logs carefully, so as to discover and remove these elements of danger. This inspector was not a fellow servant, within the technical rule of the sawyers; he was a vice-principal, discharging for the master the high duty of furnishing to the other servants safe material upon which to work.

The master could not evade its responsibility by delegating the discharge of this duty to a competent servant; it was the duty of the employer to use ordinary diligence to make the logs reasonably safe for the use of the sawyers. When it delegated this duty to an inspector, it was his duty to exercise reasonable diligence to discover and remove any iron spikes which might be concealed in the logs. This proposition is clearly within the pale of the authorities we have cited to sustain it, and we feel that it is consistent with both reason and justice.

Appellant further claims that the petition is defective, and will not support the verdict. The petition, after setting out in detail the facts of appellee's employment and duties, says that "while in the discharge of his duty, on or about the 31st of May, 1900, the defendant, with gross negligence, caused said saw either to run too rapidly in said log or timber, or because

of some iron being in said log or timber, or because of some defect in said saw, one of these said causes being true, but which one the plaintiff is unable to state, said saw suddenly twisted, bent and broke, and ran through said log in a direction opposite to where it was intended, striking the plaintiff in the leg and cutting the same off. The plaintiff charges the defendant with gross negligence in not properly remedying the defect either in said saw or in the timber, or in the manner in which said sawing was done; that all of said defects were unknown to the plaintiff, but were known, or could have been known by the use of ordinary care, by the defendant."

Appellee had the right to allege the causes of his injury in the alternative, as he did. Upon the trial it developed that the cause of his injury was the existence of iron in the log he was sawing, so that, for the purposes of the trial, the petition should be read leaving out the other alternative allegations; when so read, undoubtedly the allegations of the cause of the injury are exceedingly brief, if not scant and meagre. While the pleading is certainly very inartistically drawn, we think that its defects were cured by the verdict. Newnan in his work on Pleading and Practice, page 737, thus declares the rule on this subject: "This verdict will not only aid a defective allegation, but it extends sometimes even to cure an omission altogether, to make a necessary allegation. Where there are defects or imperfections in the pleading, yet the issue raised is such as necessarily requires on the trial the proof of the facts defectively or imperfectly stated, or even omitted, and without which it is not reasonable to presume that the jury would have given a verdict for the party, such deficiency is cured by the verdict."

The evidence in this case, under principles which we deem sound, was sufficient to warrant the submission of the question of negligence to the jury, whether or not the inspector could, by the exercise of ordinary diligence, have discovered the iron, which caused the injury, was eminently within the province of the jury to determine; and as they determined it adversely to appellant, it only remains to ascertain whether or not the law was properly given by the court.

Instruction No. 1, which is the only one complained of, is as follows: "If the jury believe from all the evidence that the log upon the carriage at the time of the injury to plaintiff, and mentioned in the proof, was, immediately before it was placed upon said carriage, inspected or examined by an employe of defendant company, known as an inspector or 'iron hunter,' and if the jury believe that in making said inspection or examination the inspector or 'iron hunter' failed to exercise such care as is ordinarily exercised by ordinarily careful and prudent persons, under the same or similar circumstances, and in the same or similar business, and that the injury to plaintiff resulted solely from said failure of said inspector or 'iron hunter,' and that the plaintiff, at the time and place of the said injury, and in the discharge of his duties, exercised such care as is ordinarily exercised by ordinarily careful and prudent persons under the same or similar circumstances, and in the same or similar business, then the jury should find a verdict for the plaintiff; otherwise, the jury should find a verdict for the defendant."

This is in harmony with the authorities we have cited, and seems to us to fully state the law governing this case. It does not make the employer in-

sure the safety of the employe, but only holds it to the exercise of ordinary diligence in supplying reasonably safe material for the use of the latter, which, as said before, is consonant with both reason and justice.

The judgment is affirmed.

ROARK v. BACH, &c.

(Filed October 16, 1908—Not to be reported.)

■ Homestead—Right of conveyance by owner—An illegitimate son of a decedent who has been allotted by the widow and heirs of the decedent a parcel of land out of the estate which he claims and occupies as a homestead with his family is entitled to hold it against the claims of a creditor whose debt had been incurred prior to the allotment of homestead; he furthermore has the right to exchange it, or a part of it, for other property and to have the deed to the latter made to his wife, who may hold it as against his creditor's claim.

B. P. Wootton and Jesse Morgan for appellant.

John E. Patrick and Kelly Kash for appellees.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Paynter.

L. C. Roark, husband of appellant, Lydia Roark, was an illegitimate son of J. B. Roark, and upon the death of the latter, and in an action to settle the estate or partition the land, he claimed that he had been, by proper orders of court, adopted as an heir at law of his putative father. This was denied, and the evidence tends to show that the claim had no foundation in fact. However, the widow and children agreed to and did allot him out of the home farm a parcel of land of less value than \$1,000, upon which he lived with his family, and claimed as his homestead. Before he acquired the land he became indebted to one Williams, whose personal representative reduced the claim to judgment, and to pay which the lot in Hazard, Perry county, was sold under execution, and by virtue of which sale appellees claim it. It was sold as the property of L. C. Roark. While he was living on his homestead with his family he sold or traded part of it to one Hurst, and as part consideration received the lot in controversy. In the exchange of deeds the lot was conveyed to his wife, the appellant, but she did not have her deed recorded before the sale under the execution.

The question before us is, did the wife acquire title to the lot? Under the statutes regulating homestead rights the homestead of L. C. Roark would have been subject to the payment of the debt if he had purchased it after the debt was created. This court, by numerous decisions, has so interpreted the statute. The evident intention of the general assembly was to prevent the debtor from converting money or property which could have been subjected to the payment of a debt into a homestead exempt therefrom. It has been held that when a debtor has acquired by descent or devise property after the creation of a debt, he is entitled to a homestead in it as against the debt. (*Meador v. Meador*, 88 Ky., 217; *Jewell v. Clark*, 78 Ky., 339; *Pendergrast v. Heekin*, 94 Ky., 384.) To so hold is not violative of the letter or spirit of the statute. In such case the creditor has not been prejudiced,

because the debtor has not converted any debt paying part of his estate into exempt property. In this case the debtor did not purchase the land. It was given to him by the widow and children of the deceased in consideration that he was the latter's illegitimate son. It was not purchased in the meaning of the homestead law; no part of the debtor's estate was converted into it; the creditor was not prejudiced because it was given to him. It would be an exceedingly narrow view to hold that the debtor acquired the land by purchase in contemplation of the statute. Homestead laws should be liberally construed, so as to carry out the purpose of their enactment. We conclude that the debtor was entitled to the land as a homestead when he sold or traded part of it to Hurst. This being true, did he have the right to give it or its proceeds to his wife? We are of the opinion that he had that right. The creditor could not seize and sell it to pay his debt. He could not restrain or interfere with the alienation or sale of it. He had the right to sell it with or without considerations, regardless of the claim of creditors. (*Tong, &c. v. Elfert, &c.*, 80 Ky., 152.) This court has held that the owner of a homestead can dispose of it by will. It necessarily follows that the husband had the right to give the homestead to his wife. If he could give her that, then he could likewise allow her to receive the proceeds. Such act was not prejudicial to the rights of his creditors.

The judgment is reversed for proceedings consistent with this opinion.

MESSER v. COMMONWEALTH.

(Filed October 16, 1908—Not to be reported.)

Homicide—Accidental killing—Where the only testimony presented by the Commonwealth to prove the guilt of one charged with murder was the statements made by the accused some time before the killing, and after he had been ordered away from her house by the deceased, that it was not all over yet, and his own admission on the witness stand that he had shot her accidentally, together with certain testimony showing that he had purchased a pistol and some cartridges shortly before the killing, while the defendant himself admitted the killing, but stated that it was accidental, and it was shown by his witnesses that he and deceased were on friendly terms the evening before the killing, the court erred in failing to instruct the jury upon the subject of involuntary manslaughter.

F. D. Sampson for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Paynter.

This is a remarkable case in some of its aspects. Mrs. Elizabeth Carnes was a divorced woman living with her children in Knox county, Kentucky. The defendant sustained unlawful relations with her, and was a frequent visitor at her house. A neighbor living near her heard some screaming at an early hour in the morning, and when he arrived at the house found her lying speechless on the porch floor. The accused was indicted, charged with the offense of having murdered her. The Commonwealth introduced testi-

mony to establish his guilt, which was to the effect that about two weeks before her death she and the defendant had some trouble at her house, when she ordered him away. One witness testified that afterwards he had a conversation with the defendant, in which he said "he was going back to have it over again." Another witness testified that the deceased was drinking at the time of the difficulty with the defendant, and had a Colt's revolver. Another witness testified that some days before she was killed the defendant spoke of the fact that she had not treated him right, and said that "it is not all over with yet." The same witness testified that on the night of the day on which she ordered him away defendant stayed with her. Mr. Hopper, a merchant, testified that the defendant bought some cartridges from him the evening before the killing took place; that the next morning the defendant told him that the pistol went off accidentally and killed Mrs. Carnes. John Dozier testified that he sold him a Smith & Wesson revolver some days before the killing took place.

This is substantially the testimony offered by the Commonwealth. No testimony was offered to show that defendant was even at the house of the deceased at the time she was killed, or that he fired the shot, except his admission that he had shot her accidentally. The case of the Commonwealth was the very weakest kind of a one to be permitted to go to the jury at all.

The defendant was introduced as a witness in his own behalf, and testified to a state of facts which, if true, show that he killed the deceased accidentally and unintentionally. He testified that they were perfectly friendly; that he stayed with her the night preceding her death; that they took their breakfast together while she was sitting on his lap; that after breakfast they went out on the porch; that she asked him to unload her revolver, which he did; that she unloaded his pistol and handed him what he supposed to be all the cartridges which it contained; and that he supposed the pistol was empty, and in handling it was discharged, inflicting the fatal injury; that after it was inflicted he went for a doctor; and then went to the county seat and surrendered himself to the officers of the law and told them that he had accidentally killed her. A witness who was a merchant testified that the evening before the homicide the deceased and the defendant were in his store, and that the defendant was buying such things as she seemed to want, and kindly asked her if there was anything else she wanted. He admitted in his testimony that he married the stepdaughter of the deceased to keep her from being a witness against him. Either of two motives might be ascribed for this act; one that she knew and would testify to incriminating facts, and the other that she did not know such facts, but might be induced to testify thereto.

If his statements be true, the pistol was not carelessly and recklessly handled, etc. The jury found the defendant guilty of manslaughter under the instruction submitting the question as to whether Mrs. Carnes was killed by the careless and reckless, etc., use of the pistol. The court did not, as it should have done, give an instruction on the subject of involuntary manslaughter. (*Wood v. Commonwealth*, 9 Ky. Law Rep., 872; *Embry v. Commonwealth*, 11 Ky. Law Rep., 515; *Smith v. Commonwealth*, 98 Ky., 318.)

The judgment is reversed for proceedings consistent with this opinion.

PLANTERS BANK AND TRUST CO. v. MAJOR.

(Filed October 16, 1903—Not to be reported.)

Husband and wife—Wife as surety for husband—It appearing from the evidence that at the time the husband and wife executed a note to the bank the husband's account with the bank was considerably overdrawn and that he owed the bank an overdue note, and that the proceeds of the note were placed to his credit in bank and checked out by him in payment of his overdue note and for other purposes, the finding of fact by the court that the note was signed by the wife as surety for the husband, notwithstanding her name appeared first on it, will not be disturbed.

Downer & Russell for appellant.

J. W. Hopkins for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Hobson.

Appellant brought this suit against Kittie H. Major and Matt S. Major, her husband, to recover on two notes, the first dated April 1, 1899, and due four months after date, on which credits were endorsed aggregating more than \$1,000, the other dated June 26, 1899, for \$1,500, due in sixty days and credited with something over \$1,300. The wife's name was signed to both the notes. Judgment was entered by default against the husband, but the wife pleaded that she was the surety of her husband on the notes, and relied on her coverture in bar of a recovery thereon under section 2127, Kentucky Statutes. The case was tried before the court on the law and facts, and he gave judgment in favor of the defendant.

The rule is that where a common law action is tried on the law and facts before the judge, his findings will be treated as the verdict of a properly instructed jury. It has also been held that although the wife's name may appear first on the note, the court will look to the substance, and if in fact the contract of the wife is an attempted assumption by her of the debt of another she will not be held liable unless she binds herself in the statutory mode. (*Crumbaugh v. Postell*, 20 Ky. Law Rep., 1366; 28 Ky. Law Rep., 2193, and cases cited.) The case before us can not be distinguished from those above referred to. When the \$1,500 note was negotiated to the bank the husband's account was overdrawn with the bank above \$300, and he had an overdue note there which, as we think, was only his debt amounting to nearly \$1,000. The entire proceeds of the note was used to pay off the old note or placed to his credit in the bank and checked out by him. The wife was not at the bank and had nothing to do with the transaction, it being all done by the husband. When the other note was made the husband's account with the bank was overdrawn more than \$500. The entire proceeds of the note was placed to his credit and speedily thereafter checked out by him, the wife being at home, ten miles in the country, and having nothing to do with the transaction except to sign her name to the note. She paid \$1,300 on the debt, and under the evidence we think the court properly dismissed the petition as against her. It is perfectly evident that her name was placed first on the notes simply to evade the operation of the statute which made the notes void as to her if she signed as surety. If such evasions of the stat-

ute were tolerated its purpose of protecting married women from this class of contracts would be entirely defeated.

There was no substantial error in the admission of evidence or in refusing to grant a new trial. If the evidence offered to be given by the bank officers when reintroduced had been admitted and also the newly-discovered evidence referred to in the motion for a new trial, this could not have affected the result, for the facts of the case, as shown by the pass book and notes given in evidence leave no doubt that the judgment is correct.

Judgment affirmed.

LIMESTONE MINING AND MANUFACTURING CO. v. LEHMAN, &c.

(Filed October 20, 1903—Not to be reported.)

Agency—Authority of agent—The matter in controversy being whether appellant, who had purchased certain timber from the owner thereof, was entitled to it as against the claim of appellee, who had previously purchased it from one who represented himself to be the agent of the owner, a telegram received from the owner by the agent authorizing him to sell the timber at a stated price, taken in connection with the testimony of the agent, is sufficient to establish the agency and the finding that the timber belonged to appellee.

Theobald & Theobald and Proctor K. Malin for appellant.

E. B. Wilhoit for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Barker.

This case involves a controversy between the parties litigant as to the title of the standing timber on a boundary of land in Carter county, Kentucky, belonging to J. McLean Staughton. Staughton sold the timber to appellant for \$375; prior thereto his agent, R. H. Paynter, undertook to sell it to appellee, Carl Lehman, for \$300. The merit of the controversy turns upon the question of the agency of Paynter to make the sale. If he had sufficient authority, the right of the case is with appellee; if not, it is with appellant.

For appellant, the vendor, Staughton, deposed that Paynter had no authority to make the sale, and that he had repudiated the contract so made; that he had sold the timber to appellant, and the title thereto rightly vested in it. On the contrary, the agent, Paynter, testified that he was fully authorized by his principal to make the sale, and that under and by virtue of this authority he had made it; and in corroboration of his testimony on this point he exhibited a telegram from Staughton, admitted to be genuine, which is as follows:

"9-14-1899, Cincinnati, O.

"R. H. Paynter, Olive Hill, Ky. :

"You may sell timber for \$250.

"J. McL. STAUGHTON."

The testimony of Staughton and Paynter constitutes the evidence on the question of authority in Paynter to make a sale of the timber. Upon trial of the case the circuit judge rendered a judgment in favor of appellee, from which this appeal has been prayed. The question submitted was one wholly of fact. We think the telegram corroborates Paynter, and to that extent

the evidence preponderates in favor of appellee. However, if we were less sure of this, we would not feel at liberty to disturb the conclusion of the chancellor on the facts, where the evidence is so nearly equiponderant. Appellant further claims that the sale of the agent was void, because he had, in collusion with appellee, received from the latter a secret commission. The existence of this fraud is denied and the evidence in regard to it is in the same condition with that on the issue of authority.

Perceiving no error in the record the judgment is affirmed.

HAWKINS v. NICHOLAS COUNTY.

(Filed October 20, 1903—Not to be reported.)

1. Mandate of Court of Appeals—Obedience to—Where this court reversed the judgment of a trial court quieting the title of one who claimed certain lands used by a county for turnpike purposes as against the county, on the ground that the county had shown possessory title and that the petition should have been dismissed, the lower court upon the return of the case properly dismissed the petition upon the failure of the plaintiff to amend his pleadings or to take additional testimony.

2. Judgment in bar—There being no allegation or proof in the case, as prepared, of the abandonment of the land in dispute by the county or the company from which it acquired the turnpike, the dismissal of the plaintiff's petition does not preclude an action to recover the property based upon its reversion to him because of an abandonment or diversion to improper purposes of the land hereafter.

Winfield Buckler for appellant.

John I. Williamson and John F. Morgan for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellant, M. C. Hawkins, in the Nicholas Circuit Court, for the purpose of recovering from the appellee twelve hundred square feet of land on the margin of the Maysville and Lexington turnpike road in Nicholas county, Kentucky. There is a small building on the land, which was formerly used as a toll house by the turnpike company. The property was acquired by appellee from the turnpike company, under the provisions of the Kentucky Statutes, which authorize counties to establish free turnpikes. This is the second appeal of this case.

Upon the first trial appellant obtained a decree quieting his title to the land as against appellee, from which the latter (then appellant) appealed to this court, which reversed the judgment in an opinion to be found in 23 Ky. Law Rep., 1327. This opinion sets forth, fully, all of the facts of the case, which makes their reiteration here unnecessary. Upon return of the case to the lower court, without any further steps being taken, either to amend the pleadings or to take additional testimony, the petition of appellant (plaintiff) was dismissed, whereupon he prayed this appeal.

The trial judge was entirely right in dismissing the petition. Under the opinion of the court there was nothing else to be done. Appellant had not altered the status of the record in any way whatever, and there was no other

method by which to carry the opinion to a legal sequence except the judgment rendered. The conclusion reached by this court, in reversing the case, was that the circuit judge should have dismissed the petition upon the original trial, because the turnpike company had acquired a possessory title, either of the fee or an easement in the fee; and that it was unnecessary, for the purpose of the case, as then prepared, to decide which, no abandonment of the land, either by the turnpike company, or its successor, the appellee, being alleged or proved. This conclusion does not preclude appellant from an action to recover the property, based upon its reversion to him, because of abandonment hereafter of the land by the county, or its diversion to purposes inconsistent with those for which it was acquired, provided, of course, the title is one to which the doctrine of reverter is applicable.

For the reasons above indicated the judgment is affirmed.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v.
BAUGHMAN.

(Filed October 20, 1903—Not to be reported.)

Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Burnam.

J. W. Alcorn and John Galvin for appellant.

H. Helm for appellee.

The questions involved in this case are the same as those decided in the opinion handed down in case No. 1, and it is unnecessary that they should be again recited.

For the reasons indicated in that opinion the judgment in this case is affirmed.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v.
BAUGHMAN.

(Filed October 20, 1903.)

1. Obstruction of public road—Jurisdiction of courts—The provisions of section 4335 of the Kentucky Statutes, imposing a fine not exceeding \$50 for the offense of obstructing public roads, "to be recovered in like manner as fines against contractors," do not confer exclusive jurisdiction upon the quarterly court for the punishment of the offense, although that court has exclusive jurisdiction of prosecutions against contractors appointed by the county judge; the provision has reference to the method of procedure, and any magistrate having jurisdiction over the district within which the offense was committed has jurisdiction of the offense under the provisions of sections 1098 and 1141 of the Kentucky Statutes. These sections are not repealed by section 4335.

2. Same—Where an incorporated town had for seventeen years failed to exercise the governmental functions granted by its charter a justice of the peace whose district includes the town site has jurisdiction to try means committed within its limits.

J. W. Alcorn and John Galvin for appellant.

H. Helm and P. M. McRoberts for appellee.

-Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, the Cincinnati, New Orleans & Texas Pacific Ry. Co., sued the appellee, M. S. Baughman, to recover the possession of a car which it claimed to be the owner of, and entitled to the possession. The appellee for answer admitted that he had the car in his possession, as sheriff of Lincoln county, by virtue of the levy thereon of eight executions issued by J. A. Singleton, a justice of the peace of Lincoln county, in favor of the Commonwealth of Kentucky and against appellant for \$50 each. For reply the appellant plead that the executions under which the appellee took and held possession of the car were void because a justice of the peace had no jurisdiction of the offense so charged; and that the judgments rendered by him were void; and that the executions being issued on void judgments, afforded appellee no justification as sheriff for his act in seizing the car sued for; and that the acts for which the warrants were issued, and upon which the judgments were rendered, were committed in the corporate limits of Tunnel City, a town incorporated by a special act of the general assembly, approved March 20, 1878; and that for this additional reason the justice of the peace, who tried the case, had no jurisdiction of the offense. The appellee rejoined, admitting the passage of the act of March 20, 1878, incorporating Tunnel City, and that the offense charged in the warrants, and upon which the judgments were rendered, were committed within the territorial limits designated by the act, and plead that for a period of more than seventeen years none of the rights and powers granted by the act had been exercised, and were forfeited by nonuser. They further plead that the obstructed road was established, worked and maintained within the so-called city as one of the public roads of the county under an overseer appointed by the county court. The circuit judge dismissed appellant's petition, and it has appealed.

The main ground relied on for reversal is that section 4335 of the Kentucky Statutes, which is a section of the act of March 10, 1894, repeals by implication so much of section 1098 and 1141 of the Kentucky Statutes as confers jurisdiction upon justices of the peace to try the offense of willfully obstructing a public road. Section 4335 reads as follows: "Any person who shall willfully obstruct, injure or destroy any of said public roads * * * shall be fined for each offense not less than five nor more than \$50, to be recovered in like manner as fines against contractors, and shall also be liable in a civil action for double damages to the county or person aggrieved or injured, to be recovered in any court in the county having jurisdiction of the amount claimed. It shall be the duty of the supervisor or overseer and his assistants, and of all constables, town marshals and sheriffs, to report promptly to the county judge or some justice of the peace all violations of this act."

The words "to be recovered in like manner as fines against contractors" are relied on as conferring exclusive jurisdiction for the punishment of the offense upon the quarterly court, for the reason that section 4316 confers upon the quarterly court exclusive jurisdiction of all breaches of contractors' bonds, and as section 4335 provides that the offense of obstructing a public

oad is to be recovered in like manner as fines against the contractors, it is argued that the quarterly court alone has jurisdiction of prosecutions for the recovery of such fines. Neither section 4816 nor section 4835 contain any express repeal of the jurisdiction theretofore enjoyed by justices of the peace to try misdemeanors of this character, and courts are always slow to favor repeals by implication.

It is provided in section 4816 that "upon the filing of the report of the supervisor or overseer that any contractor has failed to comply with his contract, or upon information or oath of any person or on his own knowledge that any road or bridge embraced in said contract is out of repair, the judge of the quarterly court of said county shall forthwith issue from and make returnable to his court a warrant in the name of the Commonwealth against the delinquent contractor, and when executed, proceed forthwith to try the same as other Commonwealth warrants are tried."

In our opinion the words "to be recovered in like manner as offenses against contractors" simply refer to the method of procedure; that it must be by warrant in the name of the Commonwealth, and by trial by jury. If the general assembly had intended to confer exclusive jurisdiction upon the quarterly court to try the offense of willfully obstructing a public road, there is no reason why they should not have done so in express words. Nor is the necessity of such jurisdiction apparent as in the case of a violation of the provisions of the contractor's bond, or failure of duty by an overseer or supervisor. The law confers upon the county judge the duty of appointing these officers and taking these bonds, and it is apparent why public convenience would best be promoted by conferring upon the quarterly court original jurisdiction for a breach of any of the duties imposed by the statute, but no such reasons apply to the offense of obstructing a public road. On the contrary, public convenience requires that offenders of this sort should be speedily brought to trial.

We are of the opinion that it is conclusively shown that Tunnel City had for more than seventeen years failed to exercise any of the governmental functions granted to it by the act of 1878, and that the magistrate in whose district the offense was committed had jurisdiction to try the offender.

Judgment affirmed.

DEUSCH, &c. v. QUESTA, &c.

(Filed October 20, 1903.)

Husband and wife—Validity of judgment against married woman—A judgment rendered against a married woman subsequent to the passage of the act of March 15, 1894, empowering her to sue and be sued as a single woman, in an action to which her husband was not a party, is not void either as to such part of it as adjudged her personally liable for the debt sued on, or as to that part which directs the sale of her real estate to satisfy a mortgage which she had executed thereon prior to the passage of the act of 1894 without her husband uniting in the deed, so far as it affects the question of title as between the purchaser at judicial sale and her heirs at law after the death of both herself and husband.

Hall & McLean for appellants.

Ernst, Cassatt & McDougall for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

Christina Deusch, in the year 1890, executed a mortgage to Georgia D. Bright on certain land in Covington to secure a debt of \$4,500, her husband not joining in the mortgage. On July 15, 1895, Bright filed suit against her, and on November 20, 1898, recovered a personal judgment for the debt; also an order for the sale of the property to pay the debt. The sale was made under the judgment. The land was purchased by the plaintiff, the sale was confirmed, and the land was conveyed to her. Thereafter she sold and conveyed the property to appellee, Adelaide Questa, who has since held it. Mrs. Deusch's husband was not a party to the suit. Some time after this she died, and also her husband. This action was begun on February 4, 1901, by her heirs at law to recover the property from Mrs. Questa on the ground that the mortgage, judgment, sale, and all proceedings thereunder were void.

As the husband of Mrs. Deusch did not join in the mortgage it was void, and if no judgment had been rendered upon it it could not be enforced. The question to be determined is whether the same rule applies to the judgment rendered against her since the act of March 15, 1894, which is now embraced in sections 2127-2148, Kentucky Statutes, because the husband was not a party to the proceedings. By this act it is provided: "A married woman may take, acquire and hold property, real and personal, by gift, devise or descent, or by purchase, and she may in her own name, as if she were unmarried, sell and dispose of her personal property. She may make contracts and sue and be sued as a single woman, except that she may not make any executory contract to sell or convey or mortgage her real estate unless her husband join in such contract." (Section 2128.)

"Husband and wife may sell and convey her land and chattels real, but the conveyance must be acknowledged and recorded in the manner required in the chapter on conveyances." (Section 2129.)

Since this statute was passed it has been held by this court that a married woman, having power to sue and be sued as though she were single, is bound by judgments against her as other litigants. (*Turner v. Gill*, 106 Ky., 414; *Wren v. Ficklin*, 109 Ky., 472; *Howard v. Gibson*, 22 Ky. Law Rep., 1294; *Shanklin v. Moody*, 23 Ky. Law Rep., 2063.) It is insisted, however, for appellants that by the statute the wife can not sell or convey or mortgage her land unless her husband joins with her, and that to permit her to be bound by a judgment in a case to which he is not a party is to allow her to accomplish by indirection what she can not do directly, and in support of this we are referred to a number of authorities to the effect that a married woman can not do by estoppel what she can not do by direct contract.

There is some conflict in the authorities as to how far a married woman may be estopped by her conduct (15 Am. & Eng. Ency. of Law, 799-800), but we do not think it necessary here to consider this question. In 24 Am. & Eng. Ency. of Law, 746, it is said: "As a general rule, at common law a married woman can neither sue nor be sued alone, but she must sue or be sued in connection with her husband, and, therefore, to render a judgment conclusive upon her, it is necessary that her husband should have been

joined in the suit. By statute, however, in most jurisdictions the common law rule has been much modified, and in some jurisdictions the disability of married women in this respect has been removed. Where her disability has thus been removed, she will be concluded by a judgment in a suit in which she sued or was sued without the joinder of her husband."

It is the purpose of our statute to enlarge the rights of married women, and among the rights conferred upon her is the right to sue and be sued as a single woman. The right to sue and be sued as a single woman necessarily carries with it the right to sue or be sued alone, and without the joinder of her husband. The exception in the act that she may not make any executory contract to sell or convey or mortgage her real estate is not a limitation upon her right to sue and be sued as a single woman, but upon her power to contract. By section 2132, Kentucky Statutes, after the death of either husband or wife the survivor shall have an estate for life in one-third of the real estate of which the deceased spouse was seized in fee during coverture, unless the right thereto has been barred or relinquished. Where the husband is not a party to the suit his rights under this section are not affected by the judgment, but as she has the power to sue and be sued as a single woman, she is bound as other litigants by a judgment against her. And appellants who are the children of the wife take only such rights as she had, as they claim under her. To hold otherwise would be to deny the statute its natural effect, and to make it mean that she may sue and be sued as a single woman only in a certain class of actions. This is not the meaning of the legislature. It has conferred upon married women the right in all actions to sue and be sued as single women. The purpose is to relieve them from the disability of coverture in so far as they could not sue or be sued alone. In conferring upon married women the power to employ counsel and control their own law suits the legislature had in mind relieving them from the power of their husbands in this particular, and this being the case the estoppel of the judgment operates upon them in all cases as though they were unmarried.

Judgment affirmed.

ILLINOIS CENTRAL R. R. CO. v. BOM.

(Filed October 20, 1903—Not to be reported.)

1. Questions for court and jury—The rule that where the plaintiff's evidence leaves the mind in doubt as to whether his injury was due to the defendant's act, or to some other cause, there can be no recovery, does not apply where such doubt arises upon the proof introduced by the defendant; such a case is one for the decision of the jury.

2. Judgment sustained by evidence—In this action, instituted by one whose lands had been damaged by floods by reason, as alleged, of the erection of an embankment by the appellant which deflected the water from its usual course and increased the velocity with which it flowed over plaintiff's lands, the evidence is sufficient to support the finding of the jury in favor of the plaintiff.

Pirtle & Trabue, J. M. Dickinson and Lockett & Lockett for appellant,
A. O. Stanley for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hobson.

The Illinois Central R. R. crosses the Ohio river by means of a ferry about a mile and a quarter above the lands of appellee. Prior to the year 1899 the track approaching this ferry on either side of the river ran on a fill, which was below high water mark. In that year the railroad company raised its track to get it above high water. After this was done there was a rise in the Ohio river, which washed appellee's land, and he filed this suit to recover damages of the railroad company therefor, alleging that by reason of its embankment it had changed the course of the water and obstructed its flow, causing it to run over his land with increased velocity, and in a different way than it did by nature. The allegations of the petition were denied, and on the trial of the case the proof was contradictory. The jury under instruction, which submitted the issue to them with admirable clearness, found for the plaintiff in the sum of \$766.66. The court refused to grant a new trial, and entered judgment. The defendant appeals.

We deem it unnecessary to set out the evidence in detail. The evidence for the plaintiff showed that his land was badly washed, and that his tract of 130 acres was damaged something like \$15 an acre, or that it was worth \$45 an acre before its injury, and was worth only \$30 thereafter. As to whether the washing of the land was due to the raising of the railroad embankment the proof is not so satisfactory, but we conclude that there was some evidence to show this, and that the case was properly left to the jury. The rule that has been laid down in several cases, that where the plaintiff's evidence leaves the mind in doubt as to whether his injury was due to the defendant's act, or to some other cause, there can be no recovery, can not be applied where this doubt arises upon the proof introduced by the defendant, for the credibility of the witnesses is for the jury, and they may believe the plaintiff's evidence, and have no doubt as to the cause of the injury. The court, therefore, properly instructed the jury as to this rule of law, and left them to decide the case on all the evidence, telling them that if the injury to the plaintiff's land was as likely produced from other causes as from the raising of the defendant's roadbed, they should find for the defendant.

It is insisted for the appellant that the proof shows that no two floods affect land in the same way, and that the flood in question came from the headwaters of the Ohio when the Mississippi was low, also the Wabash, and other streams in that vicinity, and, therefore, the water had greater velocity than usual, it being shown that the injury to land from water is greatly increased by its velocity. It is also shown for appellant that the greatest injury from water is when it is shallow, and that the water would be quite deep on plaintiff's land before it would reach the top of the old embankment, on account of which no recovery could be had. On the other hand, we think the proof fairly shows that land in the vicinity above the embankment was not washed by this flood, while that below was, and if the velocity of the water coming from above, and not the embankment, was the cause of the injury, it is hard to see why land above did not suffer as the land below. From the hills on one side of the Ohio river to the hills on the other side is between four and five miles at this point. When the river was at flood it spread itself out by nature over the entire bottom, and so followed its course.

But when the embankment was built by defendant above high-water mark the volume of water which flowed on the north side around Tow Head Island and in certain sloughs was caught by the embankment, there not being space left enough for it to pass through the opening, and it then ran southward into the main channel of the river, and not westward as it went by nature. The water was dammed up something like two feet higher on the upper side of the embankment than it stood on the lower side, and we can well understand how this would give it greater velocity below the embankment than above, for the proof shows dead water above the embankment. Whether the water flowing back into the river from the north was sufficient to deflect the current across plaintiff's land on the south side of the river below the embankment was, under these facts, a question for the jury. It is evident that water which would have gone north of Tow Head Island was by the embankment brought back into the main channel, and so the water in the main channel was raised and made to run with greater velocity. A jury of practical men from the different walks of life, putting together their common experiences, seeing the witnesses and having more or less personal knowledge of the river and vicinity, are better qualified to pass on such questions of fact than a court of last resort, whose members, from the nature of their calling, can not have as much practical acquaintance with such matters. Besides, the jury heard and saw the witnesses, and much of their testimony is hard for us to understand from the fact that the witnesses used maps before the jury, pointing here and there to indicate their statements, and the stenographic report of their evidence does not show where they pointed.

The rulings of the court on the admission of evidence were made with rare judgment and consistency. All opinion evidence was excluded. The bare facts were proven to the jury, and they were left to draw their own inferences from the facts. No conclusions of the witnesses were allowed to be given on any important matter in the case. The conclusions that were allowed to be given were on minor matters, as to the effect of floods, and the like, from witnesses specially acquainted with the subject, and, therefore, it was admissible. But there was very little of this.

The petition sufficiently states the cause of action, and while the evidence is very conflicting, and the jury might well have found a verdict for the defendant, we can not say that it is so palpably against the evidence as to warrant us in disturbing it.

Judgment affirmed.

HYATT v. ANDERSON'S TRUSTEE, &c.

(Filed October 20, 1902—Not to be reported.)

Original opinion ante 182.

Augustus E. Willson and James R. W. Smith for appellant.

Simrall & Dolan for appellees.

W. L. Doolan for appellee Reoclus.

Appeal from Jefferson Circuit Court, Chancery division, No. 2.

Judge Barker delivered the following response to petition for rehearing:

Upon a re-examination of the transcript we conclude that appellant's objection to the claims of appellee were properly presented by appellant's exceptions to the commissioner's report in view of the condition of the record and the way the case was conducted in the circuit court. But upon a re-examination of the exhibits filed with the commissioner's report we do not see that he made any error to the prejudice of appellant. The accounts show that the debts created before the 10th of August, 1893, and the execution of notes therefor after that time did not affect appellant's liability.

Petition overruled.

MASTIN v. COCHRAN'S EX'OR.

(Filed October 20, 1903—Not to be reported.)

Note—Interest—Where a note, executed at a time when the 8 per cent. interest law was in force, provided for the semiannual payment of interest "at the rate of 8 per cent. per annum from this date until paid," no time being fixed for the payment of the principal, the note fixed the rate of interest and the date from which it should run, and the contention of the obligor that it bore interest only from the date of demand of payment is not tenable; the semiannual installments of interest bore interest from the dates they were respectively due.

M. C. Hutchins for appellant.

W. D. Cochran for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted to recover usurious interest, which it is claimed was paid on a note which reads as follows:

"For value received we promise to pay Harriet F. Cochran, or order, \$2,000, with interest at the rate of 8 per cent. per annum from this date until paid, the interest to be due and payable semiannually. In witness whereof we have hereunto set our hands this 2d day of July, 1877.

"S. E. MASTIN,

"ALLEN PUMPELLY."

At the time the note was executed the 8 per cent. interest law was in force. The right to recover it depends on the legal effect of the language employed. The note did not fix any time for the payment of the debt, but provides that the interest is to be paid semiannually until the debt is paid. Counsel for appellant claims that it is a demand note, as no time is fixed for its payment, and that at the end of the first six months a demand was made because the first installment of interest then matured, and that as the note then matured it only drew 6 per cent. interest from that date. Again, he claims if it did not then mature, it did when the holder in 1898 sought to enforce its collection, hence the note did not draw any interest until that time, and at the rate of 6 per cent. If either proposition is correct, then usurious interest was paid by the appellant, and the action could be maintained. We will consider both propositions together. The collection of the note could have been enforced at any time, and, therefore, it was in the nature of a note payable on demand. There is a provision in the note which

counsel for appellant seems to overlook, and which fixes the rights of the parties. It is that provision of the note by which the appellant agreed to pay 8 per cent. interest until the note was paid. The demand of payment of the principal could not relieve the appellant of his promise to pay interest at 8 per cent. per annum until the debt was paid. While the terms of the note allowed the payee to enforce its collection, still the payor agreed to pay that rate of interest until the debt was paid. When the payor agrees to pay the conventional rate of interest until the debt is paid the courts require him to do so. (*Crosthwait, & Co. v. Misener*, 13 Bush, 543; *McNeal v. Watkins*, 15 Ky. Law Rep., 780.) There are other cases which enunciate the same doctrine. The semiannual interest installments drew interest from the date they were due. (*Hall v. Scott's Adm'r*, 90 Ky., 340.) To compute the interest on the note under the rule stated, it does not appear that appellant paid interest at a usurious rate.

The judgment is affirmed.

KING v. COMMONWEALTH.

(Filed October 20, 1903—Not to be reported.)

Criminal law—Exceptions—An alleged improper remark made by the Commonwealth's attorney in the witness room which was not excepted to at the time and was first passed on by the court on the motion for a new trial can not be considered by this court as grounds for reversing the judgment in a criminal prosecution.

Edwards & Ogden for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Paynter.

The appellant was indicted and convicted of the crime of robbery. The prosecuting witness said: "I was walking down Green street from 4th; I got to Centre. I noticed this party standing there. As I got right by her, I heard her say, 'Come here.' I looked around, said 'Not for me,' and turned my head and taken about a step or two, when I felt her hit my pocket; when she put her hand in my pocket she pulled me around and nearly pulled me off of my feet and she pulled her hand out, she had my pocketbook which contained \$4."

Robbery is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting in fear. In this case the violence accompanied the taking of the money. The court properly submitted to the jury the question as to whether it was taken by violence or by putting the prosecutor in fear. For the first time upon the motion for a new trial the appellant complained that the Commonwealth's attorney was guilty of improper conduct on account of some remark in the witness room. No exception was taken during the progress of the trial to it. The court first passed upon the question on the motion for a new trial, and under section 281, Criminal Code of Practice, decisions of the court upon motions for new trials are not subject to exceptions. This court has frequently so interpreted the section.

The judgment is affirmed.

HURST v. HURST, & Co.

(Filed October 21, 1903—Not to be reported.)

Conflicting claims on real estate—A recorded mortgage on lands held by the mortgagor by an unrecorded title bond only is entitled to preference over the unrecorded antecedent equity of one who claimed a lien by virtue of debts contracted with the equitable owner in the erection of improvements on the lot.

Z. T. Hurst for appellant.

Pollard & Redwine for appellee, Floyd Day.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge O'Rear.

S. H. Hurst was the owner of the legal title to a lot in the town of Jackson, and sold it by an executory contract to Mann. In the bond for title the vendor retained a lien to secure the unpaid purchase money. Mann assigned the bond to his wife, and they subsequently assigned it to Bailey. Bailey assumed, as part of the consideration, the payment of S. H. Hurst's purchase-money note, the payment of a \$150 note to Judge Redwine (secured by recorded mortgage on the lot) and the payment of a debt of \$285.10 to Day Bros. & Co., contracted by Mann in erecting improvements on the lot.

The original title bond from S. H. Hurst to Mann was endorsed by Mann as follows:

"For value received I hereby assign and transfer the benefit of this bond to M. J. Mann, and ask that the deed be made to her. September 28, 1901.

"S. H. MANN."

Also: "We hereby assign this bond to John A. Bailey and direct the obligors in same to make deed to said Bailey according to the terms of this bond.

"This December 21, 1901.

"M. J. MANN,

"S. H. MANN."

When the above assignment of the bond to Bailey by Mann and wife was executed Bailey and the Manns entered into a written contract respecting the terms of the assignment, in which Bailey agreed to pay, as part consideration, the debts above named. Neither of these papers was recorded or lodged in the county clerk's office. Subsequently appellant loaned to Bailey \$267.50, and took a mortgage on the lot to secure its payment. This mortgage was duly recorded in the proper office. This suit is a contest between Day Bros. & Co. and appellant, R. A. Hurst, as to which has the superior lien. The circuit court adjudged the matter in favor of Day Bros. & Co.

It is not to be doubted but that a vendor can retain a lien on the land he is selling for the benefit of a third person, and that it will be enforceable by such third person, as between him and the vendee. (*Mize v. Barnes*, 78 Ky., 506.) It would likewise be enforceable, of course, as against any other person with notice. The argument of appellee is that this is merely a contest between equal equities, and that the first in order of time must prevail. Concerning this ancient maxim of equity, the author of *Pomeroy's Eq. Jur.* (section 415) thus states the rule, according to its most general modern application: "When several successive and conflicting claims upon or interests in the same subject-matter are wholly equitable, and neither is accom-

panied by the legal estate, which is held by some third person, and neither possesses any special feature or incident which would, according to the settled doctrine of equity, give it a precedence over the other wholly irrespective of the order of time, under these circumstances the principle applies, and priority of claim is determined by priority of time."

One who claims the protection and aid of a court of equity must have been reasonably diligent in protecting himself as authorized by law, so that his failure may not have misled others to their prejudice. The law of registration of deeds and contracts affecting title to real estate, and liens thereon, is so simple and adequate to protect those who have equities in the premises, but are not in possession of the legal title or of the land, that a failure to avail themselves of the statutory method should be deemed such culpable negligence as should postpone the claimant of such equity where another who is innocent has been misled to part with his money or property on the faith of the apparent state of the title.

Section 2358, Kentucky Statutes, provides: "When any real estate shall be conveyed, and the consideration, or any part thereof, remains unpaid, the grantor shall not have a lien for the same against bona fide creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid."

Section 500, Kentucky Statutes, is as follows: "Any contract for the sale of land, or any interest therein, when acknowledged or proven as deeds are required to be, may be recorded in the county in which such lands are situated, in the same offices and books in which deeds are recorded, and the record of all such contracts recorded shall, from the time of lodging the same for record, be notice of such contracts to all persons."

The purpose of the enactment of the last section must have been to afford notice to purchasers and creditors of the terms of these incomplete conveyances which vested only the equitable title in the vendees, so that such purchasers and creditors might, with full knowledge of the facts, protect themselves by their contracts. When appellant came to deal with Bailey, whom he found in possession of the lot, but without the legal title, all that could reasonably or lawfully be required of him was to inspect those records where conveyances affecting that title should have been recorded. By doing so, he would have found simply that the legal title was yet in S. H. Hurst. He must, therefore, take notice that before Hurst would be required to convey it, his equities must be first satisfied. He would be charged with notice of S. H. Hurst's contract with his vendee. But of the rights of Mann, Day and the other intermediate holders, he had no notice.

In *Taylor v. Ford*, 1 Bush, 45, following *Anderson's Adm'r v. Wells*, 6 B. Mon., 540, and *Ligon v. Alexander*, 7 J. J. Mar., 289, this court held that a lien for purchase money upon land conveyed by title bond only could be allowed only by applying the analogy of the statutory lien provided for as to executed contracts. Therefore, as the statute provided that no lien could exist except it was expressly stated in the deed what part of the purchase money was unpaid, where the sale was by executory contract, the lien would not be decreed, as against innocent purchasers or creditors, unless the amount of the unpaid purchase money was stated in the bond. This same principle was applied in the last reported case on this subject, of *Brown v. Blan-*

kenship, 108 Ky., 464, 22 Ky. Law Rep., 143, hence we must hold that appellant's equity was superior to that of appellee Day's.

Judgment reversed and remanded for modification to the extent herein indicated.

PERKINS v. MAHAN.

(Filed October 21, 1903—Not to be reported.)

Incomplete transcript—Affirmance of judgment—Where the transcript of the record in the trial court is so incomplete that it is impossible for this court to arrive at the equities between the parties the judgment below will not be disturbed.

W. B. Moody for appellant.

Turner & Turner and W. O. Jackson for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Nunn.

The partial and imperfect record in this case discloses something like the following state of facts: That one William Kelly owned 153 acres of land and executed a mortgage on it to the Mutual Life Insurance Co. of Kentucky for the sum of \$1,500, all of which had been paid except about \$1,000; that William Kelly sold 105 acres of this land, 15 acres of it to George Mahan, the appellee, and 90 acres of it to his brother, George W. Kelly; that appellee had paid him in full for his part, and that George W. Kelly paid part cash and executed to William Kelly his four notes for \$525 each for the balance; that William Kelly transferred and assigned one of these notes to appellant, Sarah Perkins, as collateral security for a sum which he borrowed of her, and transferred and assigned two of these notes to one Heldman, Heldman & Co., of Cincinnati, and Louis Wald & Co. as collateral security to secure them in sums of \$630 to the one and \$61.28 to the other. It is not disclosed as to what became of the fourth note. Some time after this it appears that Geo. W. Kelly sold this 90 acres of land to appellee, George Mahan, for the sum of \$2,400, recited in the deed as \$1,000 cash and the balance in three equal installments of \$466.66⅔ each, for which Mahan executed his three notes. Appellant sued appellee on one of these notes which had been transferred to her by George W. Kelly, which she says she took at the instance of Kelly and appellee Mahan in lieu of the note which had been transferred to her by William Kelly. Appellee answered and claimed that under his contract with George W. Kelly, at the time he purchased the 90 acres of land from him, that Kelly agreed that all prior liens and incumbrances were to be settled and removed before appellee would be required to pay anything further on his purchase, and that the insurance company's mortgage and the two notes held by Heldman, Heldman & Co. and Louis Wald were then outstanding and unsettled, and for these reasons he should not be required to pay his note to appellant. And upon the reply of appellant admitting these allegations, and by agreement, her case was transferred to the equity docket and consolidated with the action of Heldman, Heldman & Co., Louis Wald & Co. and the Mutual Life Ins. Co., which had been brought to enforce their lien. In the consolidated actions in the year 1899 the court ren-

dered a judgment adjudging that the insurance company had a prior lien on the whole 153 acres of land, and that Heldman, Heldman & Co. and Louisa Wald & Co. held liens subsequent to the insurance company, but prior liens to any other person on the 90 acres of land heretofore mentioned, and directed a sale of the 90 acres only. The commissioner sold this land as directed by the court, and appellee became the purchaser at the price of \$1,500. As to what became of 48 acres, the balance of the 153 acres, or as to how the insurance company's mortgage debt was settled, or as to how the \$1,500 purchase price for the 90 acres purchased by appellee was distributed, this record does not disclose.

These actions remained upon the docket until April, 1902, when, for the first time, the appellant, by an amended reply, alleged and claimed that she was induced to part with the \$525 note on George W. Kelly, which had been assigned to her by William Kelly as collateral, and to accept one of the notes on appellee for \$466.66 $\frac{2}{3}$ in lieu of it, by the inducements and misrepresentations of George W. Kelly and this appellee, George Mahan. These allegations were denied, proof taken, and upon a trial the lower court adjudged that appellee pay to appellant \$152.10, that being the amount, as the court stated, of the difference between what appellee agreed to pay for the land and the amount he had been forced to pay in removing prior liens on the land.

From the record in this case it appears that there are some grounds for the contention of appellant, but from the partial and incomplete record before us it is impossible for this court to arrive at the equities between appellant and appellee, and to determine that the lower court erred in its judgment.

Wherefore, the judgment of the lower court is affirmed.

HELFRECH LUMBER AND MANUFACTURING CO. v. HONAKER.

(Filed October 21, 1903—Not to be reported.)

1. Principal and agent—Notice to agent—Where one who represented another in the taking up of saw logs, whether as special or general agent, had knowledge of the fact that the original owner and vendor had retained a lien on them to secure the payment of purchase money and certain advancements which he had made to his vendee, from whom the agent was purchasing, such knowledge is sufficient notice to the principal of the vendor's lien to render it liable for the purchase money and advancements after it had converted the logs to its own use.

2. Contracts in writing—A contract entered into after the execution of a written contract for the sale of standing timber, and before the timber has been cut and while it is still in the possession of the vendor, that the vendor shall have a lien on the logs after they are cut for the purchase money and for advancements which he agrees to make to the vendee to enable him to carry out his contract is not required to be in writing, and is binding as between vendor and vendee as well as upon purchasers with notice.

3. Purchasers with notice—One who took the logs after they had been cut and rafted and disposed of them after the existence of the vendor's liens for purchase money and advancements to the vendee had been disclosed to him, and under an agreement with the vendor to hold the proceeds subject to such claims, had sufficient notice, and is liable to the vendor.

J. S. Lay for appellant:

Wright & Logan for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee sold to one A. J. Johnson a quantity of standing timber, to be cut into saw logs, and delivered at certain points at agreed prices. The contract was in writing and signed by the parties. Johnson contracted to sell the timber to appellant, and received advances on his contract before the timber was cut. Finding himself unable to feed his teams and pay his workmen, Johnson further agreed with appellee that for such sums as appellee might furnish toward paying the workmen, and such feed as he might furnish for Johnson's teams in doing the work, as well as for the purchase price of the timber, appellee should have a lien upon the timber, or, to put it as they agreed, "appellee was to hold the title to the logs until he was paid for them as well as repaid the sums advanced." One Porter represented appellant in the making of the contract with Johnson. He was present while appellee continued to hold the possession of the timber under his agreement with Johnson, and was then told of the conditions of the agreement. Johnson was unable to pay, and did not pay appellee anything on the timber. Appellant refused to pay Johnson's indebtedness to appellee. Thereupon appellee, who then had the possession of the timber, put it in charge of an agent, and sent it to the mouth of Green river for sale. The agent was called home to the death of his wife, and abandoned the rafts of logs. Appellant thereupon took charge of the logs under its contract with Johnson, but before appellant took charge of them appellee sent another agent to appellant, and informed it of the nature and extent of his liens, and appellant then agreed to take the timber subject to appellee's rights. Instead, appellant converted the timber, settled with Johnson, and paid him for it. This suit was by appellee to recover the amount of Johnson's indebtedness under the contracts. The judgment of the circuit court gave to appellee the sums claimed.

It is complained by appellant that the petition failed to disclose whether Porter was a general or special agent for appellant, and failed to show the extent of his authority, or whether his act was within the scope of his authority. It is also denied that Porter was the agent of appellant at all at the time that he received the information from appellee touching his liens upon the logs. We are of opinion that it was not material whether Porter was a general or special agent in the matter because whichever he was, his action was not only within the scope of his actual authority, but it was subsequently ratified by his principal. He was the only one representing appellant at that time in the matter of taking up these logs. If he was sent there for the purpose of representing appellant, to that extent appellant can not escape the effect of a notice to such an agent touching liens upon the property as affecting its title before the delivery of it will be allowed.

Again, whether Porter was or was not the agent of appellant, it is shown sufficiently in the record that the notice of appellee's lien, as well as the fact of his continued possession of the property under his contract with Johnson, were brought to the knowledge of appellant's manager at Evansville

Appellant's subsequently settling with Johnson, notwithstanding such notice, was at its peril. It is further contended that although it is claimed that the written contract, by mistake or by the fraud of Johnson, failed to embrace the stipulations concerning the liens as well as the advancements and feed bill, yet there is no proof to sustain the allegations of mistake or fraud. It is sufficiently stated, however, and clearly shown, that it was agreed between the parties subsequent to the written contract, and before the timber was cut, and while it was of course yet in the possession of appellee, that he was to have the lien. The consideration for this new contract would be the agreement of appellee to furnish, and his furnishing, money and feed to Johnson to enable him to perform his contract. This contract creating the lien was not required to be in writing. It was binding between the parties as well as upon purchasers with notice? The question then comes, whether appellant was a purchaser with notice. Appellant made certain advancements to Johnson upon his contract. They were made at a time, however, so far as the record shows, when appellee was in the possession of the timber. Appellee would not have been required, even under his written contract, to surrender the possession of the timber until the consideration was paid, it being a cash transaction. If Johnson could not so compel him, neither could any one else standing in Johnson's place. Appellee continued to hold the possession of the logs notwithstanding the rafts were tied up at the bank and left in the river by his servant. And when appellant agreed with appellee's agent to take the logs and measure them, and account for them at Johnson's contract price, and to hold the proceeds subject to appellee's claim for purchase money and advancements, which were fully disclosed to him, the notice thereby given of appellee's equity was as complete as is possible for it to have been.

The equity seems to us to be clearly with appellee and the judgment of the circuit court is affirmed, with damages.

Judge Settle not sitting.

BOND v. MARTIN'S ADM'RS.

(Filed October 31, 1908—Not to be reported.)

1. Construction of will—Where a testatrix devised to a particular devisee a certain house and lot, "with all it contains—furniture, bedding, silver—everything in or about the premises, all personal property wherever it may be," without enumerating her bank stocks and choses in action, which constituted about one-half of her estate, the clause "all personal property wherever it may be" will be construed as referring only to that character of personal property which was similar in kind to that mentioned in the bequest, and not to cover the bank stock and choses in action.

2. Same—Evidence—Letter of testatrix—A letter written by the testatrix and left with her effects for the chief devisee, and particularly referred to in the will, and which expressly disavowed any intention to include bank stocks, bonds and notes in the bequest by the clause in question, was competent to disprove the contention that that clause, in its legal acceptation, covered every species of personal property owned by the testatrix, including the bank stocks.

W. M. Fenley for appellant.

M. L. Harbeson for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

The will of Irene W. Martin, a widow, was probated in the Kenton County Court on the 26th of November, 1901. The appellant, J. B. Bond, and the appellee, Augusta B. Miller, are the principal beneficiaries thereunder, and having disagreed as to the proper construction of the bequest to Augusta B. Miller contained in the second clause of the will, appellant instituted this suit for the construction thereof, and for a settlement of the accounts of her administrator, and for a sale of the real estate. The will is as follows:

"At my death I desire first my debts paid, if there be any, also my funeral expenses paid and a footstone placed at my grave on the lot at Highland Cemetery, Covington, Ky., where my family are buried.

"I then bequeath to Augusta B. Miller, the eldest daughter of my niece Matilda O. Miller (deceased), my residence property, situated at 1014 Madison Ave., Covington, Ky., with all it 'contains—furniture, bedding, silver—everything in or about the premises, all personal property wherever it may be;' also a three-story brick house, used as a storehouse, situated at 768 Madison Ave., Covington, Ky., this bequest to be allowed her without delay. In my box at First National Bank, Covington, Ky., will be found letter addressed to and intended for Gussie B. Miller. I give to my nephew, J. Brewster Bond, \$2,000, and to his son, Benjamin B. Bond, \$500.

"I give to Anna Belle Smith, Mary I. Miller, Laura C. Miller and Dollie M. Bond \$500 each.

"I give to my husband's two nieces, Libbie L. Rouse and Mattie M. Kelley, a present of \$200 each; also a present of \$100 to Mrs. M. A. Hughey. I give to J. Brewster Miller, to Henry H. Miller, to William E. Miller, Jr., and to Dr. Jim K. Miller, \$500 each.

"I give to Mrs. Charles A. Berwin, No. 15 Perry street, New York City N. Y., a present of \$200; if she should not be alive at my death to be given to her two daughters, Jennie Evelyn and Allie Berwin. The residue of my estate to be divided equally between my nephew, J. Brewster Bond, and Augusta B. Miller, eldest daughter of my niece, Matilda O. Miller (deceased). The bequest to be over to the heirs as fast as practicable after my death, except in the case of the boys, their shares to be held in trust for them until of age, W. Ed. Miller acting as guardian of his four boys, and Mr. B. Stevens, grandfather of Benjamin B. Bond, acting guardian for him.

"This is my last request.

"MRS. IRENE W. MARTIN,

"Covington, Kenton Co., Kentucky.

"November 26, 1900."

The estate of decedent disposed of by her will consisted of five separate pieces of real estate in the city of Covington, and the most valuable were devised to the appellee, Augusta B. Miller, and the balance passed by the residuary clause to her and the appellant. A personal estate amounting to about \$10,000, which was invested in bank stocks, and a considerable amount of personal property, consisting of household furniture, jewelry, and the usual furnishings of a well-appointed residence. It is the contention of the appellant that the words "all personal property wherever it may be," con-

tained in the second clause of the will of decedent, are descriptive of, and were only intended to apply to, the household furniture, silverware and jewelry, and other like personal property belonging to the decedent. The appellees, Augusta B. Miller, and the administrator, who is her father, on the other hand, insist that all the bank stock, bonds, choses in action, and personal property of every kind and description owned by decedent passed under the second clause of the will to appellee, and that the special bequests should be paid from a sale of the real estate not specifically devised in the will. The plaintiffs in their reply to this contention, after denying that the clause in controversy is susceptible of the construction contended for by the defendant, say that such was not her intention, and that the language at best is ambiguous; and that the letter referred to as in her box at the First National Bank of Covington, addressed to and intended for Gussie B. Miller, is competent evidence to show what were her real intentions as to the disposition of her personal estate, and they make the letter an exhibit with their reply. It is, viz.:

"To Gussie B. Miller:

"Dear Gussie—I have given you in my will everything in my house (residence), which includes furniture, pictures, dishes, bedding, silver, jewelry, everything in or about the house, or premises; also my jewelry that may be in my box at the bank where my papers are, of course I do not refer to any of the papers, such as bank stocks, bonds, notes, or anything but jewelry or trinkets of that kind; there might not be any there at that time; I might dispose of them myself—of course I can not tell what might happen before that time. I might lose what little I have now. In my will I have given you my residence house (1014 Mad. Ave.), and the three-story brick used as a storehouse (708 Mad. Ave.); also a share in the residue of my estate as your brothers and sisters, after the other gifts have been disposed of. Of course the girls, and possibly the boys, might like to have some things that are in the house, though there is not much that is fine or new style; some will do for keepsakes. I will mention a few as I think of them: My diamond earrings are for you, my diamond ring is for Laura's baby, give her also my hexicon silk quilt. The crazy silk quilt is for you (Anne Laythan did most of the stitching in it). Give the silk fan quilt to Dollie Bond. Give Anna Belle and May each a silk comfort. Give May the chenille table cover, your father gave it to me. Give to Laura's baby the olive spoon. Give to May one set of bed pillows and bed clothes, if she wants to take care of them until she needs them. Give the parlor mirror to Anna Bell. Remember the portraits of pa and ma belong to Ben Easton. You will find my things marked for different ones. Give them to the ones they are marked for unless I give you directions to dispose of them in some other way.

"I have taken this plan to dispose of my things, thinking it the best way. Allow the family (girls especially) to read this letter, so there will be no misunderstanding, and give the things over to each one as soon as you can. Give my watch to Laura's baby. I give to Carrie Irene Smith \$25, you will find in this letter in gold, give it to her. If you fail to find it in this letter, never mind, I may take it out."

The defendant moved to strike this letter from the reply, upon the ground that the will of testatrix does not refer to it as explanatory of her intention.

as expressed in her will, or as a part thereof, and that it was never probated or offered for probate. The trial court sustained this motion, and adjudged that the bank stock, notes, choses in action, etc., owned by testatrix at her death passed to the appellee, Augusta B. Miller, and plaintiff has appealed.

It is a canon of testamentary construction that the intention of the testator as gathered from his entire will must prevail if not opposed to some positive provision of the law, or to some general principle of public policy. (Schoeler on Wills, section 462-468, inclusive.) And it is the duty of the chancellor, for the purpose of arriving at the testator's intention, to as far as possible put himself in the testator's place at the time of the execution of the paper. (*Price v. Hutchings*, 88 Ky., 656.) Apply this rule of construction to the case at bar, and remembering that the will was written by a lady who was perhaps unfamiliar with the technical legal meaning of the words "personal property," or what they embraced, it is easy for us to reach the conclusion that she meant the tangible personal property by which she was surrounded, and with which she daily came in contact, rather than that class of property represented by stock, notes, etc., which to some degree at least partakes of the nature of intangible property. The devise is to appellee of the residence property of testatrix, situated at 1014 Madison avenue with all it contains. This devise is followed by the descriptive words, furniture, bedding, silver, everything in or about the premises. The personal property which testatrix enumerates in the clause is of comparatively small value, and constitutes a part of the home which she occupied, and which she gave to appellee. Considering the particularity with which this property is described, it is wholly improbable that she would have failed to mention her bank stock and choses in action, which constituted nearly, if not quite, half of her entire estate, if she had intended that this property should pass to the appellee. The words "all personal property wherever it may be" were plainly intended by testatrix to refer to property similar in kind to that which she had enumerated. This construction is fortified by the other clauses of the will. For instance, in the first clause she says: "I desire paid at my death, first, my debts and funeral expenses paid," and in the succeeding clauses of the will she makes special bequests amounting to \$7,500, which she directs shall be paid over to the devisees as fast as practicable after her death. The will appoints no executor, and no provision is made therein for a sale of the real estate. Testatrix owned no personal estate at the time of her death which she had not specifically devised to appellee out of which these special bequests could have been paid except the bank stock in controversy, and the value of this bank stock approximated in value the probable amount of her debts, cost of administration and the specific devises. We are, therefore, of the opinion that the words "all personal property wherever it may be" only refer to that character of tangible personal property which was similar in kind to that named in the bequest, and did not cover the bank stock or choses in action owned by testatrix at the time of her death.

In view of the conclusion which we have reached as to the proper construction of the clauses of the will in question, we deem it unnecessary to consider the relevancy of the letter referred to in her will, addressed to the

appellee, as explanatory thereof. But if the contention of appellee that the words "all personal property wherever it may be," in their legal acceptation, cover every species of property owned by testatrix, including the bank stocks in controversy, in that event we think it would have been competent for appellants to have introduced the letter referred to in the will addressed to appellee to show the character of personal property which testatrix intended to devise, and the letter certainly leaves no room for controversy on this point.

For reasons indicated the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

BOARD OF EDUCATION OF CITY OF WINCHESTER v. FOSTER, &c.

(Filed October 21, 1903.)

Public schools—Payment of tuition—Under the provisions of section 3588 of the Kentucky Statutes, which provides for the establishment of a system of public schools in cities of the second class for the benefit of the "children residing in the city between the ages of six and twenty years," to be maintained by the levy of a tax upon the taxpayers of the city, and the provision of section 3605, that "no child of persons residing beyond the city limits shall be admitted as a pupil in any such schools except on payment of such tuition fees as the board may require," a child of persons residing in another State, who resides with a relative within a city of the second class, is not entitled to attend the public schools therein without the payment of tuition fees fixed by the school board where no legal obligation rests on such relative to perform the terms of his agreement to clothe, support and educate her as one of his own children so long as she remains in the family or until she is twenty-one years of age, nor upon her to remain in his family for any length of time.

Beckner & Jouett for appellant.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, N. K. Foster, a resident and taxpayer of the city of Winchester, brought this suit, praying that a writ of mandamus issue requiring the defendant, the Board of Education of the city of Winchester, to admit his complainant, Gertrude N. Price, into the public schools of the city as a pupil without the payment of tuition fees, which had been demanded of her by the defendant. In the original petition Gertrude N. Price united as a complainant, and it is alleged in substance that she is a niece of N. K. Foster, and has for three years continuously resided with him as a member of his family; that the uncle, N. K. Foster, agreed with her parents, who resided in Virginia, to board, clothe, educate and treat her as one of his own children so long as she continued a member of his family. In an amended petition it was alleged that the uncle had agreed with the niece that he would clothe, support and maintain her as a member of his family until she was twenty-one years of age, and as much longer as she desired; and the niece had agreed, with the consent of her parents, to reside with him as a member of

his family until she arrived at the age of twenty-one years; and that she now intended to do so, or so long as the uncle continued to reside in the city. The defendant filed a general demurrer to the petition as amended on the ground that it did not state facts sufficient to support a cause of action. The demurrer was overruled, and declining to plead further judgment was entered requiring the defendant to admit plaintiff, Gertrude N. Price, into the public schools of the city of Winchester as a pupil at the public expense, without requiring the payment of tuition fees, and the defendant has appealed.

A determination of the questions raised by the appeal involves the construction of section 3588 and 3905 of the Kentucky Statutes, provisions in the charter of cities of the fourth class to which appellant belongs. By section 3588 appellants are authorized to establish a system of public schools for the benefit of the children residing in the city between the ages of six and twenty years and to maintain them by a tax levied upon the taxpayers of the city. This section plainly restricts the benefit of such schools to children who are in good faith residents of the city; that such was the purpose of the statute is also shown by section 3905 of the statute, which authorizes the board of education to admit to the schools pupils from beyond the limits of the city upon the payment by them of reasonable tuition fees for the benefit of the schools of the city. The last clause of this section provides "that no child of persons residing beyond the city limits shall be admitted as a pupil in any such schools except on payment of such tuition fees as the board may require." The powers of the board of education in the maintenance and regulation of public schools are limited by the terms of the statute, and there would have been no just ground of complaint if the legislature had failed to provide for the admission of children residing outside of the city at all, as these schools are maintained by special local taxation for the benefit of the children of persons who are subject to be taxed for their maintenance. And section 3212 of the Kentucky Statutes, which is a provision of charters of cities of the second class relating to the maintenance of public schools, contains no provision for the admission of children who are not bona fide residents of the city to public schools. In our opinion the averments of neither the original nor amended petition state a good cause of action.

It appears by express allegation that the parents of Gertrude Price reside in Virginia. There is no averment that the uncle is her guardian, curator or committee; or that she has been apprenticed to him, or that he has any control over her; and his assumed responsibilities in connection with her are only to continue so long as she resides in his family, or until she arrives at the age of twenty-one years. But there is no legal obligation upon either to perform this alleged agreement. In *Rogers v. Trustees, &c.*, 11 Ky. Law Rep., 985, this court said: "The fact that children outside of the districts are allowed to attend school is not objectionable because they are not required to pay their tuition, and are not allowed to enjoy the benefits resulting alone from the imposition of the tax. They are made to pay, and must be compelled to pay, as the act provides."

In *Haverhill v. Gale*, 103 Mass., 104, under a statute similar to ours, but which did not authorize the admission to the public schools of children whose parents resided beyond the city, it was held that the city was not au-

authorized to open its schools to children whose parents or guardians reside in another State, and if they did so, no promise of the parents or guardians to pay for tuition could be enforced. In *Binde v. Clinge*, 30 App. Mo., 285, under a similar statute, it was held that a minor, who was neither an orphan nor apprentice, and whose parents reside without the school district, was not entitled to attend the school, although he had a home, more or less permanent, within the district. In *School District No. 1 v. Bragdon*, 23 N. H., 507, it was held that children who were sent into a district by their father to reside with an aunt, under indentures of apprenticeship, but which were made only for the purpose of sending the children to school, was liable to action by the district. In *Wheeler v. Borough*, 18 Ind., 14, it was held that parents residing in another State, by sending their children to Indiana for the purpose of procuring an education, did not obtain for them the right of admission in the common schools of the State. In *Gardner v. Board of Education*, 5 Dakota, 259, it was held that where one owned a farm which had been his domicile, took his family to a city for the purpose of taking advantage of its schools, that his children did not acquire a residence to entitle them to the privileges of the city schools.

In our opinion the averments of neither the original nor amended petition, show that appellee, Gertrude Price, is a bona fide residence of the city of Winchester, and it is expressly alleged that her parents reside in Virginia. Her admission free to the public schools would violate not only the express letter, but also the spirit, of the statute, as it was plainly the purpose of the general assembly in the enactment of the statute that the benefit accruing from the maintenance of such schools should be limited to bona fide residents of the city, on whom the burden for their maintenance is cast. The circuit judge erred in his construction of the statute, and the judgment is reversed and cause remanded for proceedings consistent with this opinion.

Whole court sitting.

PERRY, &c. v. TRIMBLE, &c.

(Filed October 21, 1903—Not to be reported.)

1. Lands—Conflicting titles—A. purchased by title bond B.'s undivided interest in a tract of land and took possession, which he thereafter held adversely and continuously; subsequently he instituted suit for partition, which was ordered by the court, and his interest was allotted to him by the court's commissioner by deed duly executed, acknowledged and recorded; subsequent to A.'s taking possession C. instituted action against B. to subject his interest in certain property to the payment of a debt, and later still, and after the deed of partition to A., he sought by amended petition to subject the lands allotted to A. by the deed to the payment of B.'s debt without making A. a party to the suit; the lands having been ordered sold in satisfaction of that debt C. became the purchaser and received a commissioner's deed. Held—That C. had notice of A.'s deed to the property, the same being duly recorded, and that A.'s title is superior.

2. Same—Notwithstanding C. may have sought in his original petition to subject the lands, which A. had purchased, to B.'s indebtedness, that fact does not avail to defeat A.'s title as C. had notice of his deed prior to his own purchase of the land at commissioner's sale.

Robert H. Winn and J. H. Williams for appellants.

B. F. Day & Sons for appellees.

Appeal from Meniffee Circuit Court.

Opinion of the court by Judge Settle.

This is an action to quiet appellants' title to ninety-three acres of land which they claim to own under and by virtue of a commissioner's deed made in an action for the partition of certain lands in Meniffee county, formerly owned by them jointly with one Bettman and others. Appellants also claim to have had the actual, adverse possession of the land described in the petition by virtue of the deed of partition mentioned, and a title bond previously executed by their vendor, ever since June 1, 1883.

The petition alleges interference with their possession of the land, and the beclouding of their title, by certain acts of trespass forcibly committed by the appellees, Trimble and Parmer, particularly the latter, and by the claim of the former to the ownership of the land, which claim is alleged to be unfounded and based upon a void decretal sale and commissioner's deed, which the court was asked to declare void, and in addition judgment was asked against appellees for \$200 damages for the acts of trespass complained of.

The answer denies appellants' title and possession; also the acts of trespass charged, and avers that the appellee, Trimble, is the legal owner of the land in controversy under the decretal sale and commissioner's deed attacked by the petition, and that he is legally in possession of the land; and further, that the title bond and deed relied on by the appellants conferred upon them no title to the land. The averments of the answer were denied by reply, and after the taking of depositions by the parties the case was submitted for trial, with the result that judgment went for the appellees, and appellants' petition was dismissed, with costs. Of that judgment appellants complain, and the case is now before this court for final adjudication.

The record presents the following state of facts: On June 1, 1883, the appellants, T. N. Perry and F. N. Carter, bought of Daniel Morrison his undivided interest of one-eighth in a large tract of land in Meniffee county. A title bond of the above date evidencing the sale was executed by Morrison to the appellants. There is some question as to the date of the execution of this title bond, but we incline to the opinion that it was executed and delivered at a time subsequent to the date it bears; however, it is reasonably manifest from the evidence that it was given the date June 1, 1883, when delivered to appellants, because that was the true date on which they purchased the interest of Morrison in the land in question, and it is shown by the evidence that appellants by their agent, Day, took possession of the land on or very soon after June 1, 1883, which possession was actual, adverse to all others, and continuous through Day or other agents of appellants, down to the time of the entry thereon of appellees' agent, Parmer, which was shortly before the institution of this action in the lower court.

On June 13, 1887, an action was commenced in the Meniffee Circuit Court between appellants and Bettman and others, joint owners of the entire tract of which the ninety-three acres in controversy was a part, which resulted in a partition of the lands, and by the commissioner's report the ninety-three acres mentioned was allotted to appellants as the share to which they were

entitled under the bond from their vendor, Morrison, who was made a party defendant in the action, and filed answer admitting the sale and execution of the title bond to appellants and his willingness to have a deed made them for the land. The commissioner's report was confirmed by the court, and the ninety-three acres conveyed the appellants by deed from the master commissioner, which was acknowledged by the commissioner, and approved by the court November 29, 1888, and duly recorded in the office of the county clerk of Menifee county December 1, 1888.

On October 19, 1885, the appellee, N. H. Trimble, instituted an action in the Menifee Circuit Court for the satisfaction of a judgment which he held against Daniel Morrison, appellants' vendor, in which an attachment was issued and levied on certain lands and other property owned by Morrison, but was not levied upon the interest in the land described in the title bond to appellants. By judgment of the court in that action the properties attached were sold, but no effort was made to subject the ninety three acre tract to the payment of appellees' debt until November, 1889, at which time an amended petition was filed by appellee in which the ninety-three acres was specifically described, and its sale asked to pay his debt, and by judgment of the court it was declared subject to the debt, and ordered to be sold by the master commissioner, and was sold by him July 8, 1890, at which sale appellee became the purchaser. The sale was confirmed, and a deed for the ninety-three acres made to appellee, which was acknowledged by the commissioner and approved by the court September 12, 1890, and recorded on the 20th of September, 1890.

Appellants were not made parties to the action brought by appellee against Daniel Morrison, nor was the appellee a party to the action of partition between appellants and Bettman and others. It will be observed that the action of the appellee, Trimble, against Morrison was filed more than two years after the date set forth in the title bond from the latter to the appellants, and as the contention of appellants as to the time of their taking possession of the land in controversy is, in our opinion, sustained by the record, it is manifest that they were in the actual possession of the land at the date of the institution of appellees' suit, and had held such possession continuously for more than two years previous thereto. It will also be observed that the commissioner's deed conveying to appellants the land in controversy was acknowledged by that officer, approved by the court, and put to record in the proper office about one year before the filing of appellees' amended petition, fully eighteen months before his purchase of the land at the decretal sale, and about one year and eight months before he received his deed from the commissioner. The question presented for decision is, therefore, one of priority of title.

It is manifest that the appellee, Trimble, before the filing of the amended petition in his suit against Morrison, whereby the ninety-three acres was attempted to be subjected to his judgment debt, had notice of appellants' claim of title, and of the existence of their deed, for, in the amended petition, the ninety-three-acre tract is specifically described, which description could have been obtained nowhere else than from the commissioner's report of division in the suit between appellants and Bettman, nor from the deed of the master commissioner conveying to the appellants the land allotted them

by the report of division in that case, and, as already stated, the deed had been put to record nearly a year before the filing of the appellees' amended petition. If the papers of the suit between the appellants and Bettman furnished the appellee, Trimble, a description of the land, they also apprised him of the existence of the title bond as the source of appellants' title, and of the further fact that the deed made by judgment of the court through its commissioner had invested them with the full legal title to the land pursuant to the terms of the bond.

Section 496, Kentucky Statutes, provides that "no deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record."

Section 494, applying alone to deeds and leases of lands, mineral and other rights therein for a longer period than five years, is to the same effect. It follows, therefore, by necessary implication from the language of the two sections referred to, that such instruments of writing as are therein mentioned, though unrecorded, are not void, but valid against purchasers at sale under execution or otherwise when notice has been given, and likewise against creditors, as by the uniform ruling of this court for many years creditors and purchasers have in that respect been placed on the same footing. Indeed "notice to the creditor, at any time before he may purchase, affects his conscience, and he may be compelled in obedience to the equity evidenced by the bond or unrecorded deed to transfer the legal title to the party against whom he ought not in good conscience to hold it." (*Baldwin & Co. v. Crow*, 86 Ky. 679; *Low & Whitney v. Blincoe*, 10 Bush, 331; *Morton v. Roberts*, 4 Dana, 258.)

In the case of *Lane v. Martin*, 23 Ky. Law Rep., 438, this court extended the rule announced in the cases *supra* by holding that "if notice of the outstanding equity against the land is acquired by the purchaser before he has completed payment of his purchase, he will be charged with the equity at least to the extent of the unpaid purchase money."

So if appellants had never put to record the deed received by them through the commissioner, they would nevertheless, under the rule mentioned, be entitled to hold the land in controversy against the appellee, Trimble, as it is conclusively shown that he had notice of the equitable title conveyed them by the bond from Morrison before and at the time of his purchase of the land. He is not, therefore, an innocent creditor or purchaser.

But if it could be doubted that the appellee knew of the title bond before his purchase of the land, there can be no doubt of his knowledge of the existence of appellants' deed before his purchase, as the recording of that instrument in the proper office gave him constructive, and at the same time effectual, notice of that fact. He will not be allowed in the face of the record to deny that he had such knowledge, or to shield himself behind the deed received by him from the commissioner, which is invalid and must yield to the superior title conferred upon appellants by the deed from the commissioner to them.

It is contended, however, by counsel for appellees that the original petition in the action of *Trimble v. Morrison* mentioned the latter's interest in

the Bettman land for the purpose of subjecting it, with the other property therein described, to the satisfaction of his judgment, by reason of which and the service of summons on Morrison, appellee Trimble secured a lien on the land. As a part of the original petition has been lost, or at least, is not to be found in the record before us, we are unable to verify this statement; but if it be true we can not see how it would benefit the appellee in this case, as it could not alter the fact that he received notice of the existence of appellants' title bond and deed before the purchase of the land in controversy.

If the appellee attempted to acquire such a lien by the filing of the original petition and service of summons upon Morrison, it is strange indeed that no steps were taken by him to enforce it between October 1, 1885, the date of the filing of the original petition, and the November term, 1889, of the Menfee Circuit Court, at which the amended petition was filed, seeking to subject the land to appellants' debt.

There is no evidence conducing to show that the appellants had any knowledge of the pendency of the action of Trimble v. Morrison, or of the sale at which he became the purchaser; nor is there any evidence tending to support the averment of appellees' answer, to the effect that the appellants agreed with Morrison to cancel the title bond which he had executed to them.

As to the appellants' claim for damages caused by the acts of trespass on the part of the appellee, Farmer, the evidence is vague and unsatisfactory; but if upon the return of the case to the lower court a judgment for damages is insisted upon, further proof should be ordered taken on that point.

For the reasons given the judgment of the lower court is reversed and cause remanded for further proceedings consistent with the opinion herein.

Judge O'Rear not sitting.

SMALL v. REEVES, &c.

(Filed October 20, 1903—Not to be reported.)

1. *Res judicata*—Sufficiency of denial—Where the defendants to an action to set aside a judicial sale of lands on the ground that the owner thereof was an imbecile alleged, by way of answer, specific facts showing that in another suit involving the same parties and subject-matter the same issues had been adjudged adversely to plaintiff's contention, a denial in general terms that either the issues or the parties were identical with those in the former suit did not put in issue the plea of *res adjudicata*.

2. *Same*—The judgment of the court adversely to the contention of the plaintiff who seeks to set aside a judicial sale of lands on the ground of the imbecility of the owner thereof is a bar to a subsequent action by the same person against the same defendants and two additional ones to recover other lands sold under the same order of sale on the ground of the imbecility of the same owner.

3. *Pleading—Curing defect*—The allegation of a reply that a judgment against the pleader had been appealed by him and was pending in the Court of Appeals cured the defect, if any, in the answer, which relied on the judgment referred to as a bar to that action, on account of its failure to allege that the judgment was unreversed and unmodified.

4. Judgment in bar pending appeal—The judgment appealed from not having been superseded, it remained in full force and effect and constituted a bar to a second suit between the same parties involving the same issues, notwithstanding the appeal was pending and undetermined.

B. F. Proctor and Proctor & Herdman for appellant.

Edward W. Hines W. S. Pryor and W. P. Sandidge for appellees.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Barker.

Joseph Small died, intestate, in Todd county, Kentucky, leaving two sons, the appellant, William Small, and John S. Small, who were his only heirs at law. The estate inherited by the sons consisted of a large body of land. The father owed, at his death, debts amounting to \$1,836. In order to pay off this indebtedness, for which they were liable to the extent of the estate inherited, they borrowed the \$1,836 from John Muir, to whom they executed and delivered their joint notes to secure which they mortgaged their inheritance. This note was afterwards assigned by Muir to the Bank of Elkton, and not having been paid at maturity, legal proceedings were instituted to recover the debt, and to enforce the mortgage lien.

It having been ascertained between the brothers that William Small's part of the indebtedness to the bank amounted to \$769, a judgment was permitted to go, ordering the sale of seventy acres of his land to pay it off. At the commissioner's sale had John S. Small became the purchaser of the land for the amount of the indebtedness, and the sale being confirmed, he became the owner.

On the 21st day of March, 1855, John S. Small borrowed of B. D. Johnson \$1,027.50, and to secure its payment gave him a mortgage on a tract of eighty and one-half acres of land, and upon another tract of seventy acres, this latter being the property theretofore owned by William, and sold at the judicial sale before mentioned. On the same day William Small and John S. Small executed a mortgage to appellee, Willis L. Reeves, to secure a joint note given by them to him for \$2,556, on the same land mortgaged to Johnson, and also 146 acres of land belonging to William Small. By this arrangement Reeves acquired a second lien on John S. Small's property, and a first lien on that of William Small.

A large part of the money borrowed of Johnson and Reeves was used in paying off the indebtedness due the Bank of Elkton, evidenced by the note assigned to it by John Muir.

In 1857, his debt not having been paid, Johnson instituted an action in the Todd Circuit Court for judgment and an enforcement of his lien. Reeves was made a party defendant, and filed an answer, which was made a cross petition against the Smalls, asking for a judgment for his debt and an enforcement of his lien. No defense was made to this action, and a judgment was rendered for the indebtedness, establishing the respective priorities of the plaintiff and cross plaintiff for an enforcement of their liens, and the sale of the mortgaged land in separate tracts. As this land had formerly constituted one farm, the Smalls deeming it to their advantage that it should be sold as a whole, made a written request to the commissioner to so sell it, agreeing, if this was done, to convey it themselves to the purchaser.

At the sale had in pursuance of this judgment appellee, Thad. Coleman, became the purchaser of all the mortgaged land for the sum of \$4,602.88, which sum discharged the indebtedness to Johnson and Reeves, leaving a small balance due to the Smalls, which was paid over to them. In pursuance of their agreement they conveyed the land to the purchaser, who subsequently conveyed it to B. F. Gill.

Some six years afterwards William Small, by his next friend, T. F. Small, instituted an action in the Todd Circuit Court, setting out all of the foregoing facts, as to the creation of the indebtedness to Coleman and Reeves, and the judicial proceedings had in relation thereto, alleging that at the time of the creation of the indebtedness, the execution of the instruments of writing referred to, and the judgment of the court, he was an idiot, incapable of understanding, or making a contract; that this imbecility of mind was well known to all the parties in interest, and praying that the judgment be set aside; that his note and mortgage to Reeves be canceled, and that he recover the tract of 146 acres of land which had been lost to him by the judicial sale.

To this action Johnson, Reeves, Coleman and his subsequent vendee, B. F. Gill, were made parties defendant. Appellee, Willis L. Reeves, being the judge of the Todd Circuit Court, a special judge was elected to try the case. Although the term for which he had been elected expired before the action was tried, he, at a subsequent term, decided the action, dismissing the petition. Upon appeal to this court the judgment was reversed on the ground that the special judge had no jurisdiction after the expiration of the term for which he was elected to try the case the court also holding that appellant was entitled, when the case returned to the circuit court, to an issue out of chancery, that the question of his mental capacity might be tried by a jury. On this last issue the jury returned a verdict that he was of sound mind; whereupon the whole case, together with the verdict of the jury, was again submitted to the court, and a judgment rendered, dismissing the petition. This case was appealed to this court and the judgment affirmed. (22 Ky. Law Rep., 1051.)

Pending the hearing of his motion for a new trial in the before-mentioned case appellant instituted this action in the Todd Circuit Court, making parties defendant all of the defendants in the first action, and in addition thereto John Muir and the Bank of Elkton. He alleges in his petition all of the transactions between him and John S. Small and John Muir, together with the institution of the action by the Bank of Elkton, the sale of his tract of seventy acres of land, its purchase by John S. Small, and then again sets forth all of the allegations in his petition in his case to recover the 146-acre tract, and prays that the judgments in both cases, and the sales thereunder, be set aside and held for naught, and that all of the instruments of writing constituting the basis of these actions be canceled, and that he recover the seventy acres, which had been originally lost to him by the judicial sale had in the action of the Bank of Elkton against him and his brother, and which was subsequently mortgaged to Johnson and Reeves, and which, together with all of the other mortgaged land, passed to the purchaser, Coleman, at the judicial sale had in the Johnson case.

He again alleges his idiocy as a basis for the relief for which he prays,

and asks a trial by jury of this issue. To this petition the appellees filed answers, setting up various matters of defense, among which is the plea of res adjudicata. As a basis of this plea the answers set forth with minute particularity all of the facts contained in plaintiff's petition in his first case, the issues joined thereon, and the judgment of the circuit court dismissing the petition, alleging also, in general terms, that the issues and parties to the first action and to the second action were identical. To these pleas the appellant filed replies, denying, in general terms, that either the issues or the parties in the second action were identical with those of the former case, and also stating that he had appealed to this court from the judgment dismissing his former petition, and that he was actively prosecuting the appeal by preparing the record for transmission to this court. General demurrers were filed by the appellees to the replies, which were sustained by the court, and appellant declining to plead further, his petition was dismissed; from which judgment he has brought the case here for review.

The general denial of appellant, that the issues and the parties in the present case are identical with those in the former case, does not put in issue the plea of res adjudicata, for it leaves undenied all of the allegations of facts set forth in the answers, upon which the plea is based. These undenied allegations fully establish the identity of the issues and the parties in the cases except that appellant has undertaken to add an issue and two parties, Muir and the Bank of Elkton. In order to obtain the relief prayed in this case the judgment in the former case must be set aside for precisely the same reason alleged in the former and in the present case. The tract of 146 acres of land involved in the former case, and the tract of seventy acres sought to be recovered in this case, were sold under the same judgment, and appellant can not try the validity of that judgment in two separate cases. He sought in the former case to vacate the judgment against him because of his imbecility; he seeks in this case to vacate that same judgment because of his imbecility. This issue was tried out in the former case, and decided adverse to him; that judgment was appealed to this court and affirmed. Appellant can not separate his causes of action in this manner, in order to have two trials of the same issue. This doctrine is elementary, and has been decided so often by this court as to make special citation unnecessary.

There must be an end to judicial investigation at some time, both for the purpose of relieving the parties from vexatious litigation, and also to give repose to the title of property involved therein. The wisdom of this rule is based upon the experience of ages. But it is contended by appellant that the plea of res adjudicata is technically defective, because of its failure to allege that the judgment pleaded was unreversed and unmodified, or that it had become final. Conceding the validity of the first part of this objection, we are of opinion that appellant's replies, in which he sets forth, specifically, that the judgment against him has been appealed by him, and is pending in the Court of Appeals, shows that the judgment is unvacated and unmodified, and cures the defect, if any, in the plea. There is much authority for the position that a judgment can not be pleaded in bar of another action involving the same issue, and between the same parties, which has been appealed, until it becomes final by a judgment of the appellate court, and there

is also high authority to the contrary. We think, however, this question is settled adversely to appellant by section 747 of the Code, which provides that "an appeal shall not stay proceeding on the judgment unless superedeas be issued."

The record shows that no superedeas was issued in the former case, and this left the judgment in full force and effect, constituting a bar to the institution of the second suit between the same parties upon the same issues.

Perceiving no error in the record the judgment is affirmed.

ROBINSON v. PENCE, &c.

(Filed October 21, 1903—Not to be reported.)

Construction of will—Power of devisee to sell—One who takes under a devise in trust for his children, with "power to sell the real estate held in trust and reinvest the same in other real estate subject to the same trusts and conditions," may pass title to the real estate by his deed without obligation on the purchaser to look to the reinvestment of the proceeds.

Victor F. Bradley for appellant.

Montgomery & Lee for appellees.

Appeal from Scott Circuit Court.

Opinion of the court by Judge O'Rear.

This action involves the construction of certain provisions of the will of Mary J. Pence, deceased, as follows:

"3d. I devise to my son, Daniel B. Pence, one-fourth of my estate at my death, to be ascertained in the same way that the amount of the devise of my daughter, Emma F. Duncan, is to be ascertained; and the devise to said Daniel B. Pence is to be held in trust for his children by my said son during his life; and he is not to be required to execute any bond as their trustee, nor account to his children for the proceeds of their estate, but the same is to be invested in real estate as a home for said Daniel B. Pence and his children during his life."

And the following part of the 6th clause:

"6th. * * * I desire the aforesaid trustee to have the power to sell the real estate held in trust and reinvest the same in other real estate, subject to the same trusts and conditions."

The question for decision is, can Daniel B. Pence, by his deed to a part of the land embraced by and held under the 3d clause of the will, convey a good title to a purchaser? Daniel B. Pence admits that he holds the land in trust for his children, and it is alleged and shown that the sale is an advantageous one, and for the purpose of reinvestment as stated. The purchaser has questioned the power of the trustee to make the sale and conveyance.

We are satisfied that the deed of the trustee passes the title devised by the will, and the purchaser is not required to see to the reinvestment of the proceeds of the sale. (Section 4346, Kentucky Statutes.)

The judgment of the circuit court decreeing that the purchaser specifically perform his contract for the purchase of a part of the land is affirmed.

SHAWHAN v. HARRISON COUNTY, KENTUCKY.

(Filed October 21, 1908.)

1. Collection of taxes—Contract with fiscal court—One who is employed by the fiscal court of a county to collect "such taxes as to which the sheriff has been exonerated, and such taxes as are due the county separately from the State," is not authorized to collect from distillery warehousemen taxes due the county on distilled spirits from the collection of which the sheriff has not been exonerated, nor to receive pay for such collection.

2. Official acts—De facto officer—The right of the county to recover from its agent amounts wrongfully collected by him can not be defeated on the ground that there had been no legal payment of the taxes by reason of his alleged lack of authority to collect, as his acts, so far as the taxpayer was concerned, were those of a de facto officer acting under claim and color of authority, and were binding upon himself as well as upon the county upon its ratification of them.

3. Party to action—A suit to recover taxes wrongfully collected was properly brought in the name of the county rather than in that of the fiscal court of the county.

J. I. Blanton, W. S. Pryor and D. Bradley Shawhan for appellant.

Berry & Webster for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was auditor's agent for Harrison county. He was also appointed by the fiscal court of Harrison county in October, 1900, to collect certain back taxes owing the county. The order of appointment contains the contract, defining appellant's authority, as well as fixing his pay. As to his authority and compensation it stated: "That this order be construed to include the collection only of such taxes as to which the sheriff had been exonerated, and such taxes as are due the county separately from the State, and as to which taxes he can not recover or collect as said auditor's agent, and for his services in the collection of said taxes he is to have an amount equal to one-fourth of all sums so collected."

It is the duty of auditor's agents to cause omitted property to be assessed for taxation, and to collect the taxes due thereon. They are primarily assessing officers. They have no authority to collect any taxes except from such property as may have been omitted from assessment. Inasmuch as the same assessment operates for both State and county purposes, the act of the auditor's agents in procuring the assessment of omitted properties inures to the benefit of the counties. In the contract involved here the parties have carefully excluded from it any act of appellant as auditor's agent. What he was employed by this order to do was entirely outside of the range of his official duties.

Acting under the authority of this appointment, as appellant claims, he collected from certain distillery warehousemen, from October 14, 1890, to April 6, 1892, sums aggregating \$617.95, as taxes due Harrison county on distilled spirits contained in bonded warehouses. Sections 4105-4114, inclusive, of Kentucky Statutes, govern the assessment and collection of taxes on distilled spirits. In short, the person or corporation having the custody of dis-

titled spirits on September 15 of each year is made liable primarily for the taxes thereon. Such custodian pays the taxes, but is given a lien on the spirits for the sum so paid and interest as against the actual owner. As the spirits are or may be in bond to the United States government for the taxes due it, it is provided (sections 4100-4111) that the warehouseman shall report to the auditor of public accounts the quantity of liquors so held by him, and when United States government tax will be due; and such as will not be due before the 1st day of March after the assessment the State tax shall be due on the 2d day of January, May and September next, or whenever the spirits are removed from the warehouse. If the tax is not paid within five days after it is due it is declared to be delinquent. This tax is required by section 4111 to be paid "to the officer entitled to receive the same." By section 4120, Kentucky Statutes, the sheriff is by virtue of his office the collector of taxes of the county if he executes the bonds required by law. In default thereof the fiscal court may appoint a tax collector. The taxes on the spirits which were paid to appellant were presumably collectible by the sheriff of Harrison county, nothing appearing that he had failed to execute the proper bonds. It is neither alleged nor shown that the sheriff had ever been exonerated from their collection. By statute he was allowed 4 per cent. for collecting these taxes. We very much doubt whether it was ever really contemplated by both parties that these and similar taxes were to be embraced by the order, although its terms are broad enough to include them. But, however that may be, under the circumstances as shown appellant was not even technically entitled to receive them. Harrison county sued him to recover the sums collected, with interest from the dates of collection. His answer claimed a credit for one-fourth of the sum collected, and in addition, by way of counterclaim and set-off, he claimed that appellee had wrongfully refused to permit him to collect some \$1,500 of other and similar taxes, and had collected them itself, and that he was entitled to 25 per cent. of that sum also. The court sustained a demurrer to these pleas.

We are of the opinion that the pleas are not good. The taxes collected were not of the character covered by the terms of the contract, as the sheriff had not been exonerated from their collection. Consequently appellant was neither authorized to collect them nor to receive pay for their collection. It is suggested that appellee can not maintain this action unless it admits appellant's authority to collect the taxes under the contract; for, it is said, if appellant was not so authorized, their payment by the taxpayers was voluntary, and did not operate as a discharge of their obligations. It is claimed that until the taxes were paid to one authorized to collect them they were not paid at all in point of law, and are yet owing by the taxpayers to the county. Appellant was, as to the taxpayers, at least a de facto official, acting under claim and color of official authority. His acts are binding on himself, at least, as well as upon the county when ratified by it. He will be required to deliver to the rightful claimant the money he has collected wrongfully in its name, while acting ostensibly within, yet actually beyond, his authority. The action was properly brought in the name of Harrison county, as the money was owing to the county in its corporate capacity, and not to the fiscal court, who are but directors of the county's fiscal affairs.

The judgment is affirmed, with damages.

JENKINS v. CHISM.

(Filed October 21, 1908—Not to be reported.)

1. Pleading—Sufficiency of petition—Alienation of husband's affections—In an action instituted by a married woman to recover against another for the alienation of her husband's affections the petition need not state the particular words of flattery and misrepresentation and the particular malicious, wrongful and persuasive advice and inducements used to poison the husband's mind which she relies upon as supporting her cause of action.

2. Same—Where the petition alleged that the defendant by his words and conduct produced a separation between husband and wife, and that his purpose was to do so when he used the words and committed the acts complained of, it was not necessary to allege that he intended by what he said to alienate the husband's affections and to deprive the wife of his affections, comfort, society and support.

3. Same—Sufficiency of answer—The court did not err in sustaining a demurrer to a paragraph of the answer which alleged that the separation between husband and wife was caused by the fault of the wife, as proof as to the fault of the wife could have been admitted under the general denial in another paragraph of the answer.

4. Evidence—Evidence that the wife frequently went to town and left her husband all day was not competent in the absence of proof to show that it was without his consent or approval, or that it lessened his love and esteem for her to any extent.

5. Settlement with husband—Bar to action—Articles of separation entered into between the husband and wife whereby the wife was given the personality, which she took to her husband's home, and which she made while there, and a sum of money for her inchoate right of dower in her husband's land, did not bar her right of action against a third party for the alienation of her husband's affections.

6. Error not excepted to—Objectionable statements and improper language of counsel in argument to jury not excepted to at the time can not be considered as grounds for reversal.

George T. Duff and W. L. Porter for appellant.

Williams & Underwood for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Nunn.

On the 19th of February, 1902, the appellee filed her petition in the Barren Circuit Court against appellant, stating that she and T. T. Chism were legally married on the 20th of December, 1896, and that they lived together as husband and wife from that time until September, 1901, and that while they lived together their domestic happiness was complete; that each performed their respective duties as husband and wife. The petition continues as follows: "That on or about the — day of September, 1901, whilst she and her husband were living in the aforesaid county and State, the defendant, J. C. Jenkins, made frequent visits to the home of herself and husband for the purpose of misrepresenting her to her said husband, to poison his mind against her, alienate his affections from her and induce him to mistreat and abandon her; that said defendant did by his flattery and misrepresentations of plaintiff and by his malicious, wrongful and persuasive advice and other inducements, poison her said husband's mind against her, alienate his affec-

tions and cause him to mistreat and abandon her, thereby separating them as husband and wife; that defendant had destroyed her happiness and home forever; that the loss of her said husband, his comfort and assistance and his affections and companionship has caused her suffering mentally, etc."

There was a demurrer filed to this petition which was overruled. It is argued by appellant's counsel that the courts erred in this, that the petition failed to allege the particular words and acts of flattery, misrepresentation and his malicious, wrongful and persuasive advice and other inducements to poison her husband's mind. As an original proposition there would seem to be much force in this contention. But in view of the fact that this court has held that a plea to a note that was obtained by fraud, covin and misrepresentation, without setting forth the particular facts which constituted the fraud, covin and misrepresentation, was good, and that this court has repeatedly decided that a petition stating that an injury sustained by reason of the negligence of the defendant in the management and operation of the machine or thing under defendant's control without setting forth the particular acts of negligence, and, likewise, that the plea of contributory negligence of the plaintiff produced the injury without setting forth the particular acts of negligence relied on, was sufficient and a good plea, we are of the opinion that the court did not err in overruling the demurrer to the petition on that ground. Appellant further contends that the petition is insufficient in failing to allege that appellant intended by what he said to appellee's husband to thereby deprive her of his affections, comfort, society and support; that it should have been alleged that appellant knowingly and intentionally poisoned the mind of appellee's husband against her. We are of the opinion that this criticism of the petition can not avail, for it is stated in the petition that appellant, by his words and conduct, did produce the separation, and that such was his purpose when he used the words and committed the wrongs alleged.

In our opinion the petition was sufficient. (*Beitzman v. Millin*, 23 Ky. Law Rep., 298.)

Appellant complains that the court erred in sustaining a demurrer to the second paragraph of his answer, in which he alleged that the separation of appellee from her husband was caused by the fault of appellee, and that appellee and her husband had entered into a written contract of separation by which he accepted \$250 in satisfaction of her claim upon her husband by reason of which she surrendered her right to maintain this action. The court did not err in this. The first matter referred to in the second paragraph of the answer, to wit, that it was by her fault the separation was brought about, if competent, could have been introduced as evidence under the general denial in the first paragraph of the answer. The issue to be tried was whether or not the appellant, by his wrongful conduct, caused the separation. On the trial appellant did introduce proof which was withdrawn from the jury by the court, over the objection of the appellant, to the effect that appellee frequently, during the last year before the separation, left home early in the morning and drove to town with her daughter, by her first husband, remaining away all day, leaving her husband alone. The court did not err in this for the reason that the appellant did not prove, or offer to prove, that this absence of the wife was without his approval or consent, nor that

it at all affected him or lessened his love and esteem for his wife in any respect.

The written articles of separation referred to in the second paragraph of appellant's answer was by appellant introduced as evidence over the objection of appellee. This contract, as we construe it, is not a bar to her cause of action against appellant because under it she did not receive anything for her support.

She only received the personal property which she took there, and which she made while there, and \$250 for her inchoate right of dower and homestead in the lands of her husband, which interest in the lands she was invested with by the statutes at the instant of her marriage, or at the moment of purchase thereof by her husband. Even if she had received, under the articles of separation from her husband, anything for her support, it is an undetermined question in this State whether this would bar her right of action against a third party, and for the reasons stated it is unnecessary for the court to pass upon this question in this case.

As to the ground of improper language used by Underwood, appellee's counsel, in his closing argument to the jury. It is sufficient to say that it does not appear that his statements were objected to or excepted to at the time, hence we can not inquire into the propriety or impropriety of the statements alleged to have been made. In *Saylor v. Commonwealth*, 22 Ky. Law Rep., 473, the court said: "The objectionable argument of the prosecuting attorney does not appear in the bill of exceptions, and we, therefore, can not consider it. It appears only in the motion for a new trial." (21 Ky. Law Rep., 231.)

The appellant's objection to the instructions are not well taken. They contain the law of the case. The evidence introduced on the trial was conflicting, and while not very satisfactory, yet the verdict of the jury was not so flagrantly against the evidence that we feel authorized to disturb it.

Perceiving no error prejudicial to the substantial rights of the appellant the judgment of the lower court is affirmed.

CITY OF LEXINGTON v. GENTRY.

(Filed October 22, 1903.)

1. Jailer's fees—Liability of city for—The county jailer has no right to refuse to receive prisoners committed to his custody by the judgment of the police court of a city on the ground that the court has not complied with the provision of section 3151 of the Kentucky Statutes, requiring all prisoners for whose keep the city is liable to be confined in the city workhouse, and the city is, under the provisions of section 1730 of the Kentucky Statutes, liable to the jailer for the keep of prisoners committed to the jail in cases where the city gets the benefit of fines, notwithstanding the police court may have failed to comply with section 3151.

2. Same—In cases in which no fines are imposed by statute the city is not liable for the keep of prisoners confined in the county jail.

W. S. Bronston for appellant.

George C. Webb for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Barker.

The appellee, J. Morgan Gentry, instituted this action in the Fayette-Circuit Court to recover of the city of Lexington (a city of the second class) the sum of \$436.50, the aggregate amount of fees claimed to be due him as jailer of Fayette county, for the keep of certain classes of prisoners committed to his custody by the police court of Lexington.

The validity of this claim depends upon the construction of the following sections of the Kentucky Statutes:

"Section 1730. The fees of the jailer shall be as follows: * * * For keeping and dieting prisoners in jail when confined for an offense other than a felony or contempt of court, 50 cents per day. to be paid out of the county levy, unless confined for a breach of the by-laws or ordinances of a city or town, or for the violation of a statute, where the city or town gets the benefit of the fine; in that case to be paid by such city or town. For imprisoning and releasing a prisoner charged with a misdemeanor, 60 cents, to be paid out of the county levy, unless confined for a breach of the by-laws or ordinances of a city or town, or for a violation of statute, where the city or town gets the benefit of the fine; in that case to be paid by such city or town. * * *

"Section 3147. Said court (police court of cities of the second class) shall have exclusive original jurisdiction in all prosecutions for the violation of the ordinances of the city, and jurisdiction concurrent with the circuit court and justices of the peace of all pleas of the Commonwealth arising within the limits of the city, except cases of felony; and said court shall have power and authority to take recognizances from persons charged with offenses recognizable before said court, to appear and answer the same as the circuit courts have, and a like power to enforce compliance with the same, and as to committing criminal offenders and sending them on for trial. Said court shall have all power given by the general law to examining courts.

"Section 3151. That all persons committed by said court for default of surety for good behavior or to keep the peace, and all others whom the city is bound to maintain when committed to jail, shall be confined in the city workhouse or prison, and they may be compelled to labor as many days, at such sum per day as may be necessary to defray the reasonable cost of their board, to be, from time to time, determined by the mayor and general council.

"Section 3155. All fines and penalties and costs collected in the police court shall be for the use and benefit of the city, and the officer collecting such fines and penalties shall make daily reports of such collections to the treasurer, taking duplicate receipts therefor, one of which shall be delivered to the auditor."

Appellee, in his petition, sets out an itemized account of his claim, showing the names of the prisoners, the offenses with which they were charged, and of which they were convicted, and the number of days they were kept in jail. For appellant it is contended that section 3151 forbids prisoners, for whose maintenance and keep the city would be liable under section 1760, from being confined, except in the city workhouse or prison, and, therefore, it is not responsible for the maintenance of any prisoners confined in the

county jail. Appellee contends that, as jailer of Fayette county, it was his duty to receive and keep any prisoners committed to his custody by order of the police court, and that he could not look behind the order of commitment; that having kept the prisoners in question, and been put to the expense of their maintenance, he is entitled to a judgment for the whole claim sued for.

Section 1780 fixes the liability of the city for the keep of prisoners confined for a breach of the by-laws or ordinances of a city or town, or for the violation of a statute, where the city or town gets the benefit of the fine, and section 8155 provides that "all fines and penalties and costs collected in the police court shall be for the use and benefit of the city." It is, therefore, clear that the city is liable for the keep of all prisoners convicted in the police court, where there is a fine imposed, unless section 8151 protects it from such liability.

Section 2226 of the Kentucky Statutes provides that "the jailer of each county shall receive and keep all persons in the jail who shall be lawfully committed thereto until they are lawfully discharged. He shall treat them with humanity, and furnish them with proper food and lodging during their confinement." * * *

Where the court has jurisdiction of the subject-matter and of the person the judgment can not be questioned collaterally, and, therefore, the jailer could not refuse to receive prisoners committed to his custody by a judgment of the police court, where the court had jurisdiction to try the offense and of the person charged therewith; he could not go behind the judgment and determine that the court should have sentenced the prisoner to confinement in the city workhouse. While we are of opinion that section 8151 clearly requires the court to sentence all prisoners for whose keep the city is liable to the city workhouse, still this was a matter wholly beyond the control of appellee, and as these prisoners were sentenced to confinement in the city jail, and were kept by him, as it was his duty to do, the provision of section 1780 fixes the liability of appellant to appellee.

But there are a large number of prisoners for whose keep appellant was made liable by the judgment for which it was not responsible. An examination of the itemized account of appellee's claim shows that many of the prisoners were charged with, and convicted of, offenses which are not punishable in whole, or in part, by fine. Section 1780 makes the city liable for the keep of prisoners only in cases where it gets the benefit of the fines, it being, doubtless, assumed by the legislature that, in the aggregate, the fines collected would remunerate the city for the cost of the keep of the prisoners; but it was not intended that the city should be liable for the keep of any prisoners where, from the nature of the case, it could not, in any way, be remunerated.

Appellee's account shows that many of the prisoners were charged with petit larceny, an offense for the punishment of which a fine constitutes no part; and, therefore, the city, under the provisions of section 1780, is not liable for their keep by the county jailer when in his custody, either for appearance or under sentence. The same conclusion applies to vagrancy, fugitives from justice, and to all statutory misdemeanors, for the punishment of which no fine was, or could be, imposed. The trial judge should have disallowed the claim of appellee to the extent herein indicated.

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

VANCE, &c. v. VANCE'S ADM'R, &c.

(Filed October 22, 1903.)

Decedents' estates—Rents on real estate—The heirs of a decedent are entitled to the rents from lands belonging to the decedent's estate, notwithstanding the lands were rented out by the administrator on the order of court after the institution of a suit to settle the estate and to sell the lands to satisfy the decedent's debts.

Clay & Clay for appellants.

Yeaman & Yeaman for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hobson.

S. B. Vance died July 15, 1901, and on August 16 this suit was filed by his administrator to settle his estate. It was alleged in the petition that the decedent owned at his death several tracts of land; that the personalty was insufficient for the payment of his debts, and that a sale of the real estate would be necessary. A settlement of the estate was prayed, and a sale of so much of the real estate as might be necessary to pay the debts. In this condition of the record on September 14, on motion of plaintiff, the administrator, it was ordered that the plaintiff rent out the real estate of the decedent on Wabash Island for the ensuing year on the best terms obtainable, taking bond subject to the further orders of the court. The land was rented by the administrator under the order for the year 1902 for the sum of \$1,684.15. Thereafter the heirs at law of the decedent filed in the action their petition, claiming the rent, and the court, having adjudged against them and dismissed their petition, they have appealed.

It was agreed on the hearing that the assets of the estate, including the rent in question, will not be sufficient to satisfy the debts of the decedent. It is insisted for the appellees that the land was under the control of the court, and that for good reasons it was ordered to be rented out instead of being sold, and that the proceeds of the rent stand as much for the payment of the debts of the ancestor as would the proceeds of the sale. This seems to have been the view of the circuit court.

In *Collins v. Richart*, 77 Ky., 621, it was held that a vendor of land, who had retained a lien on it for the purchase money, but not on the rents, is not entitled to have the lands put in the hands of a receiver and thus secure a lien on the rents. The same rule was applied to a mortgage. (*Newport & Cincinnati Bridge Co. v. Douglas*, 75 Ky., 705; *Douglas v. Cline*, 75 Ky., 621.) In *Taliaferro v. Gay*, 78 Ky., 496, these cases were approved, and it was held that the rents accruing before the confirmation of the sale belonged to the owner of the land, and were subject to attachment by his general creditors. In *Ball v. First National Bank*, 80 Ky., 501, the testator died insolvent, and the suit was filed to settle his estate. The real estate had been rented by the testator to tenants who paid the rents monthly, and the controversy arose between the heirs and the creditors of the testator as to the

title to the rents. It was held that rents accruing before the death of the testator vested in the executor as assets, but that the rents accruing after the death of the testator and before the confirmation of the sale belonged to the heirs. The court said: "If the property descended is being wasted or about to be sold, so as to defeat or delay the creditor of the ancestor, there is ample remedy to prevent either, and preserve the property for the satisfaction of his debts, and the remedy afforded by law on this alternative state of facts is an additional reason for allowing the heirs to take the rents so long as he holds the title, and is entitled to the possession. It is insisted by counsel for the creditors that as the chancellor has jurisdiction for the settlement of the estate he should maintain it for all purposes, and, therefore, subject the rents accruing after the death of the ancestor to prevent a multiplicity of suits against the heirs for their aliquot parts. This argument is founded on a premise which does not exist, but is erroneously assumed, as no action could be maintained for rents thus accruing, and the chancellor has no incidental jurisdiction over the rents because they are neither legal nor equitable assets of the estate."

In *Elliott's Adm'r v. Bush*, 3 Ky. Law Rep., 466, which was also a suit to settle an insolvent estate, during the progress of the suit the administrator, who was likewise guardian for the infant children, rented out the land and collected the rents. It was held that the heirs were entitled to the rents up to the confirmation of the sale; and in *Mayfield v. Wright*, 107 Ky., 430, which was a similar suit, the court placed the land in the hands of a receiver, and it was rented out. The widow and children were held entitled to the rents.

These cases are conclusive of the one before us. The land at the death of the decedent descended to his heirs. Being the owners of it, they were entitled to the rents until their title was divested. The creditors of the decedent, as held in the cases cited, may subject the land to their debts, but they have no lien on the rents, and the right of the heir to the rents of the property descended as long as he remains the owner is recognized by the statutory provisions. The rents are neither legal nor equitable assets of the estate.

Judgment reversed and cause remanded for a judgment in conformity herewith.

SWINEBROAD v. BRIGHT, &c.

(Filed October 23, 1903.)

1. Transactions with dead person—Competency of witness—In an action by a devisee under a will to compel the payment of a legacy the executor and his surety are competent witnesses to prove a verbal declaration made by the testator with reference to the legacy.

2. Residuary legatee—Competency to testify—A residuary legatee under the will is not competent to testify as to a verbal statement made by the testator in regard to one of the bequests in the will.

3. Same—Neither the legatee, who claims the legacy in controversy, nor her husband, is competent to testify to anything which took place between her and the testator with reference to the legacy; nor does the fact that one in whose presence a transaction between the testator and the husband took place was made a witness by the adverse party render the husband competent.

4. Same—Statements of testator—The statements of the testator made

about the time he placed certain notes in the hands of an attorney for the benefit of one of the devisees in his will were competent to show whether or not he intended the notes to be in satisfaction of the bequest to that devisee.

G. B. Swinebroad, R. H. Tomlinson and R. P. Jacobs for appellant.

W. G. Welch and Hill & McRoberts for appellees.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Hobson.

Appellant's father devised to her \$1,000. Appellee as his executor refused to pay her the amount on the ground that the legacy had been adeemed. She thereupon sued to recover it. The case is here for the second time. The facts of the case are stated in the former opinion. (Swinebroad v. Bright, 23 Ky. Law Rep., 55.) On that appeal there had been a judgment for defendant, which was reversed on the ground that under the statute the burden of proof was on the executor to show that the \$1,000 paid appellant after the date of the will was intended by the testator in satisfaction of the bequest to her. On the return of the case the defendants amended their answer in conformity to the opinion, and the case being tried before a jury, a verdict was returned in favor of the defendant, on which judgment was again entered, and the plaintiff appeals.

The only ground of complaint necessary to be noticed relates to the admission of evidence, as no objection is taken to the instructions of the court, and the amended answer was sufficient; for the allegation that the payment was intended by the testator in satisfaction of the legacy is necessarily an allegation that it was so intended by him at the time the gift was made; and the court in its instruction thus submitted the issue to the jury. The verdict of the jury, therefore, supplied this averment in the answer and cured the omission, if material. The executor himself and his surety in his bond were introduced as witnesses to prove the declarations of the testator as to the purpose of the gift of \$1,000. It is insisted for the defendant that being defendants in the action, they were testifying for themselves as to a verbal statement of the decedent, and that their testimony was incompetent under section 606 of the Civil Code. We do not so understand the rule. The question before the court was whether the estate of the testator owed the plaintiff \$1,000. The testimony of the executor and his surety was to the effect that the estate did not owe the money. It was the duty of the executor to protect the estate, and we know of no rule of law making him an incompetent witness for the estate as to a transaction of his own decedent with him. If the \$1,000 was not going to the plaintiff it belonged to the residuary devisee. The executor had no interest in the fund. The judgment in the case did not affect his liability in any way, as in either case he had to pay the money over to somebody. He was not, therefore, interested in the result at all, and was not testifying for himself. Neither was the surety, J. B. Owsley. The Code of Practice was aimed to widen, not narrow, the admissibility of witnesses, and one of the purposes of the section was to protect the estate of decedents. To hold the executor incompetent in a case like this would be to defeat the purpose of the statute, for this is really a controversy between the devisees under the will as to which of them is entitled to the part of the estate in question, and the executor is only in effect the

stakeholder between them. The cost of the action if decided against the executor would be paid out of the estate, and he has no interest in the controversy except to procure the direction of the court in the execution of his trust.

The court also allowed George Bright, one of the residuary devisees, to testify as to a verbal statement of the testator to him. This testimony is objected to on the ground that, being one of the residuary devisees, and, therefore, entitled to the fund in contest, or a part of it, if not recovered by the plaintiff, he was testifying for himself, and that the evidence should not have been admitted under section 606 of the Code. It has been held that in a contest over a will all the devisees are competent witnesses as to transactions with the deceased. (*Flood v. Pragoff*, 79 Ky., 607; *Williams v. Williams*, 90 Ky., 28.) Our first impression was that the same principle should be applied between devisees as to transactions with their testator; but on reconsideration we conclude that the statute does not permit this. It forbids one testifying for himself as to a verbal transaction with one who is dead. The residuary devisee was testifying here for himself, for if appellant's claim was defeated, the fund would go to him and the other residuary devisees. (*Hopkins v. Faber*, 86 Ky., 223.) Under the express mandate of the Code he can not testify as to the transactions with the decedent. (*Turner v. Mitchell*, 22 Ky. Law Rep., 1787; *Townsend v. Wilson*, 24 Ky. Law Rep., 1276.)

For the same reason appellant, Mrs. Swinebroad, can not testify to anything which took place between her and the testator. Her husband may testify to any matter which she might testify to, as either one of them, but not both, may testify. (*Bright v. Swinebroad*, 21 Ky. Law Rep., 369.) The husband, under the rule laid down in that case, can not, therefore, testify to any transaction between him and the testator. The court allowed him to testify as to the transaction proven by the witness, John Bright, but as John Bright was not interested in any way in the estate it was improper to allow appellant's husband to testify as to a transaction between him and the testator in John Bright's presence, and the introduction of John Bright as a witness for appellee did not change the rule.

We, therefore, conclude that the testimony of George Bright and appellant's husband, so far as they testified to transactions with the testator, should have been excluded. The declarations of the testator, whether made before or after the notes were placed in the hands of the attorney, were properly admitted, as they were all made before the money was collected and the transaction closed up. They were so interwoven and so closely connected that they were competent to show the intention of the testator in the transaction which he then had in hand.

We have had some difficulty in determining whether there should be a new trial on account of the admission of the evidence of George Bright under all the circumstances and in view of the fact that there have been heretofore two judgments in favor of appellee. But the testimony of George Bright, taken alone, was sufficient to warrant the verdict, and as the jury is the sole judge of the credibility of the witnesses, we can not say what effect on their verdict this testimony may have had. We conclude, therefore, a new trial must be granted. The former opinion (*Swinebroad v. Bright*, 24 Ky. Law Rep., 2253) has been withdrawn.

Judgment reversed and cause remanded for a new trial and further proceedings consistent herewith.

NICHOLS v. NUNN.

(Filed October 23, 1903—Not to be reported.)

Action to quiet title—The appellant having admitted that appellee had acquired title by adverse possession to one-half the land in controversy and the testimony as to the balance being conflicting, the judgment quieting appellee's title is affirmed.

Geo. T. Duff for appellant.

Hatchett & James for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Paynter.

This is an action to quiet the title to about five acres of poor land. Both parties claim to own it and be in possession of it. The action was instituted by the appellee, and the evidence shows that he was in the actual possession of it at the time the action was instituted, and had it enclosed by a fence and part of it was in cultivation. During the progress of the trial the appellant admitted that the appellee had acquired from one-third to one-half of the land by an adverse holding. There was conflict in the testimony as to the possession of the balance of the land and as to the boundary covered by the deed, and the court found for the appellee on the question of fact. We do not feel disposed to disturb the finding of the chancellor.

The judgment is affirmed.

WEBB v. PORTER.

(Filed October 23, 1903—Not to be reported.)

Action on note—In an action on a note by the appellant against the appellee the latter claimed that the note was actually the property of appellant's husband and that he had credited the amount of it on a note held by him against a partnership of which the husband was a member with the consent of the husband and the partnership, the trial resulting in a verdict for the appellee. Held—That the verdict is not flagrantly against the evidence.

N. P. Moss for appellant.

Bullock & Smith and J. C. Dean for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Paynter.

The appellant brought suit against the appellee on a note for \$534.10. The appellee held two notes for \$2,500 each, executed to him by Southerland & Webb. He claims that the note in suit actually belonged to J. L. Webb, although it is made payable to his wife, the appellant. The appellee credited one of the \$2,500 notes held by him against Southerland & Webb with the amount in suit, claiming that he did so by virtue of an agreement which he made with J. L. Webb and Southerland & Webb. This is the second ap-

peal in this case. (*Porter v. Webb*, 22 Ky. Law Rep., 917.) On the former appeal the question involved was whether the court erred when it gave a peremptory instruction to find for the appellant. In reversing the case the court, among other things, said: "The statements of appellant are largely corroborated by Southerland, and also by Reeves, the president of the bank. It seems to us that there is considerable testimony conducing to show that the money for which the note sued on was executed was really the property of J. L. Webb, and not of his wife, the appellee. He loaned the money, gave a check therefor, and shortly after the execution of the note we find it in possession of the husband, properly indorsed by the wife, "to be used by him as collateral to protect his own individual liability to the bank. If, as a matter of fact, the money for which the note was executed belonged to the husband, or the note itself was subsequently transferred to him by the wife for the purpose of investing him with title thereto, then his alleged agreement to look to Southerland & Webb for payment is binding and enforceable. We think, upon the whole case, that the chancellor erred in giving the jury peremptory instructions to find for the plaintiff, and we are also of the opinion that the court erred in refusing to permit appellant to testify as to whom he originally borrowed the money from, and as to how the note in question came to be executed to appellee. These questions should have been submitted under proper instructions to the jury for decision."

On the return of the case both parties introduced testimony tending to support their respective claims. The jury found for appellee. There was a sharp conflict in the evidence. The issue of fact was for the determination of the jury. We are not willing to say that the finding of the jury is so flagrantly against the weight of the evidence as to warrant us in reversing the case for the reason. Counsel for the appellant has analyzed the testimony in a striking and forcible way, but we do not feel like invading the province of the jury by granting a new trial. The court seems to us to have properly submitted to the jury the questions as directed by this court on the former appeal. Whether the court decided the case correctly or erroneously on the former appeal the opinion delivered by it under the doctrine of stare decisis is the law of this case.

The judgment is affirmed.

ROYER WHEEL CO. v. DUNBAR.

(Filed October 22, 1903—Not to be reported.)

1. Plea to jurisdiction—What constitutes entry of appearance—Where a defendant entered a motion to require the plaintiff to paragraph his petition before it filed a plea to the jurisdiction of the court his motion amounted to an entry of appearance to the action, and the court properly disregarded the question as to the jurisdiction.

2. Striking pleadings—In an action on a contract, where the allegations of the petition are denied in one paragraph of the answer, it is proper to sustain a motion to strike out another paragraph of the answer which sets up affirmatively the contract as understood by the defendant, it being competent to prove the contract as construed by defendant under the general issue.

3. Amendment of pleading to conform to proof—It is within the rule of practice to permit amendments of pleadings to conform to the proof. Where

such an amendment proves a surprise to the adverse party such fact should be made known to the court as grounds for a continuance; otherwise, an error of the court in that particular will be considered waived.

Denton & Robinson and Stone & Stone for appellant.

W. S. Pryor and Aaron & Phelps for appellee.

Appeal from Russell Circuit Court.

Opinion of the court by Judge Barker.

Appellant, the Royer Wheel Co., is a corporation created under the laws of the State of Ohio, doing business in this State, and, for the purpose of complying with the provision of section 571 of the Kentucky Statutes, having an agent in Lebanon, Marion county, Kentucky, upon whom process could be served.

Appellee, C. R. Dunbar, instituted this action against appellant in the Russell Circuit Court to recover the price of certain hickory spokes which he alleged he had sold to it. His petition, as amended, substantially sets forth the following contract: "That he had agreed with appellant to cut and deliver to it, at the mouth of Wolf creek, in Russell county, Kentucky, hickory spokes in practically unlimited numbers, at a price per thousand regulated by the quality grade of the spokes delivered; that when he had as many as twenty thousand spokes at the mouth of Wolf creek notice was to be given to appellant, whereupon it agreed to send an agent to the place of delivery, and there cull, classify and pay for the spokes according to contract. The spokes were to be delivered at the mouth of Wolf creek not later than the middle of March, 1902. That in pursuance of this contract he cut, prepared and delivered at the mouth of Wolf creek fifty-seven thousand, four hundred and forty-eight spokes, of which he duly notified appellant, who failed and refused to send an agent to receive, cull and classify, or pay for them; that the average value of these spokes, under and by the terms of the contract, was \$20 per thousand, making an indebtedness of appellant to him of \$1,148.96."

On the 19th day of June, 1902, appellant moved the court to require appellee to paragraph his petition, and afterwards, on the same day, filed an answer, by which it undertook to question the jurisdiction of the court of its person, and alleging that Marion county is the only county in the State of Kentucky in which its agent and officer resides, and that Pulaski county is the only county in which the contract set forth in the petition was made and was to be executed. Again, on the 20th day of June, 1902, it filed a motion requiring the plaintiff to paragraph his petition, which was sustained by the court, and thereupon it filed, under protest, and not waiving the question of jurisdiction, an answer to the merits of the case as presented in the petition. By the first paragraph of its answer it put in issue all of the material allegations of the petition as amended, and by the second paragraph set up a substantially different contract from that sued on by appellee. All of the second paragraph of the answer was stricken from the record, on the motion of appellee.

A trial being had by jury, a verdict was rendered in favor of appellee for the sum of \$778, upon which the judgment of the court was entered, of which the appellant now complains. It is insisted by appellant that the court

erred in requiring it to plead to the merits of the controversy, without first adjudicating the question of jurisdiction raised by the answer filed for that purpose; and this brings up the question as to whether or not appellant's motion to paragraph, entered before it raised the question of jurisdiction, did or not enter its appearance to the action.

In the case of the Standard Furniture Co. v. Stanley, 21 Ky. Law Rep., 452, it was held that the filing of a general demurrer to the petition, prior to a special demurrer to the jurisdiction, entered the appearance of the defendant. In the case of the Sun Mutual Insurance Co. v. Crist, 19 Ky. Law Rep., 305, it is said: "It is well established that a party defendant may appear for the purpose of moving to quash a summons, or the return thereof, without thereby entering an appearance to the action. Not so, however, when he appears for the purpose of seeking affirmative relief, as in the case of a motion to discharge an attachment; nor, we think, in a case like this, where the defendant moved to correct the record."

In the case of Hampden v. Frantz, 17 Ky. Law Rep., 980, it was said, in response to a petition for rehearing, that "this court finds a brief for counsel for the appellees in this case, and, although the names of the appellees are not given, we must regard the brief as an appearance for all, and particularly with the identity of interest pertaining to all the appellees."

In the case of the Maysville & Big Sandy R. R. Co. v. Ball, 21 Ky. Law Rep., 1693, it was held that where a defendant moved the court to quash the return of the sheriff on the summons because of its insufficiency, that this operated to enter its appearance, and gave the court jurisdiction of the parties.

Under the principle established by the cases cited we think the motion to paragraph the petition entered appellant's appearance, and that the court correctly proceeded to a trial of the merits of the case without reference to the question of jurisdiction sought to be raised. Appellant also complains of the action of the court in striking the second paragraph of its answer from the record. In the case of Burke v. Shannon, 19 Ky. Law Rep., 1170, which was an action similar in principle to the one at bar, the defendant filed an answer in two paragraphs, the first of which denied the material allegations of the petition, and, in the second, the defendant alleged, affirmatively, the contract, as he understood it. Upon the motion of plaintiff the second paragraph was stricken from the record. This action of the trial court was approved by this court in the following language: "Upon motion of plaintiff that part of the answer setting up the contract as defendant understood it was stricken out, and we think properly so; it was simply a further denial by defendant in another form of the statement of plaintiff's petition, and the proof of such contract could have been, and was, heard under the issue made by the allegation of the petition and a plain denial thereof by the answer."

Furthermore, although appellant objects to the action of the court in striking from the record the second paragraph of its answer, this is not made a ground for its motion for a new trial, and can not, therefore, avail it here. The court did not err in permitting appellee to amend his petition, changing the time of the delivery of the spokes, under the contract, from the 1st to the 15th day of March, 1902, in order to make the allegation of the plead-

ing conform to the proof. This is permissible under the Code, and is constantly done in practice. If appellant was surprised by this change in the date it should have made that fact appear to the court, who would have continued the case, to give it opportunity to prepare for the new issue; its failure so to do waived the error, if any.

Instruction No. 1, the giving of which is assigned for error, seems to embody the principles of law applicable to the issues raised by the pleadings. There was no real controversy as to the number of spokes delivered at the mouth of Wolf creek, and the jury could not have understood, by the instructions given, that appellee was to receive pay for any spokes he had not delivered, under the terms of the contract, as contended for by him. The jury were instructed that, unless they believed that the contract between the parties litigant was as alleged by appellee, they should find for appellant.

In instruction "B.," given by the court, the jury were told that they should not find for the plaintiff the price or value of any spokes sued for that the defendant had not contracted and agreed with the plaintiff to take from him, or which he was not to make or manufacture for it.

These two instructions seem to embody the whole law of the case, and obviate the necessity of discussing in detail the instruction offered by appellant and refused by the court.

Perceiving no error in the record the judgment is affirmed.

STUM'S ADM'R, &c. v. STUM, &c.

(Filed October 22, 1908.)

Judgment in bar—Discharge of rule—Where the court sustained a demurrer to a rule issued to compel the restitution of money received by one under a judgment which had been vacated, and entered a judgment discharging the rule on the ground that the plaintiffs in the rule, having gotten back the lands sold under the judgment afterwards vacated, were not entitled to compel the restitution of the proceeds of the sale, the judgment was a final order from which an appeal might have been taken, and, being unmodified and still in force, operates as a bar to a subsequent proceeding for a rule against the same party to require the repayment of the same fund, notwithstanding it might have been based on erroneous grounds.

E. D. Guffy, Ben D. Ringo and W. A. Wickliffe for appellants.

J. S. Glenn for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hobson.

A. M. Stum died intestate a resident of Ohio county previous to the year 1890, and D. B. Roll was appointed his administrator. Roll, as administrator, on November 5, 1891, filed a suit in the Ohio Circuit Court for the settlement of the estate. The debts were reported to be \$2,194.57, and at the May term, 1892, a judgment was entered to sell the land of the intestate for the payment of the debts. The sale was made in August, 1892, L. A. McDaniel being the purchaser at the price of \$2,261.02. At the following December term the sale was reported to the court, exceptions were filed to it, but they were overruled, and the sale was confirmed. In the meantime, on Novem-

ber 5, 1892, A. H. Stum, who was the guardian for two of the infant children of the intestate, filed for them in the Ohio Circuit Court a petition for a new trial in the action, and to set aside the judgment entered at the May term. He made defendants to his petition D. B. Roll, who, as administrator, was plaintiff in the former suit, and J. S. Miller, who, as administrator of L. H. Stum, had been allowed a claim of \$800 by the judgment, and as administrator of Emma Stum, a claim of \$498. Issue was joined on the allegations of the petition in the suit for new trial, and on November 30, 1895, the case was submitted in the circuit court. The court adjudged in favor of the plaintiffs, granting a new trial. At the March term, 1896, a rule was taken out against Miller as administrator of L. H. Stum, also as administrator of Emma Stum, to pay into court the amount he had received under the judgment which had been set aside. He filed a response to this rule, pleading in effect that he had been appointed by the Muhlenberg County Court; that he had settled his accounts in that court and had paid out the amounts in his hands to the persons entitled thereto, and that his settlement had been confirmed by the court long before the rule was taken out. He also filed a demurrer to the rule. On March 21, 1896, the court sustained the demurrer to the rule, and discharged it. No ruling was made on the sufficiency of the response. On April 27, 1896, Miller, McDaniel and Roll sued out in this court an appeal from the judgment granting a new trial and setting aside the former judgment; and McDaniel and Roll executed supersedeas bonds and sued out a supersedeas, but Miller took out no supersedeas. On May 31, 1896, the appeal was heard in this court and the judgment appealed from was affirmed. (Roll v. Stum, 20 Ky. Law Rep., 661.) After the new trial was granted litigation ensued between McDaniel, the purchaser of the land, and the infant children of the intestate as to whether McDaniel was entitled to a lien on the land for the purchase money which he had paid, and on December 18, 1901, it was held by this court that he was entitled to a lien for his purchase money. (McDaniel v. Stum's Adm'r, 23 Ky. Law Rep., 1895.) On June 28, 1902, the infants by their guardian sued out an appeal in this court from the judgment of November 30, 1895, on the ground that it was erroneous as to them in certain particulars. This appeal was heard by this court and the judgment was affirmed on June 9, 1903. (25 Ky. Law Rep., 208, Stum v. Roll's Adm'r.) In the meantime, on May 20, 1902, another rule was taken out on the motion of the infants, or their representative, against Miller, as administrator, to pay into court the amounts received by him as administrator under the original judgment. In response to the rule he pleaded the judgment on the former rule in bar. He also pleaded the five-year statute of limitation, and set up as before that he had paid out the money in the year 1893 to the heirs and distributees of the estate, and had settled his accounts; that his settlement had been confirmed, and he had been discharged by the Muhlenberg County Court in the year 1893. The court sustained a demurrer to his response, and gave judgment against him for the money, with interest. From this judgment he appeals.

As to the plea in bar we have had difficulty to determine just what was decided on the former rule. A judgment dismissing a proceeding on the ground that it is premature does not bar another action. On the contrary a judgment on demurrer, that certain facts do not constitute a cause of action,

is as effective in bar of another proceeding as a judgment where the same facts are shown by evidence on the final hearing of the case. (Freeman on Judgments, section 267.) The rule was in the usual form. The judgment on the rule is in these words: "This cause having been submitted on the demurrers of defendants, D. B. Roll, administrator of A. M. Stum, deceased, and J. S. Miller, administrator de bonis non of the estate of L. H. Stum, deceased, and also administrator de bonis non of the estate of Emma Stum, deceased, to the rules herein against them, and on the motion of Henry and Annie Stum, by their guardian, A. H. Stum, for a judgment for costs on the petition for a new trial, and the court being now sufficiently advised, and being of the opinion that so much of the judgment entered herein at a former term of this court, in order book No. 40, at page 347, as adjudges to L. A. McDaniel, the purchaser of the land heretofore sold in this action, a lien on the land for the amount of the purchase money paid by him, with interest from the date of its payment, is merely an interlocutory order, and as such is not final or conclusive as to any of the parties to this action, and this court being now of the opinion that the infant defendants herein are not affected by said part of said judgment, it is now considered and adjudged, therefore, that each of said demurrers to said rules be, and the same is now hereby, sustained, and each of said rules is now discharged, and the defendants, D. B. Roll, administrator of A. M. Stum, deceased, and J. S. Miller, administrator de bonis non of the estate of L. H. Stum, deceased, and administrator de bonis non of Emma Stum, deceased, recover their cost in and about said rules expended against H. A. Stum, guardian of Henry and Annie Stum, to which said H. A. Stum, guardian as aforesaid, excepts."

The power of a court of equity to compel one by rule to make restitution of money received under a judgment which has been vacated, while the action is still pending and the parties are before it, is undoubted, and the demurrer does not seem to have been sustained by the court on but one ground, and that was that, admitting all of the facts shown by the record, including the receipt of the money under the judgment and its vacation, still appellant was not liable to a rule by the infant defendants because they were not affected by that part of the judgment. In other words, the idea of the court seems to have been that McDaniel had no lien on the land, and that the judgment giving him a lien was not final, but interlocutory, and that the infants having gotten their land back, were not entitled also to have the proceeds of the sale of the land, and, therefore, he discharged the rule, for, after reciting that the former order as to McDaniel's lien on the land was not final, the judgment reads: "And this court being now of the opinion that the infant defendants herein are not affected by said part of said judgment, it is now considered and adjudged, therefore, that each of said demurrers to said rules be, and the same is hereby, sustained, etc." The infants were seeking relief both against McDaniel and appellant. They were not entitled to both the land and its proceeds. The court adjudged them the land free of lien, and refused, therefore, to give them a judgment against appellant for the proceeds. It was simply a case of the plaintiffs' suing two defendants and recovering against one, and losing as to the other. McDaniel appealed from the judgment against him and reversed it, but the infants took no appeal from the judgment in favor of appellant, and that

judgment is still in force. The rule was not dismissed because it was premature. No appeal had been taken at the time from the judgment on which it was based, and, therefore, no supersedeas was in the way. The fact that appellants' claims had not then been finally passed on did not give him any right to keep the money which had been paid to him. This was not set up as a defense in the response, and it sufficiently appears from the judgment of the court that it was not based on this ground, but on the ground that the infants had gotten the land, and could not get both the land and the purchase money. Although this judgment was erroneous, it is a final judgment, and it is none the less a bar to another rule against appellant because it was based on erroneous grounds. Appellees' remedy was by appeal. If the rule were otherwise a new proceeding might have been instituted the next day. The court did not mean to leave the matter at large. It was not a dismissal of the rule without prejudice, but a judgment on the merits.

We, therefore, conclude that the judgment on the former rule is a bar to this proceeding and the judgment is reversed, with directions to dismiss the rule.

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[Reported by Walter G. Chapman, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

BROWN v. CROFTON.

(Filed October 22, 1903—Not to be reported.)

Discounted note—Liability of endorser—The payee of a note payable at an incorporated bank and discounted by him at that bank is relieved from liability on the note as endorser by the failure of the bank to protest it for nonpayment at maturity or to notify him of its nonpayment, and also by reason of the failure of one to whom the bank assigned the note to institute suit thereon at the first term of court after its maturity and nonpayment.

Sims & Grider for appellant.

Wright & McElroy for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 12th day of June, 1898, D. W. Browning, S. J. Hall and M. D. Hall executed their written obligation to Alex. Brown for \$304, due one hundred and twenty days after date, negotiable and payable at the Warren Deposit Bank. This note was on the same day transferred and assigned by Brown to the bank for value by endorsement and delivery. The proceeds were placed to Brown's credit on the books of the bank and were afterwards drawn out by him. The note was renewed from time to time until the 12th day of June, 1898, the makers paying the discount and the renewal note being sent to Brown for his endorsement at Franklin, Ky. The bank assigned the last renewal note to J. C. Crofton, on the 9th day of February, 1899, and he brought suit against the obligors and Brown as endorser, and alleges that the original note was discounted by the bank for the accommodation and benefit of Brown; and that he received the proceeds thereof; that the Warren Deposit Bank is an incorporated institution under the laws of the State of Kentucky, and negotiable notes discounted by it are by law placed upon the footing of bills of exchange. Judgment was taken by default against the obligors, but Brown answered and said that he was only

the accommodation endorser for his codefendants; and alleges that the note sued on matured on the 18th day of October, 1896; that it was not protested for nonpayment, nor was he notified of the default in payment thereof; that the holder could have instituted suit thereon in the Warren Circuit Court at its November term, 1896, and obtained judgment against his codefendants, but that he had failed to do so, or use due diligence in the prosecution of its claim; and that by reason of such laches on the part of the plaintiff he was released from liability as endorser. Upon the trial of the case the president of the bank testified that when Brown applied to the bank to discount the original note in September, 1896, he informed him "that he would discount it for his accommodation, but would look to him to take care of it."

Brown denies that anything was said to him about taking care of the note at the time of the original discount; that he was at that time living in Logan county, and that before the maturity of the note he had moved to Simpson county, where he had since resided; that the bank had given him notice in advance of the time when each renewal of the note would fall due with the request that it should be arranged, but had given no similar notice of the maturity of the last note or of its nonpayment. Upon this testimony the circuit judge gave judgment for plaintiff and the defendant has appealed. By section 483 of the Kentucky Statutes "promissory notes payable to any person, or corporation, and payable and negotiable at any bank incorporated under any law of this Commonwealth, or of the United States, which shall be endorsed to, and discounted by, the bank at which same is payable, or by any of the banks of this Commonwealth, are placed on the same footing as foreign bills of exchange."

The law required immediate presentment at maturity at the place of payment, and in case of default that notice thereof should be given in order to fix the liability of an endorser. This is the general rule. (*Randle v. City National Bank of Paducah*, 5 Ky. Law Rep., 185; *C., N. O. & T. P. Ry. Co. v. Pendleton*, 8 Ky. Law Rep., 169; *Daniel on Negotiable Instruments*, section 970.)

But it is contended for the appellee that appellant is not entitled to this plain provision of the law for the reason that he does not occupy the attitude of an accommodation endorser; but as a matter of fact the note was made by the payees and discounted by the bank for his accommodation, and that the law, therefore, imposed upon him the duty of making provision for the payment of the note regardless of notice. *Daniel* in his work on *Negotiable Instruments*, section 1085, says: "While the endorser of a bill, drawn for the accommodation of the drawer or acceptor, and the endorser of a note made for the accommodation of the maker, is entitled to insist upon its due presentment at maturity; yet if the bill is drawn and accepted, or note made for the accommodation of a particular endorser, that endorser is the real party who should make provision to pay the bill at maturity, and a failure to make a due presentment or give notice will be excused as to him, though not as to the other endorsers or to the drawer if it be a bill."

The author cites *Story on Notes*, section 268; *Edwards on Bills*, section 638, and other authorities. But the author goes on to say: "This rule rests on the principle that the accommodated endorser can not by any possibility (as a rule) suffer loss by reason of a failure to make due presentment, since

if the bill or note is dishonored there would be no party against whom he would have recourse upon paying it."

We are unable to see how this principle of law has any application to the facts of this case. There is no pretense that the note was made for the accommodation of Brown, or that the obligors were not in good faith indebted to him for the amount thereof. On the contrary the amended petition alleges that the note was executed to Brown for a debt due him by the payors. Nor does the alleged statement of the president of the bank to Brown, that he would look to him to take care of the note, add anything to the obligation incurred by him by his endorsement thereof. There is nothing in the facts to distinguish this transaction with the bank from the usual and ordinary course pursued in the discounting of paper, or to exempt it from the obligation imposed by law to give notice of the default to endorsers or from the consequences resulting from such failure. It is also manifest that neither the bank nor plaintiff, as assignee thereof, have manifested the diligence required by law to hold appellant liable as assignor. We are, therefore, of the opinion that appellant has been released from all liability as endorser by reason of the laches indicated, and that the circuit judge erred in not so deciding.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

HURT v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed October 23, 1903.)

1. New trial granted by trial court—Review on appeal—Where the trial court is convinced that a verdict is not warranted by the evidence, or that it has been returned either under a misunderstanding on the part of the jury or because of their prejudice, or other undue influence, it is the province of the court, as well as its duty, to set the verdict aside; and such action of the court will not be disturbed on appeal unless it appears that there was an abuse of the liberal discretion accorded courts in such matters.

2. Railroad—Personal injury to employe—Negligence—In an action by a brakeman to recover damages against his employer, a railroad company, for personal injuries received by him while setting the brake on a car which had been "kicked," or turned loose from the locomotive with momentum, and which he had safely mounted, the court properly refused to instruct the jury to find for the plaintiff if they believed from the evidence that the car was delivered at a reckless or dangerous rate of speed, as the rate of speed could not have been considered the direct or proximate cause of the injury, which occurred after he had safely mounted the moving car and was engaged in setting the brake.

3. Failure of proof—Where the circumstances attending the injury show nothing as to the real cause, but leave it to conjecture whether it was the negligence of the master, the fault of the injured servant, or an unaccountable accident, there is a failure of proof to sustain an action for damages.

Bennett H. Young and Edwin C. Waide for appellant.

Helm, Bruce & Helm for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 1.

Opinion of the court by Judge O'Rear.

Appellant was a member of a switching crew in appellee's yard at Louisville. A flat car, loaded with railroad rails, was "kicked" or turned loose with a strong shove from the locomotive, down a track that crossed a public street. It was appellant's duty to mount this car as it passed him, and to set the brake so as to stop it within a reasonable distance. In setting the brake appellant fell or was thrown from the car, falling in front of it, and lost two of his limbs, and was otherwise hurt.

This suit charged that the injury was because of the gross negligence of appellee's agents in charge of the locomotive in delivering the car at a too rapid rate, and in the failure of appellee to provide the car with a safe brake. The car was turned loose, when going, appellant testified, at eight or ten miles an hour. Witness for appellee said at two to six miles an hour. Others thought it was more than ten miles an hour, while some expert witnesses, who were not present at the time of injury, thought, from the distance the car traveled before stopping, that it was from twelve to twenty miles an hour. Appellant made two efforts to set the brake. The first time he thought it was set tight enough, but finding it was not, and probably because of a command of some one to stop the car, he attempted to set it tighter. He says that as he swayed his body forward and outward to give the brake-wheel the necessary turn "something slipped or gave way," and he fell in front of the moving car. He did not know what it was that slipped or gave way. He had not previously examined the brake, or the car, nor had opportunity to, so far as was shown, and did not afterward examine it.

The brake was an upright iron rod, extending about three feet above the platform of the car, and surmounted with an iron wheel used in turning it. It extended below the platform. A chain was attached to the lower end, and connected with a horizontal rod attached to the brake-beam. As the brake-wheel was turned the chain was wound around the upright rod, thereby shortening the chain and drawing the brakes against the wheels.

Appellant said that he thought, and that is his theory of the cause of the accident, that this chain was too long, and lapped upon itself, partially. In the setting up of the brake, and when he put the extra force on the wheel to set it tighter the chain slipped off the lap, whereby he was given an unexpected lurch forward, and was thrown as stated. If the chain was so long as to permit it to overlap, or "ride" itself, it is claimed that it was an unsafe provision, and that allowing it to be so was negligence on the part of the company.

A number of persons inspected the car and the brake immediately after the accident, within a few minutes, and while it was in the same condition as it was when the injury occurred. They all testified that the chain was not too long, and was in perfect order. The brake was set up, and worked properly.

There were three trials of the case. At the first trial the jury disagreed.

Upon the second trial the jury returned a verdict for appellant in the sum of \$10,000. A motion was made by the company for a new trial, based upon numerous grounds, among others that the verdict was flagrantly against the weight of the evidence, and that the verdict was excessive. The court granted a new trial, but upon which of the grounds the record does not show. Upon the third trial, upon substantially the same evidence and under

practically the same instructions, the jury found for the defendant, appellee. Appellant's motion for a new trial was overruled. This appeal seeks to reverse the action of the trial court in setting aside the verdict for \$10,000, and granting a new trial of the action, and to have this court order a reinstatement of the judgment upon that verdict; or, if that is not done, then that the judgment in this case upon the verdict rendered at the last trial be set aside because the court failed to properly instruct the jury at appellant's instance.

We will first review the action of the trial court in setting aside the verdict in appellant's behalf. Appellee insisted that there was no evidence to have authorized the submission of the case to the jury at all, and that its motion for a peremptory instruction should have been sustained. The trial court, however, did not set aside the verdict on this ground manifestly, because upon the next trial, when the evidence was not materially different, he again refused to grant a peremptory instruction, and submitted the case to the jury. Nor was the action of the court probably based upon the complaint of the company that the court had misinstructed the jury, for upon the next trial he gave about the same instructions as before. His action then must have been based upon the ground either that the verdict was not sustained by, but was contrary to, the evidence, or that the amount of damage was excessive.

Trial courts have, and ought to have, a very liberal discretion accorded to them in the matter of passing upon grounds for a new trial, and in this, as in other matters of discretion, their judgments therein should not be disturbed, except it should appear that its exercise has been abused. The judge who presides at the trial has an opportunity that this court can not have, of seeing the manner in which the witnesses testify, of observing the attention and conduct of the jury, and the demeanor of the parties and counsel, and of many other circumstances which might affect the verdict. He has also an opportunity, and it is his duty, to note the evidence submitted to the jury, and while it is the province of the jury to decide the questions of fact involved in the issue being tried, yet they should not be allowed to disregard it. Where the trial judge is convinced that the evidence does not warrant the jury's verdict, and that the verdict has been returned either under a misunderstanding upon the part of the jury, or because of their prejudice, or other undue influence, it is certainly within the province of the court, as well as his duty, to set it aside.

In *Reliance Textile & Dye Works v. Mitchell*, 24 Ky. Law Rep., 1286, we held: "This court is less inclined to disturb the action of the circuit judge in granting a new trial than in refusing one, for the reason that the new trial simply gives the parties another hearing without finally settling their rights. * * * The law has wisely vested in the circuit judge a judicial discretion on this subject." (*Taylor, Jr. v. Louisville Public Warehouse Co.*, 24 Ky. Law Rep., 1656.)

The circuit judge, under the evidence in this case, was acting clearly within his supervisory discretion in setting aside the verdict upon the ground that it was against the weight of the evidence, and flagrantly so. The principal criticism of the last trial is that the trial court failed to submit to the jury an element of appellee's negligence that was charged in the

petition and claimed to be justified by the evidence. The circuit court told the jury, in substance, that it was the duty of the railroad company to provide safe appliances upon the car, and that if it failed to do so, in that the brake was defective, and that it knew, or by the exercise of ordinary care might have known, of the defect in time to have remedied it before the accident, and that the injury was caused by such defect, without negligence upon the part of the plaintiff, then the jury should find for the plaintiff. The complaint is that the court failed to submit to the jury also the fact of whether the defendant was not negligent in delivering or sending the car to plaintiff at a reckless and dangerous rate of speed. The court declined to instruct upon this theory because, as said in his opinion on that point, that the evidence showed conclusively that appellant was not injured by the rate of speed, for he mounted the car in safety, whether it was running too fast or not. The argument for appellant at this point is that the momentum of the car being too rapid, necessitated more force to be put upon the brake to stop it; that at a moderate and proper speed it could have been stopped by appellant's first effort in setting the brake, and that, therefore, his injury was caused by the high speed of the car. While not without some plausibility, we can not agree that this position is sound. The rate of speed of the car was not the proximate cause of the injury according to appellant's testimony, but it was something about the brake that slipped. If the brake had been in proper condition, the rate of speed of the car could not have caused the injury. On the other hand, if the brake was defective, as charged, it is not material at what speed the car was moving, whether two miles an hour, or twenty miles, because if appellant was injured by that defect the company is liable. To have submitted to the jury the question of appellee's negligence upon the question of the speed of the car would have been misleading. It might have been that the car was turned loose at a point in the city where its rate of speed was negligent to those using the street, or to one required to make a coupling of the car, but to the brakeman who was safely upon it there is nothing in the evidence to show that it was at all negligent. If the brake had worked properly, and there was no other cause for the accident, appellant could not have been thrown from the car merely by the rate of its speed, nor does he claim that he was.

There was evidence tending to show that appellant was using a brake-stick in violation of the rules of the company, the danger of which was well known to him. This is what might have slipped. Appellant may in some way, unaccountable even to himself, have lost his balance and fallen. At any rate, there is nothing to show that the rate of speed was the direct or proximate cause of his injury. It was, therefore, proper not to have submitted that question to the jury.

The plaintiff's theory of the cause of the accident, so far as the condition of the brake is concerned, is only a theory. He does not profess to know personally what was the cause. No witness testifying for him said that the brake was in anywise defective, or that it was possible for the chain to have overlapped as surmised in the theory for appellant. The witness, Bashaw, who testified for plaintiff that he had examined a car which had been pointed out by "some railroad employes" on the following day, and that one of the links of the brake was pressed together, does not really identify

the car, nor the relation to appellee of the person who pointed it out to him. But even if this witness' identification of the car had been satisfactory, the evidence was simply overwhelming that he was mistaken; that the chain was not defective as stated. However, this constituted what might be called a scintilla of evidence, requiring a submission of the question to the jury. Appellee's motion for a peremptory instruction was properly overruled. But it does not follow by any means that the rule requiring the submission of a case to the jury, if there is a scintilla of evidence, means that a verdict may be sustained upon a mere scintilla of evidence, where it is flagrantly against the weight of all the evidence.

Before the injured servant can recover damages from his master he must show that his injury was caused by some neglect of the master, or by some other servant of the master which is imputed to him. It is not enough to show merely that the plaintiff sustained his injury while in the service of the master. Where the circumstances attending the injury show nothing as to the real cause, but leave it to conjecture whether it was the negligence of the master, the fault of the injured servant, or an unaccountable accident, there is a failure of proof. The cause of the injury must be proved. Unless it is shown affirmatively there can be no recovery. (*Hughes' Adm'r v. Cincinnati, &c., Ry. Co.*, 91 Ky., 526; *Louisville Gas Co. v. Kaufman, Straus & Co.*, 105 Ky., 181; *L. & N. R. R. Co. v. Wathen*, 22 Ky. Law Rep., 85; *Illinois Central R. R. Co. v. Gholson*, 23 Ky. Law Rep., 2210.)

The judgment of the circuit court must be affirmed.

The whole court sitting.

LOUISVILLE & NASHVILLE R. R. CO. v. CARTER.

(Filed October 23, 1903—Not to be reported.)

Excessive damages—Passion and prejudice—Where on a former appeal the court reversed a judgment awarding damages for the obstruction of a passway across a railroad track on the ground that an instruction allowing a recovery of punitive damages should not have been given, a verdict, on a subsequent trial awarding damages in excess of the first verdict and in excess of the actual value of the property from which the passway leads, could have been the result only of passion and prejudice, which authorizes a reversal of the judgment.

C. R. McDowell for appellant.

Robt. Harding and John W. Rawlings for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Settle.

This case is before this court on a second appeal. The action was instituted in the lower court by the appellee, Jane Carter, to recover damages against the appellant, Louisville & Nashville R. R. Co., for the closing by the latter of a passway which leads from her place of residence, that she holds as a homestead, to the Alum Springs public road, about 200 yards distant, and crosses the appellant's railroad track in front of appellee's lot.

The evidence conduces to show that the appellee and her husband, before his death, and she since his death, have used, held and enjoyed this passway

adversely to the appellant and all others for nineteen years or more, continuously, before the institution of the action, and that their right to use it was recognized by appellant down to June, 1899, as it appears during the time mentioned to have maintained a crossing at the point where the passway runs over its track. This passway is traveled by the appellee and her family in going to the spring, from which they get water, and in going to the church, schoolhouse and postoffice in the neighborhood.

The closing of the passway complained of was done by the appellant in June, 1899, by wrongfully constructing a wire fence across the same on each side of its track in front of and adjoining appellee's lot which completely obstructed the passway, thereby depriving appellee of its use, by which she claims to have been subjected to great trouble, annoyance and inconvenience, and greatly restricted in the enjoyment of her property. The defense interposed by the appellant was that appellee's use of the passway was merely permissive, and that in erecting the fence complained of its only purpose was to enclose its track to prevent injury to stock that had been wont to stray thereon.

Upon the first trial of the case in the lower court the jury failed to agree upon a verdict, but on the second trial the appellee recovered a verdict and judgment for \$600. An appeal was taken from that judgment by the appellant and a reversal of the judgment obtained in this court. Upon the return of the case to the lower court another trial was had, which resulted in a verdict and judgment in appellee's favor for \$718, and the lower court having again refused to grant the appellant a new trial it brings the case to this court, asking at its hands a second reversal. The grounds urged for a reversal are, first, "that the verdict of the jury is not sustained by sufficient evidence;" second, "that the damages given in the verdict are excessive, and appear to have been, and were given, under the influence of passion or prejudice."

It appears that appellee's lot contains but one acre, and that her husband paid for the property \$150. There was on it a small dwelling at the time of the purchase, and after the purchase a small frame building for use as a storehouse was erected on it, in which small stocks of merchandise were kept from time to time. A little later an icehouse and stable were built upon the lot. None of the improvements are very valuable. According to the evidence the storehouse would not rent for more than \$3 a month, and the property as a whole is not of greater value than \$500 or \$600. In the opinion delivered on the former appeal this court approved the instructions given to the jury by the lower court in so far as they submitted to them the question of whether appellee's use of the right of way was adverse to appellant, and as a matter of right, or merely permissive, and whether such use continued for more than fifteen years before the obstruction complained of, and in so far as they directed the jury to allow her compensatory damages, but expressly condemned the instructions to the extent that they permitted the jury to find punitive damages.

On this point the court said: "The fence was built on the company's right of way. * * * This act at the worst was a mistake only as to their right. The manner of executing the work and the character of the work done neither indicates a malicious motive, nor a purpose to annoy or vex appellee. The instruction as to punitive damages should not have been

given. The verdict returned, \$600, necessarily includes smart money, for it is much beyond any fair or reasonable compensation for being deprived of the use of passway for the length of time that appellee was deprived of it, that is, from some time in September to about the following March or April. At the latter date appellant erected gates at the point where the passway was claimed, thus recognizing appellee's right to so use it. They had a right to so erect gates across the passway; it was not an unreasonable obstruction by appellant of its property." (*L. & N. R. R. Co. v. Carter*, 23 Ky. Law Rep., 2104.)

This court must accept and adhere to its former deliverance in this case, as the questions of law and fact now presented by the record do not differ from those before the court on the first appeal, except that it is now shown by the record that appellee's passway was obstructed something over ten months, instead of about eight months, as shown on the former appeal. It follows, therefore, that if a verdict of \$600 was excessive, as held on the former appeal, that of \$718, returned by the jury on the last trial, is more so. In fact it exceeds by \$118 the maximum estimate put upon the market value of appellee's property by the witnesses. In view of the fact that the instructions given by the court on the last trial properly confined the jury to compensatory damages, the excessiveness of the verdict can be accounted for only upon the ground that it was the result of prejudice or passion existing in the minds of the jury. It was certainly unauthorized by the evidence.

It is our duty, therefore, to adjudge that it be set aside, and to that end the judgment of the lower court is reversed and cause remanded, with directions to that court to set aside the verdict and judgment and grant the appellant a new trial.

Whole court sitting.

COMMONWEALTH v. LEAK.

(Filed October 23, 1903.)

Betting on election—Sufficiency of warrant—A warrant issued against a person charged with having violated the provisions of section 1975 of the Kentucky Statutes, which impose a fine for the offense of betting on an election, is fatally defective in failing to allege that the bet was made before the result of the election was ascertained and known where it was charged that the bet was made after the election had been held.

L. B. Flinn and C. J. Pratt for appellant.

Appeal from Simpson Circuit Court.

Opinion of the court by Chief Justice Burnam.

The Commonwealth appeals in this case from a judgment of the Simpson Circuit Court, sustaining a general demurrer to the following warrant:

"Commonwealth of Kentucky.

"To the Sheriff or any Constable of the County of Simpson or Marshal of the City of Franklin, State of Kentucky:

"It appearing from the sworn statements of J. H. Durbin that there are reasonable grounds for believing that J. M. Leak has committed the offense of betting on an election held under the Constitution and laws of the State

of Kentucky, in Simpson county, Kentucky, committed as follows, to wit: The said Leak heretofore, to wit, on the 20th day of November, 1901, in said county of Simpson and State aforesaid, did unlawfully and willfully bet and wager money of the value of \$50 (his own) with one John Durham upon the election for governor, which was held in and for the State of Kentucky, under the Constitution and laws of the said State, on November 7, 1901, wherein William Taylor was the Republican candidate for said office of governor and William Goebel was the Democratic candidate for said office of governor. Said money (\$50) as aforesaid was wagered against an equal amount (\$50), which was bet by the said Durham as aforesaid. Done as aforesaid against the peace and dignity of the Commonwealth of Kentucky. You are, therefore, commanded to arrest the said Leak forthwith and bring him before me, or some other magistrate of Simpson county, to be dealt with as the law directs. Witness my hand as judge of the Simpson County Court this 3d day of February, 1903.

"W. S. McCLANAHAN, Judge S. C. C."

This warrant was issued for a violation of section 1975 of the Kentucky Statutes, which reads as follows: "If any person shall wager or bet any sum of money or anything of value upon any election under the Constitution and laws of this Commonwealth, or the Constitution and laws of the United States, he shall be fined \$100, to be recovered in any county where the party so offending may be found, or where the bet is made."

A general demurrer having been overruled, a trial of the defendant under this warrant before the county judge resulted in his conviction and the infliction of the fine of \$100. An appeal was prosecuted by the defendant from the judgment of the county court to the circuit court. Upon the trial of the demurrer in the circuit court it was held that the facts recited in the warrant did not constitute an offense. In that court the demurrer was sustained and warrant dismissed, and the Commonwealth has appealed. Section 27 of the Criminal Code requires that the warrant of arrest should in general terms describe the offense charged to have been committed; the city or county in which it was committed. And section 124 of the Criminal Code requires that an indictment should be direct and certain as regards the party, the offense, the county and the particular circumstances of the offense charged, if they be necessary to constitute a complete offense. The Ency. of Pl. & Pr., volume 7, page 404, says: "An indictment for betting on an election should state the purpose for which the election bet on was held and the date of the election, and that it would be sufficient if the indictment charged that the bet was made before the result of the election was known; and that it would be sustained by evidence that the bet was made after the election, but before the result was known."

In *Llewellyn v. State*, 18 Texas, 538, it was held that a charge that defendant on the 1st day of August, 1844, "bet money upon the result of an election ordered and held in Fayette county, according to law, for the election of a clerk of the district court of Fayette county in the State of Texas," does not sufficiently specify the time of the election. While the charge that defendant bet that B. would be elected governor of Pennsylvania, under the Constitution and laws of that State on the 9th of October, in the year 1833, sufficiently alleges the time of the election. (*Shehan v. Commonwealth*, 3 Watts, 212.)

The section of the statute on which the warrant was issued was before this court in the case of the Commonwealth v. Avery, 77 Ky., 626, and it was held there to be a violation of the statute if the bet was made after the election had been held, but before the result had been declared. In that case the defendant relied upon the State v. Mehan, 2 Ala., 840, as authority for the position that a bet made after the election on the result thereof was not against the statute. In commenting upon this case the court said: "The conclusion reached by the court appears to be a correct one, but not for the reason assigned. The demurrer should have been sustained because the indictment showed that the election had been held two months prior to the time the bet was made, but it did not charge that the result was unknown to the parties at the time the bet was made. After such a lapse of time, in the absence of any express allegation to the contrary, the result of the election would be presumed to be known to the parties. In that case there could be no offense against the letter or spirit of the statute."

There is some conflict, but the great weight of the authorities is to the effect that a bet made after the election had been held and the result finally ascertained and announced is not a violation of either the letter or spirit of the statute. But if the result of the election has not been distinctly ascertained and determined, it is a violation of the statute even if the bet was made after the day on which the election was held. The same technical strictness is not required in a proceeding by warrant, as by indictment, and ordinarily a warrant in the form prescribed by the Code sufficiently describes the offense; but if made to appear to the satisfaction of the court that a defendant can not intelligently make defense, it should be made more specific. But when, as in this case, the facts recited in the warrant show conclusively that no public offense has been committed, the trial court properly sustained a demurrer. No election was held for the office of governor on the 7th of November, 1901, nor were William Taylor and William Goebel candidates for governor at that time. The last election for the office of governor preceding the issue of the warrant on the 3d of February, 1902, was held in 1900, and in the absence of a specific allegation to the contrary the court properly presumed that the result of the election had been ascertained and determined.

For reasons indicated the judgment is affirmed.

Whole court sitting.

SAVAGE v. BULGER, &c.

(Filed October 23, 1903—Not to be reported.)

1. Wills—Mental capacity of testator—On appeal from the probate of a will, by which the testator, a colored man, left his property to a woman whom he had recognized as his wife from the time they had begun living together during her slavery, though never married to her, and to his children by her, the contention of the contestant, his sister, that he was not mentally capable to make a will can not be sustained in the face of the consistent and rational provisions of the will itself and of the testimony of all the witnesses, who saw him on the day of the execution of the will, to the effect that he was mentally capable.

2. Undue influence—Considering the natural desire which the testator would have to leave his property to the woman whom he had recognized as

his wife for years and to his children by her, testimony of two or three witnesses as to some expressions on the part of the woman that she expected and desired such a will as was made by the testator is not sufficient to support the charge of undue influence.

8. Execution of will—It appearing from the evidence that the testator, being unable from physical weakness to sign his name, made his mark to the writing which was drawn by another, and that the witnesses who were present at the time he made his mark signed their names as witnesses in his presence, one of them, who was unable to write his name, signing by mark, there was a substantial compliance with the provision of the statute in the execution of the will, and no express acknowledgment was necessary.

A. E. Cole & Son and L. W. Galbraith for appellant.

W. D. Cochran for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Settle.

This is a contest over the will of Ezekiel Williams, colored, who, by industry and economy, succeeded in accumulating a considerable estate. His intelligence and excellent character seem to have commanded the respect of all who knew him. His family, at the time of his death, consisted of a woman, Nellie Williams or Bulger, whom he recognized as his wife, and three children, who had been born to them.

His will devised his entire estate to the woman, Nellie, and their children, one-third to her, and the remaining two-thirds to the three children in equal shares. The will was admitted to probate in the county court, but the appellant, Ellen Savage, sister of the testator, entered a contest by taking an appeal to the circuit court from the order of the county court admitting it to probate. As the other brothers and sisters of the testator refused to unite in taking the appeal, they, with the devisees named in the will, were made parties to the proceedings in the circuit court. The trial in the circuit court resulted in favor of the validity of the will, and a new trial having been refused the appellant, she prosecutes this appeal.

It is contended by appellant that the testator did not possess sufficient mental capacity to make the will, and, furthermore, that it was procured to be made through the undue influence of the woman, Nellie, known as his wife. A careful examination of the evidence found in the record satisfies us of the testator's mental capacity; indeed on this point the evidence is so clear and convincing that we deem it unnecessary to comment on it, except to say that not only those present when the will was executed, but all the witnesses who saw him on the day it was executed, testify positively to his competency. We may also add that the draughtsman of the will was the physician by whom the testator was attended throughout his last illness; he was familiar with every phase of the disease with which the testator was afflicted, as well as the condition of his mind, and testified that the testator was of sound mind when the will was made. It may further be said that the will itself testifies to the mental capacity of the testator, as it is consistent in its provisions and rational on its face.

As to the question of undue influence there is very little contrariety of evidence. Two or three witnesses testify to some expressions on the part of the woman, Nellie, to the effect that she desired and expected such a will as

was made by the testator, but taking these expressions in their strongest sense, they do not indicate any unusual solicitude on her part for the making of the will. Indeed, in view of the mutual affection and confidence that seemed to exist between her and the testator, she might have been expected to display a greater degree of solicitude than was manifested by her. It is to her credit that there is no evidence whatever tending to show that she resorted to flattery, except excessive importunity, or even legitimate persuasion, to procure the execution of the will. She was not the wife by marriage of the testator, but through a long series of years lived with and served him in that capacity. We do not mean to express approval of such a connection, for it might have been changed by the marriage of the parties before the testator's death, but there is much to be said by way of extenuation. It is shown by the evidence that the relationship was entered into when the woman was a slave, and soon after the freedom of the testator had been purchased by his father. Before the abolition of slavery in this country there was no such thing as a legal marriage among that class. According to common parlance the testator "took up" with Nellie when she was only fifteen years of age, and the relation thus begun when she was a slave continued until his death, during the whole of which time she was, according to the evidence, faithful and loyal to him. Her loyalty and affection appear to have received a full return from him, as he recognized her as his wife, and held her out as such to the world, manifesting for her at all times the affection and confidence due the wife from the husband in such a relation. She became the *in part* of all the children that were born to him, and she and the children by their industry and economy doubtless rendered some assistance in the accumulation of his estate. Under such circumstances it was but natural that he should have desired to give them the property devised them by the will. It is contended, however, by counsel for appellant that the will was not executed in conformity to the statute, and that it should not have been admitted to probate because the testator made an attempt to sign it, but, through physical weakness, failed, and had the draughtsman to write his name to it. This is true, but the testator then and there affixed his mark to the paper, and in the name, after it had with his consent been thus written. It is also contended that the will was not signed by the subscribing witnesses in the presence of the testator. This contention is not sustained by the evidence. Section 4828, Kentucky Statutes, provides that "no will shall be valid unless it is in writing, with the name of the testator subscribed thereto by himself, or by some other person in his presence, and by his direction, and, moreover, if not wholly written by the testator, the subscription shall be made, or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

The evidence shows that after the testator voluntarily made his mark at the proper place in his name when written by the physician, his signature and the paper as a whole were duly attested at the same time by the subscribing witnesses who were then present, and their names were written in the presence of the testator. The testator was cognizant of all that was done, and as both of the subscribing witnesses were in the room and saw him make his mark, no express acknowledgment by him of the will was neces-

ary. The witness, Milton Bulger, was unable to write his name, but made his mark when the name was written by the doctor at his request. We are of opinion that the manner of the execution of the will was a substantial compliance with the statute, for, as repeatedly held by this court, in the execution and attestation of wills, "a substantial rather than a liberal compliance with the statute is required, and if its object and intent are reached without a violation of its express language, nothing more is required." (Soward v. Soward, 1 Duvall, 126; Porter v. Ford, 82 Ky., 191; Upchurch v. Upchurch, 16 B. M., 102; Flood v. Pragoff, 79 Ky., 607.) "It is not even material whether the names of the attesting witnesses, or that of the testator, be first subscribed, if the witnesses were present when the testator either wrote his name or acknowledged it as his signature." (Sechrest v. Edwards, 4 Met., 168; Swift v. Wiley, 1 B. M., 114.) "An attestation in the same room with the testator is taken as an attestation in his presence." (Orndorf v. Hummer, 12 B. M., 619.)

We have examined the instructions given and refused by the lower court, and find no error in those given, as they are substantially in the form usually followed in such cases, and are such as have received the approval of this court. Objection is especially urged to the word "credible," in instruction No. 1, used in reference to the character of the subscribing witnesses to the will. The objection is without merit, as the word credible appears in the statute in the same sense and connection, and the use in the instruction of any other word as a substitute would have been improper. We are also of opinion that the lower court did not err in rejecting the refused instructions found in the record, as nearly all of them were misleading, or otherwise improper, and, besides, those given fairly presented to the jury the law covering every aspect of the case.

Wherefore, the judgment is affirmed.

FINLEY'S EX'ORS v. PEARSON, &c.

(Filed October 23, 1909—Not to be reported.)

1. Will—Settlement of executor—Where the testator's will provided that the executors should invest the proceeds from the personal estate and apply the income therefrom to the education of his children the executors should have been allowed, in a suit by one who took under the will for a settlement of the executors' accounts, credit for tuition fees paid out for the education of the children.

2. Same—The testator having, by the will, expressed his opinion that a new and commodious dwelling was needed for his family, and the will having conferred on the executors the power to sell a portion of the land for the purpose of providing such a dwelling, and the executors having used a part of the personalty in erecting the building, thereby saving the realty to the beneficiaries, they should be credited by sums which they paid in the construction of the building, being charged with the proceeds of timber cut from the lands used for that purpose.

3. Removal of executors—The suit being brought by a devisee who had attained the age of twenty-one years, and who was entitled to receive her share of the estate as provided by the will, and no grounds being alleged for the removal of the executors as such and as trustees, it was error to direct

the payment to the commissioner of the court all the funds in the executors' hands.

R. S. Crawford for appellants.

Tye & Denham for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge O'Rear.

G. W. Finley died in 1892 leaving a will, which was probated. His family then consisted of his widow and eight children, several of them being quite young. He owned a tract of land near Williamsburg, worth probably not exceeding \$3,000 or \$3,000, and less than \$1,000 of personal property subject to his debts. He nominated appellants as his executors. It appears that he had but recently purchased this land, and was preparing to build an adequate dwelling house on it when he sickened and died. The only building on it (which was the only dwelling house owned by decedent or his widow) was a two-room box house, not weather-boarded, nor celled, nor plastered; with loose rough plank floors, and boards laid loosely for a temporary ceiling. Two small lean-to rooms, similarly built, had been added. The house had but one fire place, and a flue for one stove. Among the members of the testator's family were several daughters nearly grown.

The widow seems to have taken up the grave responsibilities of the head of this family with commendable courage. On the land was a coal bank, opened for mining coal. The widow had set apart to her a wagon and team. She had two or three young boys who were yet large enough to work and manage the team. The problem presented to this large family, with its very limited means, was how to keep their home, provide the necessities of life, and fit the children for their duties when they should have matured. Such seems, too, to have been the dominant wish and provision of the dying father and husband. His will is copied in full, as follows:

"I, George W. Finley, of Whitley county, Kentucky, do make this my last will and testament:

"1st. I will that my executors hereinafter named take charge of all my notes, accounts and money on hand and collect my notes and accounts and pay my just debts and funeral expenses, and give to my wife \$50 for to meet the present wants of the family; they will also take charge of such personal property as they may believe should be sold and sell same, leaving, however, for the benefit of the family such stock on hand as will be useful and necessary for the support of the family in keeping up the farm and making support for the family.

"2d. I greatly desire that my children shall at least have a good common English education, and to this end desire that my executors will put the money raised from the collection of my notes, accounts and the sale of personal property after the payments above directed to be made at interest and the proceeds used for the education of my children.

"3d. If in the judgment of my executors it is best and necessary for the education of my children to sell some of my lands in order to raise the means with which to do so, they may sell such portions as in their judgment will be the least value to the family for farming (my wife concurring in the sale), and put this sum also at interest and use the proceeds for the education of my children.

"4th. If in the judgment of my executors it is best, and my wife agrees thereto, they may sell all my lands and reinvest the money in other lands for a home for my wife and children, nevertheless keeping in view the education of my children.

"5th. My desire is that my family have a new, commodious and comfortable dwelling in which to live, and I request that my executors will, if they shall dispose of any portion of my land, have a view to the erection of this house as well as to raise money for educational purposes.

"6th. I wish my children as they become twenty-one years of age to have their proportion of all sums held for educational purposes.

"7th. I hereby appoint my brother, R. H. Finley, and my nephew, Charles Finley, my executors, to carry out this my last will and testament, with full power to sell and convey all lands and do and perform fully all the bequests herein made."

It will be seen that the testator had prominently in view two controlling ideas: One, to provide for his children "a common English education;" the other, to provide his dependent family an adequate and comfortable home. No other object, except the payment of his debts, seems to have been deemed of enough urgency or importance in his estimation to have incorporated it in the will. Even the body of his estate, the residue, if any, after meeting these requirements, was not disposed of, except of the personal property.

The executors qualified and took up the execution of the trusts imposed upon them by the will. They were immediately confronted with this actual situation: The family were in distress for want of an adequate dwelling house. The property, altogether (home and all), if converted into interest-bearing securities, would not yield income enough to comply with the direction to educate the children out of the income, if any other construction was to be put upon that provision than that they should be afforded the benefits of the common school system, and the academy in that county. The family had to live, too, and there were debts to be paid of some \$400 or \$500.

The executors and the widow took this course: They sold about \$100 worth of saw logs off of the land, and with the proceeds bought lumber. The widow, with her boys and team, hauled coal, and sold it, and paid certain debts against the estate, including tuition for some of the children at the Williamsburg Baptist Academy. She boarded some of the workmen; traded for certain material, and the house was repaired and added to until it was made fit for the needs of the family. Altogether this cost about \$300. The arrangement between the executors and the widow was, that she was to use her boys, teams, coal, and her own services as far as possible in paying the bills against the estate and for repairing the house, and they, the executors, would, out of the money collected for the estate, repay her, thus enabling her to get along in the way of providing the family with its necessities, and converting their resources into needed cash, without, however, entailing any loss upon the estate. This arrangement was executed by the parties.

This suit was brought by one of the children, after she had arrived at twenty-one years of age and was married, to recover of the executors her proportion of what was alleged to be the surplus of personal estate, the whole of the surplus claimed to be about \$700. By amended petition all the

devises were made defendants, and a complete settlement of the executors was demanded. The suit became then an action for the settlement of the testator's estate. A reference to the master was had, to audit claims, and to report a settlement with the executors. His report shows that they had received \$1,405.87 in personal estate, including interest charged against them; that they had paid out about \$1,118.16. But interest was allowed, so that the net result was, the executors were found to have on hand at the date of the commissioner's report (January, 1900) the sum of \$783.94. The circuit court allowed some further credits of taxes paid by the executors, reducing the balance to \$639.18 as of January 8, 1900.

As to the items constituting this settlement, so far as it charged or credited the executors, we deem it sufficient to say that they all appear to have been proper, and correctly entered. The circuit court adjudged that the executors pay this sum over to the master commissioner of the court, and refused to allow the credit for the money paid for building the house, or for tuition of the children after the death of the testator. The action of the court in these particulars only is the matter for review on this appeal. The executors were given the title to and control of all the personal estate. From it they were required to set apart certain needed live stock for the support of the family. They were then to pay the debts of the testator. The remainder was set apart, the income on which is to be used to educate the testator's children. Although this duty may not have been an executorial one, yet as the same persons were executors, and testamentary trustees, at the suit of one claiming under the will it is a sufficient answer for the executors to show that the estate has been applied as directed by the will. As the bills of the Williamsburg Academy, which were rejected, were less than the interest charged to the executors on the residue of the personal estate found to be in their hands, they should have been allowed.

The next question is, did the will permit the executors to build a suitable dwelling for testator's family, and charge it to his estate? The testator expressed unequivocally his opinion that "a new, commodious and comfortable dwelling" was needed; and that he desired to have it built for his family. The thing about which he seemed to be not entirely certain was how to provide the means with which to build it. Having in mind, as the language of the 5th clause of the will shows, that he had already set apart all of his personal estate to provide an education for his children, as well as had vested his executors (subject to the concurrence of his widow) with the power to convert some of his land into money for the same purpose, he then left the matter of expediency with the executors as to whether they would sell any of his land in order to build the house. This view is further sustained by the 7th clause of the will, which finally vests his executors "with full power to sell and convey all lands, and do and perform all the bequests therein made." The executors did not sell the land. Instead, they seem to have taken an equivalent of the personal estate, the principal of which, under the will, finally comes to the same persons (as does the title to the land), and used it in building the house. It is possible that the income from the land afforded enough, with the income from the remaining personal property, to pay such sums as were required to provide what the testator had in mind as "a common English education" for his children. At any rate, we are of

opinion the executors might have sold enough land to have built the house. But they did not. As a consequence it was saved to the devisees, and they got it. Now is it equitable that they should hold it after coming to contractual age, and at the same time claim the personal property that was actually and honestly used to same the land? Not only that, but it appears that this building added probably \$500 value to the land, and when it came to be divided among the widow and children this added value was taken into account, and the children had the benefit of that. Appellee bringing this suit has invoked the aid of a court of equity against her trustees. As a condition to granting her relief the chancellor will require her, and those who would take the benefit of her suit, to do equity. Whatever may have been the legal rights of the parties, it is not just that these executors, who in this matter have apparently acted honestly and wisely to the benefit of this estate, should be made to lose the money they have paid out for building the house, the full value of which the children have received. The executors should be charged with the \$100 worth of timber sold from the land, and credited by the sums which they paid to the widow to enable her to repair the house, and for the tutions mentioned. This suit was not brought to remove the executors either as executors or trustees. No grounds therefor are stated in the pleadings, and no such relief is claimed. It was error, therefore, to require them to pay over to the commissioner of the court all the money on hand. Only so much of the balance of the personalty as those children who have arrived at twenty-one years of age were entitled to receive under clause 6 of the will should have been adjudged against the executors.

The judgment is reversed and cause remanded for further proceedings not inconsistent herewith.

JOHN SHILLITO CO. v. KEITH, & CO.

(Filed October 23, 1903—Not to be reported.)

Actions against heirs and devisees—A creditor may maintain an action against one, to whom his debtor has fraudulently conveyed his interest as heir at law in his father's estate, for the purpose of subjecting that interest to the payment of the debt; and after the death of the debtor may revive the action against the grantee as his representative and heir at law for the purpose of subjecting the estate in his hands which the original petition sought to reach.

A. E. Cole & Son for appellant.

L. W. Robertson for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Burnam.

In 1878 W. H. Richardson, then a resident of Cincinnati, O., bought from John Shillito Co. a bill of goods for which he agreed to pay \$313.33. He subsequently moved to New York City, where he resided until his death without paying for the goods. In 1890 his father died, a resident of Maysville, Ky., leaving a considerable real and personal estate, which descended to his children and heirs at law. The appellant subsequently brought suit in the Mason Circuit Court, alleging that W. H. Richardson had fraudu-

ently conveyed his interest in the estate of his father to his sister, Mrs. Annie Dudley Keith, for the recited consideration of \$15,000 in cash, but that in fact she had paid no part of the pretended consideration, and asked that the conveyance should be set aside and the property subjected to the payment of their debt; and at the same time sued out a general attachment which was levied upon certain real estate in Mason county.

Mrs. Keith and her husband were both made parties to this proceeding. W. H. Richardson entered his appearance to this proceeding and filed an answer in which he plead the lapse of time and the statute of limitation in bar of plaintiff's claim. Plaintiff, by way of avoidance of the plea of limitation, replied that both it and W. H. Richardson at the creation of the debt were citizens of the State of Ohio and at the accrual of their cause of action; and that before their claim had been barred under the Ohio statute Richardson left the State of Ohio and became a citizen of New York, and had ever since been continuously absent from the State of Ohio. The circuit court sustained a demurrer to this reply, to which plaintiff excepted and prayed an appeal to this court. During the pendency of the appeal in this court W. H. Richardson died, and the case was duly revived against his personal representative by warning order and the appointment of a nonresident in this court. This appeal resulted in a judgment of reversal, this court holding that an action between citizens of another State upon a cause of action which accrued in another State could be maintained in this State if the action would not be barred if it had been brought in Ohio.

After the mandate of reversal had been filed in the Mason Circuit Court appellant filed an amended petition against the appellee, Mrs. Keith, as real representative, alleging that Richardson had devised the bulk of his estate, both real and personal, to her; and that the bequest covered the real estate upon which plaintiff's attachment had been levied. It was also alleged that no personal representative of decedent had been appointed or qualified in this State, and asked that the action should be revived against Annie Dudley Keith as his real representative, as provided by section 505 of the Civil Code. Appellee, for answer to the amended petition, denied that W. H. Richardson was the owner or held title to any real estate in Kentucky, or that she had ever received as heir or devisee any property, real or personal, from his estate, and denied that she was the real representative of decedent. Subsequently the appellant filed another amended petition, in which it alleged that the real estate described in his original petition as having been fraudulently conveyed by decedent to Annie Dudley Keith, had descended to her as heir at law at his death, at the same time suing out another attachment which was levied upon the real estate, and sought to subject the same property to the payment of his debt. The appellee, Annie Dudley Keith, filed a general demurrer to these various amended petitions, which were sustained, and the motion of the appellant to revive the action against Annie Dudley Keith was overruled, and appellant's action stricken from the docket, and to reverse that judgment this appeal is prosecuted. We are of the opinion that the chancellor erred in sustaining appellee's demurrer. The theory of the original action was that the conveyance of Richardson to appellee was fraudulent and void, and that the property still belonged to Richardson. The amended petition simply brings appellee before the court as the representa-

tive and heir at law of decedent, and appellant still attempts to subject in her hands as heir at law the real estate which the original petition sought to reach. Section 2038 of the Kentucky Statutes provides "that to the extent of assets received the representative, heir and devisee of an heir or devisee shall be chargeable for the liability of their decedent or testator, respectively, to the creditors of the original decedent or testator."

Appellant's right to maintain the action instituted by him against appellee is, we think, fully recognized in *Hagan, & Co. v. Patterson*, 78 Ky. 441.

For reasons indicated the judgment is reversed and cause remanded, with instructions to overrule appellee's demurrer and for other proceedings consistent with this opinion.

HODGES v. METCALFE COUNTY COURT.

(Filed October 22, 1903.)

1. Liquor selling—License by county judge—Where an applicant for license to sell liquor by retail has complied with the provisions of the statute with reference to the giving of notice and no objection to the granting of the license is made by the legal voters of the neighborhood, and nothing appears to show that the applicant is a person of bad character, or that he will not keep an orderly and law-abiding house, it is the duty of the county judge to grant the license.

2. Appeal to circuit court—An appeal from the order of the county judge refusing to grant the license applied for is tried by the circuit court on a bill of exceptions, and no testimony outside of the bill of exceptions should be heard.

3. Same—Mandate of circuit court—The judgment being reversed because the applicant was shown to be entitled to the license, the circuit court should have remanded the case with directions to the county court to grant the license, and not to grant a new trial.

J. W. Kinnaird and J. R. Breckinridge for appellant.

Compton & Stone for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Chief Justice Burnam.

At the January term of the Metcalfe County Court, 1903, the appellant applied for a license to retail liquor in the county by the quart, and testified, and showed by the testimony of the witnesses, that he had given the notice required by section 4203 of the Kentucky Statutes. No objection was made to the application, and there was no evidence that he was a person of bad character, or that he would not keep an orderly or law-abiding house. The county judge on this showing refused the license, and his motion for a new trial having been overruled, appellant prosecuted an appeal on a bill of exceptions to the Metcalfe Circuit Court. Upon the trial of the appeal in that court it was found that appellant had complied with all of the statutory provisions, and a judgment was entered reversing the judgment of the county court, and remanding the proceeding with direction "to grant appellant a new trial consistent with the judgment and according to law." The appellant objected to so much of this judgment as directed the county court to grant a new trial, and appeals to this court, and insists that the

circuit judge should have remanded the cause with directions to issue the license.

The duty of granting licenses to sell liquor by retail is imposed by section 4208 of the Kentucky Statutes upon the county judge; and provides that it shall not be granted until ten days' notice shall have been given of the application; and if a majority of the legal voters of the neighborhood protest against the granting of the license it should be refused. It also provides that no license shall be granted to a person of bad character, or who does not keep an orderly and law-abiding house. In numerous decisions of this court it has been held that where there is a conflict in the testimony the county judge has a large discretion as to granting licenses of this character, and that his action will not be interfered with unless manifestly erroneous. But we have here a case in which the applicant has complied with all of the provisions of the statute, and there is no objection, so far as the record shows, from any one of the legal voters in the neighborhood in which the license is to be exercised. Nor is there any proof that the applicant is a person of bad character, or that he will not keep an orderly and law-abiding house. The discretion of the county judge is not an arbitrary one in such cases, and must not be the result of mere caprice or prejudice, either against the applicant or the business in which he proposes to engage. Under the showing made in this case we are of the opinion that it was the plain duty of the county judge to have granted appellant's application.

Where an appeal is taken to the circuit court from a judgment of the county court refusing the application, the circuit court must hear the case, not *de novo*, but on a bill of exceptions. (*Thompson v. Koch*, 98 Ky., 400; *Hensley v. Metoalfe County Court*, 25 Ky. Law Rep., 204; *Merideth v. Commonwealth*, 25 Ky. Law Rep., 450.) The circuit judge did not err in refusing to hear the testimony not contained in the bill of exceptions, as in that event a different state of facts might have been shown in the circuit court from what was shown on the original hearing. The circuit judge also properly reversed the judgment of the county court, but it erred in remanding the case for a new trial. Appellant should not again be required to incur the trouble and expense of another trial in the county court, in which a different state of fact might be shown to exist and a different conclusion authorized. The case should have been remanded, with directions to the county court to grant appellant's application as required by the statute.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

JONES v. COMER, &c.

(Filed October 27, 1903—Not to be reported.)

1. Contract in writing—Statute of frauds—A contract whereby a mother surrendered her infant son to another in consideration that he would rear and educate the child until he should arrive at the age of twenty-one years, when he would furnish him with certain articles of value, was not one which comes within the statute of frauds and perjuries with regard to being reduced to writing, the actual performance of her part of the contract by the mother in surrendering her child taking it out of the provision as to contracts not to be performed within a year.

2. Limitation—The infant was entitled to institute an action for a breach of the contract at any time within five years after he arrived at the age of twenty-one years.

3. Decedents—Creditors—The infant was entitled after the death of the contractor to maintain an action against his heirs and real representative to subject the proceeds of the decedent's estate in their hands for the breach of the contract.

Max Harlin and Sherman Spear for appellant.

Baird & Richardson for appellees.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Nunn.

This is an appeal from the judgment of the Monroe Circuit Court sustaining a demurrer and dismissing the petition of appellant. It is in substance alleged in the petition that when he arrived at the age of eight years, his mother being a widow woman and unable to support and educate him, one Andy Comer made and entered into a contract with this appellant's mother to the effect that if she would permit him to take this appellant to his house to rear, educate and live with him as a member of his family, that when the appellant arrived at the age of twenty-one years he would furnish him with a horse, bridle and saddle, valued at \$100, and household and kitchen furniture valued at \$150; that in consideration of this promise and agreement on the part of Andy Comer, and in pursuance thereof, his mother delivered and turned over this appellant to Comer, and that Comer complied with his part of this contract for about seven or eight years only, and without any fault on the part of this appellant Andy Comer violated his part of the contract that he had made with appellant's mother and drove him from his home and premises, and refused after that to support and educate him or pay him the horse, bridle and saddle and the household and kitchen furniture as he had agreed to do; that appellant arrived at the age of twenty-one years on the 11th of April, 1897. We are not informed of the reasons upon which the lower court acted in dismissing appellant's petition, but from the briefs filed in the cause we presume that the lower court was of the opinion that because the contract made by Andy Comer with the mother of this appellant was made in the year 1833, was not reduced to writing and signed by Comer, and for the reason that the contract was not to be performed within a year the same was governed by the statutes of frauds and perjuries, and was void. This statute does not apply to a case like this; here the mother parted with her child and performed fully her part of the contract. What higher or greater consideration could the mother have surrendered or given than the right to the care and custody of her child? And if this contract was made and the consideration given and surrendered to Comer by the mother, it is certain that neither Andy Comer nor his real representatives can be heard to say that they are not bound by this contract because it was not reduced to writing or to be performed within one year. The case of *Berry v. Graddy*, 1 Met., 553, was where Graddy had purchased a farm in Kentucky, and was induced to do so by Belt, who was an uncle of Graddy's wife, Belt promising to pay \$5,000 of the purchase money in three years if Graddy would purchase the place and not remove to Mississippi. Graddy

performed his agreement, and the statutes of fraud being pleaded, it was held that as he could not be restored to the situation which he was in before the contract was made, nor compensated in damages by any other standard than that furnished by the contract itself, it would be a fraud to deprive him of the benefit of it on the ground that it was verbal merely. The questions involved and the principles enunciated in the case of *Benge v. Hiatt's Adm'r*, 82 Ky., 667, are peculiarly applicable to the question herein involved.

With reference to the question of the statutes of limitation, it is sufficient to say that this can not avail except when pleaded, and the appellee failed to properly plead such a statute, and even if properly pleaded by answer, if the facts are as stated in the petition the appellant arrived at the age of twenty-one years on April 11, 1897, and this action was instituted on the 2d of April, 1902, it was brought within five years after the disability of infancy had been removed. By section 2515 of the Kentucky Statutes, an action upon a contract not in writing, signed by the party, may be brought within five years next after the accrual of the cause of action. This section is included in article 3 in this subdivision under the head of "Limitation of Actions." In section 2525 it is stated "If a person entitled to bring any of the actions mentioned in third article of this chapter, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant, * * * the action may be brought within the like number of years after the removal of such disability."

Appellee contends that appellant had not the right to institute this action against the administrator of Andy Comer for the reason that he made no demand of him for the claim sued on, and because Andy Comer died in the State of Tennessee, and a resident thereof, and that all of his property, real and personal, was situated in the State of Tennessee, and that the county court of this State had no authority at law to appoint any one as administrator of Comer's estate. Even if this be true, it did not authorize the lower court to dismiss appellant's petition, for he had sued the children and real representatives of Andy Comer. Section 2088 of the Kentucky Statutes is as follows: "To the extent of assets received the representative, heir and devisee of an heir or devisee shall be chargeable for the liability of their decedent or testator, respectively, to the creditors of the original decedent or testator." In the case of *Rubel v. Bushnell*, 91 Ky., 253, which was a case where heirs had received assets from their deceased ancestor and the court had given judgment against them to the extent of assets received, the judgment was several, not joint. The court in that case said: "Section 434 of the Civil Code provides 'legatees and distributees shall be liable to a direct action by a creditor to the extent of estate received by each of them, notwithstanding the failure of the creditor to appear and the discharge of the personal representative.' Section 10 of article 1, chapter 44, General Statutes, also provides 'the heir or devisee may be sued in equity by a creditor for any liability of the decedent,' and section 9 of same article provides 'to the extent of assets received the representative, heir and devisee of an heir or devisee shall be chargeable for the liabilities of their decedent, etc.' There can be no question of the liability when assets have been received, nor is it material under the present provision of the Code that it should appear that the personal representatives have no assets. The right to sue is expressly given the creditor, and the only question is, when the liability is conceded, has

the distributee used assets from the estate? If so, he becomes liable to the creditor to that extent, and may be sued for the whole sum received, and required to look to his codistributees for contribution."

The appellant in his petition alleged that the defendants, the children and heirs, had sold personal estate of their father for about \$400, and the real estate left by him at the price of \$2,100; had received the proceeds thereof and had placed the same in the hands of the defendant, Emberton, the personal representative, and that he then held the proceeds. Under the laws of this State the administrator of an estate has nothing to do with the real estate or the proceeds thereof, and if he has in his hands the proceeds of this real estate he must be considered as holding same as the agent of the children and real representatives of Andy Comer, and this must be construed as the children having received assets to the extent thereof. While the petition is not perfect, yet, considered as a whole, is stated a cause of action.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

ANDERSON v. SOUTHWORTH.

(Filed October 27, 1903—Not to be reported.)

1. Right to use of passway—Sufficiency of evidence—In this action by appellee to establish his right to a passway over the lands of appellant for the purpose of reaching the public highway the evidence is sufficient to show that appellee and those under whom he claims have used the passway in question as a matter of right and without interruption for a period of thirty years, which, under the law, establishes his legal right thereto.

2. Same—The fact that appellee may enjoy the permissive use of a road over the lands of a third party can not deprive him of his legal right to the passway in controversy.

Montgomery & Lee for appellant.

Victor F. Bradley for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Settle.

By this action the appellee invoked the aid of the chancellor to establish his right to the use of a passway described in the petition as leading from his land over that of appellant to the Long Lick turnpike, and which furnishes the only route whereby he can reach the turnpike from his residence and thereby get to the county seat, the neighborhood mill, store, postoffice and public school.

It is averred in the petition that he and his vendors had used the passway in controversy as a matter of right, adversely to the appellant and all others, for more than fifteen years continuously before the institution of the action, and that the appellant had illegally and without right obstructed and attempted to prevent his use of the passway by locking a gate that stands thereon. An injunction was asked to compel the appellant to remove the lock and restrain him from further interfering with appellee's right to the use of the passway. The answer of the appellant denies that appellee has

any right to the use of the passway, and avers that his use thereof was merely permissive, and that such use did not continue for as much as fifteen years before the institution of the action; and further, that appellee has another and good road to the county seat, church, postoffice and schoolhouse, that can be traveled by him.

The chancellor upon the trial of the case rendered judgment in appellee's favor, establishing his right to the passway, and perpetuating the injunction theretofore issued at his instance. Of that judgment appellant complains, and its reversal is sought by this appeal. It appears from the record that appellee owns eleven, and the appellant sixty-two, acres of land that originally constituted one tract owned by William Forsee. The passway in controversy ran from the eleven acres now owned by appellee over the sixty-two acres of appellant when and before the two parcels of land were owned as one tract by Forsee, and furnished the only outlet from the eleven acres to the turnpike. We think it is fairly shown by the evidence that this passway, which is the same now claimed by appellee, was used as a matter of right by the appellee and those under whom he claims for not less than thirty, and perhaps as much as forty, years before the filing of his action. It is true that one or two changes of the passway were made to straighten the fences of some of the owners of the land, or to get it upon firmer and better ground, but such changes were made by moving it only a few feet, and with no purpose of abandoning it as a passway.

It is claimed by appellant that the appellee once asked of him permission to use the passway. This is denied on the deposition of appellee, and the denial is supported by the fact that when appellant first locked the gate to prevent the use of the passway by appellee, the latter had him indicted for it, and it is hard to understand why he would have taken such a step if his use of the passway was merely permissive. It is to be presumed that he resorted to the process of the criminal court because he believed that his right to the use of the passway was of such fixed and definite legal character as to entitle him to be freed from any interference on the part of the appellant. We are unable to find in the record proof of any act or declaration of the appellee that was or is inconsistent with his claim to the use of the passway as a matter of right, and we are not disposed to interfere with the judgment of the chancellor on a question of fact unless it is made to appear that it is against the weight of the evidence. The law applicable to the facts presented by the record in this case is well settled in this State.

"A grant of a right of way by prescription will be conclusively presumed from an uninterrupted, unexplained adverse use of such a nature as to indicate a claim of right, and not the effect of indulgence or permission for a period of fifteen years or more." (Wilkins v. Barnes, 79 Ky., 323.)

In *O'Daniel v. O'Daniel*, 88 Ky., 185, this court said: "It was not necessary for the plaintiff to show by positive testimony that he had claimed this use as a matter of right and so proclaimed to his neighbors, the burden being on the defendant after such a long use of his premises to show that the use was merely permissive. Under our statute of limitation the continued use of a passway over another's land for fifteen years unexplained creates the presumption that the use he did claim was adverse."

The foregoing doctrine was reaffirmed by the court in the case of *Bowen*

v. Cooper, 23 Ky. Law Rep., 2065. The appellee has gone further in this case than the mere presumption recognized by the cases *supra*. He has shown by the evidence that his use of the passway in question was exercised by himself and vendors as a matter of right, and without interruption for not less than thirty years. We find no merit in the claim made by appellant that there is another road by which appellee may reach the turnpike. There is some proof to the effect that appellee can pass through the lands of J. W. Sharp, Robert H. Southworth and others to the county road that leads into the turnpike, but if so, the fact that he may enjoy the permissive use of a road over their lands can not deprive him of his legal right to the passway in controversy, where that right had been established, as in this case, by proof of its continuous adverse use for more than fifteen years.

Judgment affirmed.

FIRST NATIONAL BANK OF PINEVILLE v. REESE.

(Filed October 27, 1903—Not to be reported.)

Banks—Liability of cashier for overdrafts of depositors—Where the cashier of a bank is authorized by the board of directors to lend the money of the bank, and it is the custom of the bank to honor the check of a regular depositor, who is regarded as solvent, when he hasn't sufficient funds on deposit to pay the check and to charge the amount up to him as a loan or overdraft, and the cashier acts under the authority vested in him and on the custom of the bank and exercises such care, diligence, discretion and judgment as an ordinarily discreet and prudent man would exercise in the management of his own business of a like nature, he is not liable to the bank for losses occasioned by permitting overdrafts.

J. R. Sampson for appellant.

C. W. Metcalfe and J. W. Alcorn for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Nunn.

This was an action brought in the Bell Circuit Court by appellant against appellee, alleging that it was conducting a national bank, and that appellee was its cashier; that he executed bond as such, whereby he obligated himself to faithfully discharge the duties of his position, and that he continued to act as such cashier for and during the year 1898; that it was his duty to receive and pay out money on checks of depositors and to pay checks only when depositors should draw the same and have money in bank to meet them; that while acting as such cashier, and during the year named, he failed to faithfully and properly discharge his duty as such cashier, in that he permitted overdrafts and paid checks drawn by E. C. Richardson when he had no money to meet them and the same were overdrafts. The overdrafts are specifically set forth and itemized, making a total of about \$455; that these sums were paid out of the funds of the bank and paid by appellee in violation of his duty as cashier of appellant.

Appellee answered, and denied that he allowed or paid any overdrafts of Richardson, but alleged that when he was cashier of appellant he was, by the direction and sanction of the board of directors, authorized to lend the

money of the bank, and that it was the custom and usage of the bank, sanctioned, approved and acted upon by the board of directors, that if a regular depositor of the bank, who was believed to be solvent and good for the amount of a check, drew a check on the bank at a time when he did not have a deposit or funds sufficient to pay the check, the bank would advance for and lend to him the amount of the check, and with the money so loaned pay the check, and the amount so paid was a loan by the bank to the depositor and a check until paid or redeemed was held by the bank as a "cash item;" that at the time of the different checks of Richardson were presented Richardson was a regular depositor of the bank, and was considered good and solvent for the amount of each and all of the checks, but did not have the money on deposit with which to pay them, and acting under the rule and usage of the bank, he, as cashier, advanced and loaned to him, from the funds of the bank, the money for the payment thereof, and with that money paid the checks and held them as a loan under the head of "cash items." The appellant, by reply, traversed these allegations.

A trial before a jury was had and a verdict was returned in behalf of appellee, and the appellant has appealed from the judgment of the court rendered thereon. The appellant contends that the lower court erred in not sustaining a demurrer to the answer of appellee, claiming that it did not present any defense to the action; that a cashier can not avoid liability under any such usage or custom as alleged in his answer or by the consent or direction of the directors of the bank; that if he chose to make a loan under such circumstances he does it at his peril, and if loss is sustained he must make it good to the bank. Appellant cites respectable authority to support its contention. But in the case of *Pryse, &c. v. Farmers Bank, &c.*, 17 Ky. Law Rep., 1067, which was a case the facts of which were very similar to the case at bar, the court, by Judge Hazelrigg, announced a different principle from that claimed by appellant. In the *Pryse* case the lower court told the jury in an instruction that if the cashier permitted Bullock and others to overdraw their account, and loss resulted thereby, they should find for the bank the amount of such loss. This court reversed that case by reason of that error and others therein discussed. The court, in discussing the instruction referred to, used this language: "Again, the second instruction assumes it to have been negligence in itself to suffer the overdraft to Bullock and others. This is not the law of this case. If the directors might have made these loans, for that is what the overdrafts were, then the cashier might have done so by reason of the condition already alluded to, and that the directors might have done so, under an agreement with the patrons named, seems well settled. While denying such right to the cashier generally, Mr. Morse in his work on 'Bank and Banking,' says: 'Of course, however, there is a power in a bank to allow overdrafts.' (Volume 1, section 358.) If the cashier is held liable on this account, it must be by his failure, first, to make reasonable inquiry into the financial standing of those making the overdraft; and, second, to exercise the discretion required in the fifth instruction, and this, we add, is the criterion by which the cashier's conduct is to be judged."

The fifth instruction referred to said that the cashier is not to be held responsible for any loss in discounting paper if he exercised such care, dili-

gence, discretion and judgment as an ordinary discreet and prudent man would exercise in the management of his own business of a like nature. This appears to be the correct rule by which to determine the liability of bank officials where the facts appear as in the Pryse case and the case at bar, where the cashier, without the aid of a finance committee or the direction of a board of directors, acts upon the custom and usage of the particular bank by the advice of the president and directors individually and upon his own judgment as to the best interest of the bank. Under such a state of case it would seem a great hardship on him to establish any other rule to determine his responsibility. The court gave two instructions to the jury, and by them in effect submitted the principles above referred to, and the jury determined that appellee, under the facts proven, observed the diligence required of him before cashing the drafts and making the loans to Richardson.

Wherefore, the judgment of the lower court is affirmed.

WILKERSON v. COMMONWEALTH.

(Filed October 27, 1903—Not to be reported.)

Homicide--Failure of evidence to establish guilt--Where the evidence against one charged with the murder of his wife, who came to her death by poisoning, merely showed circumstances which were explainable naturally and consistently with his innocence, while there was evidence tending to show that the deceased had in effect threatened to take her own life and had stated that she had poison about the house and didn't want her husband to know it, the trial court should have of its own motion given an instruction to find the defendant not guilty.

S. M. Peyton for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant was convicted of the crime of murder, and his punishment fixed at life imprisonment. He is charged with having murdered his wife by administering strychnine to her, from which she died. The court gave the jury two instructions defining the law of this case, one embracing the law of murder, the other of reasonable doubt. If there is a case to be submitted to the jury at all these are the only instructions that should have been given, nor is there just ground of objection to their form.

Appellant and his wife had been married about eight years. They had two children, one aged about five, the other about three years. His wife was pregnant at the time of her death, the stage advanced to about seven months. Some four years before her death she and her husband became estranged, and she left, but did not remain away longer than a day or two. The cause of this was not shown. She died in February, 1902. The 1st of September, 1901, she again left him, and at his repeated solicitation she returned to him the 1st of December following. There is no evidence of any estrangement since then, or of any cause for one. There is this singular fact to be noted from the record, singular in view of the serious charge and

verdict against appellant: There is not a syllable of evidence of his ever having treated his wife in any way unkindly; of his ever having spoken to her a harsh word, or his ever having failed to provide for her to the best of his ability, and as he should.

The Commonwealth attempts to sustain this charge by showing first that appellant had the opportunity to commit the deed, and then showing a probable motive. His opportunity was merely the fact that he was living with his wife in a country neighborhood, he and she and the two children alone. She died in his house, and when he was at home. It was not shown that there was any other person at the place when she was taken ill except his family. The motive sought to be established by the Commonwealth was that appellant had changed his affection; had become enamored of his sister-in-law, the widow of his brother who had died in July, 1901. To show this alleged illicit love the Commonwealth proved a number of incidents which it is thought tended to show an improper regard and relation. Quite a number of witnesses were examined on this point. The whole of their testimony is merely that appellant was seen in company with his sister-in-law on several occasions at a camp meeting, held in the neighborhood where they lived, within a half of a mile of appellant's home. The only attention that the record discloses that he showed her was to give her a drink of water on one occasion; was seen a few times talking to her during the meeting, and to walk home with her on another occasion or two, when she was stopping at appellant's house. These attentions were publicly given; no apparent effort to conceal them. Her attentions to him were that one night when he was at the mourners' bench, seeking a religious experience, she talked to him and fanned him and one witness said put her arm around his neck. There were a number of persons at this mourners' bench on that occasion, whose friends and relations exhibited toward them a personal solicitude. After the meeting she removed from that neighborhood to a distant part of the county where her mother lived. Appellant and a brother of this sister-in-law moved her furniture, etc., for her. Appellant also moved some canned fruit for her, and took her and her sister and her sister's children in a wagon to her mother's. He remained over night, returning the next day. The distance was some seventeen or eighteen miles. He told a neighbor woman, so she says, that when he left his sister-in-law that she wept and begged him not to go, and that on that account he stayed longer than he otherwise would have stayed. It also appeared that appellant's brother died but a few days before this camp meeting; that they lived upon adjoining farms; that appellant had his brother's farm rented, and was to pay by dividing its produce and crops. The sister-in-law dried some of her fruit at appellant's house. On one occasion a neighbor saw them standing near the peach orchard by the side of the roadway. Appellant's wife was only a short distance away, and in hearing, if not in sight. This is in substance the whole of the evidence tending to show an improper relation between these parties. We fail to see in it anything incompatible with virtue.

The attempt of the Commonwealth to connect appellant with the death of his wife consisted, in addition to the above, in showing that about three weeks before her death he applied to a druggist to buy strychnine. The druggist had none, and appellant is not shown to have gotten any or applied

for any elsewhere. The clerk of the druggist asked appellant what he wanted with it, and he responded that he wanted to poison some dogs that were in the habit of coming to his home at night and killing his chickens; that they were dogs belonging to some of his near neighbors, and that he asked the clerk not to speak of it. It was not shown that appellant ever had any strychnine.

The Commonwealth further attempted to show that appellant appeared indifferent and unmoved at the death of his wife; that appellant was not demonstrative and violent in the expression of his grief may be true, but his conduct altogether did not necessarily indicate indifference.

Appellant explains the incidents just before the neighbors were called in as follows: His wife had been complaining of feeling unwell for some two or three weeks, yet was able to attend to her ordinary household duties with his assistance. On the day of her death, which was on Saturday night, he had been over to his father's, a mile or so distant, for a few hours, returning about 3 o'clock in the afternoon, and found her complaining. Still she continued to do her customary work. He assisted her in getting the supper, which was served about 5 o'clock in the evening. He told what was had for that meal. He said that he and the children, as well as his wife, all partook of some part of everything served at the meal; that the food was eaten from the same dishes; that none of the others were affected; that his wife did not appear to be affected by anything she ate. After supper he cleared the table and washed the dishes. He got out the clean night clothes for the children, and put them to bed. His wife got out her own clean night clothes, after having assisted in some of the preparations for the breakfast for the following morning; that he retired first and fell asleep. A few minutes before 9 o'clock he was awakened by his wife, who told him that she was suffering greatly, and asked him to call some of the neighbors who lived two or three hundred yards distant; that without waiting to dress himself fully he went out of the house and called loudly for his neighbors that his wife was very ill, and to come. He called loud enough that not only those living two or three hundred yards away, but some of these living a quarter and a half a mile away heard him, though some of them had gone to bed for the night. The weather was cold; the doors and windows were all closed. They all describe his cry as one of distress. They were alarmed by it and hastened to his home, and arrived there a few minutes after 9 o'clock, and found his wife in convulsions. She was not unconscious, however, but said nothing except to complain of pain in the back, head and feet. She said this pain was killing her. One of the neighbor women asked her if she had taken anything, but that from the shake of her head she could not determine whether the answer was intended to be yes or no. She died within thirty minutes after 9 o'clock. No poison or other drug was found about the house. She was buried the next evening, Sunday. A rumor was spread that her death had been caused by poisoning, charging appellant. He was told that there was talk of arresting him, and that there was also talk of disinterring the body for examination. He expressed his willingness to have her disinterred. He did not flee. The latter part of the week the body was taken up and the stomach taken from it, but no examination of the body was made. The stomach was sealed in a glass jar and sent to Louisville.

where it was analyzed by a chemist, who pronounced that he had found, by estimation, three-fourths of a grain of strychnine in it. The evidence is convincing that she came to her death by poisoning, and that strychnine was the agent.

Several witnesses testified to having heard the deceased complaining during the last several months before her death of being tired of life; that she would not care if she would never waken again from her sleep; that she was in trouble; that certain of her relations had been carrying tales to her. In her statements there were certain expressions that might be construed as threats of self-destruction. To one witness, a neighbor woman, she said that she had poison on the place, but she did not want her husband to know it; that she had it concealed in a pocket of her underskirt. After her death the underskirt showed that there was such a pocket, but there was nothing in it. There were some other circumstances, not very material, about to the same effect as the foregoing. This is all the evidence in the case, yet the jury found the accused guilty.

We have studied this case with care to discover any evidence upon which this verdict could be properly rested. We are adhering to the rule in this case which has been more than once announced by this court, that where there is any evidence of the guilt of the accused, that this court will not reverse upon the ground merely that the verdict of the jury is contrary to the weight of the evidence. We have not weighed the evidence for and against the accused. There is none against him in this record. All of the circumstances proven against him, though relevant in an investigation charging him with this crime, are explainable, naturally and reasonably consistent with his innocence. All together it scarcely justifies a suspicion of the guilt of appellant. The presumption of the innocence of the accused in an investigation of a criminal charge is a presumption both of fact and of law. It continues till there is some evidence to overcome it, and it is the duty alike of the court and of the jury to reconcile the circumstances of the case with that presumption where it reasonably can be done. Our action does not involve the disbelief of any witness' statement. It does not have to reconcile any conflicting statements and circumstances where to do so is to ignore one to the belief of the others.

Society is interested in the punishment of criminals in order that crime may be prevented. But the law can not afford to punish even a criminal without evidence of his guilt. It may be possible, of course, that appellant is guilty of this crime. If so, it is unfortunate for the Commonwealth that the evidence of it has not been found, but it would be far worse if the law allowed one accused of such a crime to be convicted and punished in the absence of all evidence of his guilt. The courts are not unmindful of the great prevalence of crime, and of the crying need for its speedy punishment. Guilty men may have escaped punishment altogether, others may have been punished too lightly for their crimes, others may have unreasonably delayed their punishment, but none of these conditions, nor all of them together, can ever warrant the punishment of a man by the law for an offense without some evidence of his guilt, and a legal trial of the fact.

We are of the opinion that the trial court should have upon his own motion instructed the jury at the close of all the evidence to find the defendant

not guilty. If upon a retrial substantially the same state of case is presented the court will so instruct the jury.

For the reasons indicated the judgment is reversed and cause remanded for proceedings not inconsistent herewith.

EVERSOLE v. WALSH.

(Filed October 28, 1908—Not to be reported.)

1. Sidewalk improvement—Validity of ordinance—Section 8706 of the Kentucky Statutes does not require the trustees of a town to allow the owner of property the privilege of himself putting down a sidewalk, but the fact that such privilege was granted did not invalidate the ordinance.

2. Same—There being no obligation on the council to allow the property owner the privilege, he can not assail the ordinance because the opportunity afforded him for putting down the pavement was not ample.

3. Acceptance of work—After an acceptance of the work by the trustees the property owner can not escape paying for it on the ground that it was not done in accordance with the ordinance.

P. F. Stillings for appellant.

Charles R. Brook for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Hobson.

This is a suit to enforce an apportionment warrant for the construction of a sidewalk in the town of London, Laurel county. The amount of the warrant was \$123.50, and it was shown that appellant's property was enhanced in value \$200 by the improvement. Section 8706, Kentucky Statutes, under which the work was done, does not require the town trustees to allow the owner the privilege of doing the work. Still the fact that they gave him this privilege did not invalidate the ordinance. (Board of Councilmen v. Murray, 99 Ky., 422.) And as the council was not required by the statute to give appellant the privilege of doing the work, he can not assail the ordinance because the opportunity afforded him by it for doing the work was not sufficiently ample as it was all a mere matter of grace on the part of the trustees. It is also objected that the grade of the street was not fixed, but the proof is otherwise. The work was accepted by the council, and there is nothing to show any bad faith on their part in accepting it. Appellant, after the work was accepted by the trustees, can not be allowed to escape paying for it by mere proof that the work was not done in accordance with the ordinance. (Purdy v. Drake, 17 Ky. Law Rep., 819; Allen v. Wood, 20 Ky. Law Rep., 59; Henderson v. Lambert, 77 Ky., 24; Joyes v. Shadburn, 11 Ky. Law Rep., 892.)

Judgment affirmed.

MARAMAN v. OHIO VALLEY TELEPHONE CO.

(Filed October 28, 1908—Not to be reported.)

Validity of municipal ordinance—Irregularity of passage—An ordinance of a city of the sixth class which purports to grant the exclusive privilege of

constructing and operating a telephone system within the city, which was passed at the same meeting at which it was introduced, is in violation of section 3699 of the Kentucky Statutes, which provides that ordinances granting franchises shall lie over for five days after their introduction, and is void. Such an ordinance passed at a called meeting of the board is in violation of the provision of the statute requiring passage at a regular meeting.

Chapeze & Halstead for appellant.

Fairleigh, Straus & Fairleigh for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by appellant in the Bullitt Circuit Court against appellee for an injunction preventing the latter from erecting poles, and stringing telephone wires along the highways of Shepherdsville (a city of the sixth class), and thereby interfering with, and encroaching upon, his exclusive privilege, or franchise, of operating and maintaining a telephone system in that municipality. He obtained a preliminary injunction from the clerk of the court, under section 273 of the Civil Code, which was afterwards dissolved by the circuit judge, who dismissed the petition.

The basis of appellant's cause of action is the grant to him, by the board of trustees of Shepherdsville, of an exclusive privilege, or franchise, to maintain a telephone system in the corporate limits of the municipality. Certified copies of the various ordinances constituting his chain of title to the exclusive franchise claimed are filed as exhibits with the petition. The original ordinance, authorizing the sale of the exclusive privilege, was passed by the board of trustees the same night upon which it was introduced, and at a called meeting. Section 3699 of the Kentucky Statutes provides that "no ordinance or resolution (cities of the sixth class) granting any franchise shall be passed by the board of trustees within five days after its introduction, nor at any other than a regular meeting."

If the ordinance authorizing the sale of the exclusive privilege involved in this litigation be considered as granting the privilege, then the initiative ordinance was void, both because it was not required to lie over five days after its introduction before the board of trustees, and because it was passed at a called meeting of the board; if, however, it is conceded that the initiative ordinance did not grant the privilege, but only authorized its advertisement and sale, in that event we must look to the ordinance ratifying the sale had under the first ordinance, and formally conveying the franchise to the purchaser. An examination of this second ordinance shows that it possesses one of the infirmities exhibited in the first; it was passed at the same meeting at which it was introduced.

The question here presented arose in the case of the East Tennessee Telephone Co. v. Anderson County Telephone Co., 23 Ky. Law Rep., 418. Lawrenceburg is a city of the fifth class, and section 3636 of the Kentucky Statutes is identical. In substance, with section 3699. The court held an ordinance of the city of Lawrenceburg, granting a franchise to establish and operate a telephone system in that town, void because it did not lie over five days, as required by section 3633 of the Kentucky Statutes. The court said: "We regard this provision of the statute as a highly important one,

and as mandatory. Whatever rights, exclusive, or otherwise, appellant may have had, if possessed of proper municipal authority, to prevent its competitor, the appellee, from erecting a rival telephone plant, it certainly can not prevent appellee from so doing, when acting without such authority. The chancellor, therefore, properly dismissed appellant's petition."

The ordinance under which appellant claims an exclusive franchise is void, because in violation of the requirement of section 3699 of the Kentucky Statutes, in that it did not lie over five days after introduction before passage; and, being void, appellant acquired no rights, exclusive or otherwise, to operate a telephone system in Shepherdsville, and the lower court did not err in dismissing his petition.

For the reasons indicated the judgment is affirmed.

GOFF, &c. v. YOUNG, &c.

(Filed October 28, 1903—Not to be reported.)

1. Settlement of partnership—Election as to cause of action—Where the plaintiff's petition prayed for a settlement of a partnership of which he was a member, for a sale of the partnership property, and that the defendant be required to pay one-half the balance of firm indebtedness after the assets were exhausted, no ground existed on which to base a motion for an election, as the entire petition related to the settlement of the partnership and the payment of its debts.

2. Conflicting testimony—Where the testimony is conflicting and the mind is left in doubt the finding of the chancellor on questions of fact will not be disturbed.

M. O. Allen and Allen & Wing for appellants.

Sandidge & Sandidge for appellees.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Hobson.

Robert Young filed this suit in the Cumberland Circuit Court, alleging that he and the defendant, T. C. Goff, formed a partnership in the year 1899 in the stove business, each to furnish half of the capital and share equally the profits and losses, Goff to attend to the business and to be paid a reasonable sum for his services; that the business was unprofitable, and has been discontinued; that they then had a settlement, on which it was agreed between them that the firm was indebted to Goff in the sum of \$211.74, and to Young in the sum of \$300; that the firm had no assets except a stove bucker and a steam engine; that it owed the bank of Cumberland a debt of about \$1,000. He prayed a settlement of the partnership, the sale of the engine and bucker, and that the defendant, Goff, be required to pay the bank one-half of the balance of its debt after the firm assets were exhausted. Goff entered a motion that the plaintiff be required to elect which cause of action set out in his petition he would prosecute. The court overruled the motion, and he then filed an answer in which he, in substance, denied the allegations of the petition, and alleged that the firm was composed of J. S. Young and C. H. Goff, as well as himself, and the plaintiff, and that each was to have

one-fourth of the profits, and share one-fourth of the losses. J. S. Young filed an answer denying that he was a member of the firm. C. H. Goff answered, setting up, in substance, the same facts as his brother, T. C. Goff. Issues were joined on the allegations of the answers. The proof showed that for many years previous to 1899 Robert and J. S. Young had been in business as partners under the firm name of R. & J. S. Young, dealing in lumber and the like. It also showed that at the time the firm in controversy was formed the two Goffs were in the stove business, under the firm name of T. C. Goff & Bro., and that the arrangement for the forming of the firm in controversy was made between Robert Young and T. C. Goff. They differ radically as to what took place between them; but under the evidence the circuit court held that the firm in controversy, which did business in the name of R. Young & Co., was composed of the firm of R. & J. S. Young and the firm of T. C. Goff & Bro., each of these firms agreeing to contribute one-half of the money, and to share equally in the losses and profits. T. C. Goff produced an account against the firm which was allowed, \$211.74. C. H. Goff produced an account against the firm, and of this \$239.80 was allowed, or \$8 less than the face of the claim. From this judgment the Goffs have appealed, and the Youngs prosecute a cross appeal.

The court properly overruled the motion to require the plaintiff to elect which cause of action set out in his petition he would prosecute. The entire petition related to the settlement of the partnership and the payment of the partnership debts. The appeal and cross appeal raises a question of fact on which the evidence was very conflicting. The chancellor's conclusion will not be disturbed in such cases where the mind is left in doubt by the proof, and on the whole record the preponderance of the evidence here sustains the chancellor's conclusion, which seems also in accord with the equity of the case. While the arrangement was made between Robert Young and T. C. Goff for the formation of the firm of R. Young & Co., we think it pretty clear from the facts and circumstances shown that neither of them put into the firm of R. Young & Co., or contemplated putting into, it his individual means; but that the venture was understood by all parties to be undertaken and maintained by the firm of R. & J. S. Young and the firm of T. C. Goff & Bro. While there is much in the record to discredit the claim of C. H. Goff, we conclude that there is not enough to justify its rejection in view of the positive testimony sustaining it.

The judgment complained of is, therefore, affirmed on the original and the cross appeal.

CUMBERLAND TELEGRAPH AND TELEPHONE CO. v. MARTIN'S
ADM'R.

(Filed October 28, 1903.)

Negligence—When no liability attaches—Where a person, who took shelter under the porch of a building during a storm, was killed by a stroke of lightning which was communicated to him by a telephone wire on the building, the owner of the wire was not liable in damages for his death, although the wire was attached to the building in a negligent manner, as he was a mere licensee, to whom neither the owner of the building nor the owner of the wire owed any duty.

Wm. L. Granberry and Humphrey, Burnett & Humphrey for appellant.

R. C. Warren and W. G. Welch for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Hobson.

Appellee filed this action to recover of appellant for the death of his intestate, Walter Martin, a young man twenty-five years old, charging that his death was caused by the negligence of appellant. He recovered judgment for \$5,000. The only question we deem it necessary to consider on the appeal is whether the facts shown on the trial warranted a recovery. These facts are as follows: On May 18, 1901, a dark cloud came up at Roland, Ky. The deceased, in company with another young man and some boys, took refuge from the rain under the porch of a store building. Part of the boys entered the store, but the deceased remained on the porch, sitting on a goods box, with his back against the grating over the window. This grating ran up near the roof, and consisted of metal rods. A telephone wire belonging to appellant, as found by the jury, ran over the roof of this porch, and within two or three inches of it. The roof was of metal, and wet. Lightning struck one of the telephone poles about six hundred yards from the porch, and after shattering that pole and several on either side of it, was conducted by the wire to the porch, where it left the wire for the iron roof, or part of it did, and passed from the iron roof to the grating, and thence through the body of the deceased to the ground, killing him instantly. There was sufficient evidence of negligence in the way the wire was attached to the house to go to the jury if the defendant owed any duty to the deceased, or if his death was the proximate result of its negligence. The wire had been placed thus on the building in the year 1899, and there had been some complaint then by the owner about it, and there had been a promise to remove it by the person who put it there, and there was some complaint also in the year 1900, but for some months before the injury nothing appears to have been said about it. Appellant did not put the wire there, but found it on the house when it took charge, but there was evidence of notice by the owner that the wire should be removed after this. There was some conflict in the evidence, but this is as strong a statement of the facts as the proof for appellee warrants.

In *Pittsburg, &c., R. R. Co. v. Bingham*, 29 Ohio St., 364, 23 Am. Reports, 751, the deceased, being out of employment, went to the passenger station of the railway for pastime, and as a place of safety during a storm. The house was negligently constructed, and by reason of this negligence fell during the storm, killing the deceased. The action was brought to recover for his death. The court, after pointing out that actionable negligence exists only where he, whose act causes the injury, owes to the injured party a duty, and referring to many cases applying this principle, held that the plaintiff could not recover. It said: "It is doubtless true that a railroad company, by erecting station houses and opening them to the public, impliedly licenses all persons to enter. But it is equally true that such license is revocable at the pleasure of the company as to all persons who are not there on business connected with the road, or with its servants or agents. An implied license to enter a depot creates no additional duty upon the part.

of the company as respects the safety of the building entered. Its only effect is to make that lawful which, without it, would be unlawful. (*Wood v. Leadbitter*, 13 M. & W., 838.) It is a waiver or relinquishment of the right to treat him who has entered as a trespasser."

In *Lary v. Cleveland, &c., R. R. Co.*, 78 Ind., 323, 41 Am. Reports, 572, some boys took refuge in an old freight house in a storm, and one of them was injured by the falling of part of the house. The court, after showing that the railroad company owed him no duty, applied the principle that where there is no duty to the person injured there is no actionable negligence. In *Severy v. Nixon*, 130 Mass., 303, 21 Am. Reports, —, a longshoreman, after loading ice on a vessel, went on it after finishing his work merely to gratify his curiosity, and while there fell down an open hatchway negligently left open, and broke his leg. It was held that the owner of the vessel owed him no duty, and that he assumed all the risks of the place. The court said: "The distinction which exists between the obligation which is due by the owners of premises to a mere licensee, who enters thereon without any enticement or inducement, and one who enters upon lawful business by the invitation, either expressed or implied, of the proprietor, is well settled. The former enters at his own risk."

These decisions are in accord with the entire current of authority, both English and American. Thus in 1 Thompson on Negligence, section 946, it is said: "As a general rule, the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, intruders, idlers, bare licensees, or others who come upon them not by any invitation, express or implied, but for their own purposes, their pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be."

In sections 947-953 many illustrations of this principle are given. To same effect is note to *Godley v. Hagerty*, 59 Am. Decisions, 736; also note to *Zoeblisch v. Tarbell*, 87 Am. Decisions, 637; *Hart v. Cole*, 16 L. R. A., 557; *Sterger v. VanSiclen, Id.*, 640.

If it be conceded that the deceased was not technically a trespasser, but a licensee, still he was a bare licensee. He had no business at the store. He went under the porch to get out of the rain, and remained there entirely for his own convenience. Under the above authorities the owner of the property was under no liability to him to keep it safe. If the telephone company had owned both the building and the wire, it would not have been under any responsibility to the deceased for his injury, although he was under its porch by its implied consent, as he was there as a bare licensee, for his own convenience. If the telephone company would not be responsible if it owned both the wire and the building, it is certainly under no greater responsibility when it owned only the wire. If it had put its own wire negligently on its own building, and thus endangered its being struck by lightning, it would be responsible to those it invited to the building in a dangerous condition, but it would not be responsible to those merely using it for their own convenience as a shelter in a time of storm. When it put its wire negligently on another person's building and was negligent in securing it, it violated its duty to him, but it violated no duty to those to whom neither he nor it were under any obligation. We, therefore, conclude, for the rea-

sons stated, the plaintiff made out no cause of action against appellant. This conclusion makes it unnecessary for us to consider the other questions discussed.

Judgment reversed and cause remanded for further proceedings consistent herewith.

COMMONWEALTH, BY, &c. v. POLLITT, &c.

(Filed October 28, 1903—Not to be reported.)

1. Exemption from taxation—Public charity—Educational institution—A bequest to a public school district of a county for the education of "all poor and indigent children in said school district" is exempt from taxation both on the ground that it is devoted to a purely public charity, and is a gift to an institution of education not used for private gain.

2. Construction of will—Defeasible fee—Where the testator devised his estate to a school district for the education of the poor and indigent children therein on the condition that if his son, who had mysteriously disappeared previously to the making of the will, should return, the property should be turned over to him to hold during his life and to the heirs of his body forever, the school district took a defeasible fee in the estate, subject to be defeated by the return of the son.

A. E. Cole & Son for appellants.

E. L. Worthington and Garrett S. Wall for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Burnam.

This proceeding was instituted under section 4241 of the Kentucky Statutes by the auditor's agent for Mason county to have the Mason County Court assess for taxation as omitted property a fund of about \$12,000 in the hands of the defendants, J. M. Byar and S. E. Pollitt, as testamentary trustees under the will of James Hieatt for the Minerva School District. The will was executed on the 5th day of June, 1889, and probated shortly after his death by the Mason County Court in 1892, and is as follows:

"I, James Hieatt, of the county of Mason, State of Kentucky, do make this my last will and testament.

"Section 1. I give and devise to Margaret Bratten the sum of \$300, conditioned as follows, viz.: That the said Margaret Bratten remain with me and continue to act as my housekeeper, as she is now doing, during the remainder of life.

"Sec. 2. I give and devise to the school district of Minerva, Mason county, Kentucky, all my estate, personal and real, of what nature and kind it may be, except the bequest made in section 1 of this testament, to be controlled and used as hereinafter set forth. My executors, hereinafter named, shall, as soon after my death as convenient, use all my personal estate, and after paying all my just debts, burying expenses, etc., and paying the bequest named in section 1, shall use the remainder of the proceeds of personal estate as hereinafter shall be directed.

"The said executors shall lease or let for money rent, payable semi-annually, all the lands of which I may be possessed at my death to the highest and best bidder for a term of two years, from the first day of March following my

death, the said rents to be used by my executors as hereinafter directed. At the expiration of the said two years the said executors shall sell all of the lands at public sale to the highest bidder, and shall invest the proceeds of said sale in interest-bearing bonds, said bonds to be selected by my executors, with the concurrence of the judge of the Mason County Court, and the interest accruing from said bonds, shall constitute a perpetual fund, which shall be known as the 'Hieatt Fund,' and shall be used and applied by my executors, hereinafter named, and their successors, who shall be appointed as hereinafter set forth, and who shall constitute a committee for the disbursement of said funds to the educating of all poor and indigent children in said school district. Said poor and indigent children shall be supplied with all necessary books and stationery for school purposes, and their tuition paid; in cases where parents can not clothe their children comfortably for to attend school, clothing also shall be supplied to said children out of said funds by said committee, and after all the above-named wants have been supplied, if there is remaining in the hands of the committee at the end of any year more than \$50, said overplus above \$50 shall be turned over to augment the public school fund of said Minerva district.

"The two executors hereinafter named shall constitute the first committee for to disburse the above-named funds as above set forth, and shall continue to act as such as long as they shall live, or remain residents of said Minerva School District. In case of death or resignation or removal from the district of either of said executors the county judge shall, with the concurrence of the remaining committeeman, appoint another resident of said Minerva district to fill the vacancy, who shall give such bonds as the county judge shall deem proper for the security of the funds which may come into his hands, and in case of the death, resignation or removal, or both, of said committeemen, then the county judge shall have power to appoint two residents of said Minerva School District, who, after they have executed bond as above named, shall constitute a committee to take charge of the funds, and the county judge is hereby empowered to fill all vacancies that may occur in said committee from time to time, this making the committee and fund perpetual.

"Sec. 3. The above bequests and conditions appended thereto shall constitute my will for the disposal of all my estate, real and personal, conditioned as follows:

"That my son, Samuel Walter Hieatt, who disappeared from his home on the 22d of November, 1887, and has not since been heard from, is dead; but should my said son, said Samuel Walter Hieatt, return and identify himself at any time after my death, and before the sale of my real estate, then my executors shall turn over to the said Samuel Walter Hieatt all my lands and other property and money that may be in their hands, after the payment of all claims and expenses have been paid. To have and to hold during his life, and to the heirs of his body forever. But should the said Samuel Walter Hieatt return and die without issue or heirs of his body, then at his death all that may remain of what is now my estate shall be placed in the hands of two trustees, appointed by the judge of the Mason County Court, who shall invest said funds as provided, and set forth in section 2, and said trustees shall disburse said funds for the same purpose and in the man-

ner as set forth in section 2, and said committee shall be required to give bond and security as required in section 2. But should the said Samuel Walter Hiatt return after the proceeds of my estate have been invested in bonds, then my executors shall surrender to the said Samuel Walter Hiatt said bonds, but shall not account to him for any interest that may have accrued on said bonds. The said Samuel Walter Hiatt to have and to hold the same under the same conditions as set forth in relation to him holding the real estate.

"Sec. 4. Should said Samuel Walter Hiatt not return until my executors have leased the lands as directed in section 2, then my executors shall use so much of the rent and proceeds of the personal property as they may deem necessary in advertising or other means to find said Samuel Walter Hiatt.

"I do hereby constitute and appoint Joseph M. Byar and O. N. Weaver executors of this my last will and testament. In witness whereof I have hereunto set my hand this 5th day of February, 1889."

Several years before the execution of this will Samuel Walter Hiatt, the only son of the testator, mysteriously disappeared and had not been heard from before his father's death. It is the contention of the appellant that the fund in the hands of the trustees should be assessed for taxation for two reasons: First, that under the will it belongs to Samuel Walter Hiatt in the absence of allegation and proof by the defendants that he is dead; second, that the devise is not to an "institution of education, not used or employed for gain by any person or corporation," and "the income of which is devoted solely to the cause of education, and that it is at best a mere private charity."

We can not concur in either contention. The bequest is not to the son, and in case of his death then to the school district; but to the school district subject, however, to be defeated by the return of the son. The return of the son is not a condition precedent to the vesting of the gift, but a condition subsequent, which would defeat the previously vested gift. There is no allegation that Samuel Walter Hiatt has returned, and there is no presumption that he has done so. On the contrary, the rule of evidence is that where a state of fact is shown to exist it is presumed to continue. As it is conceded that the son disappeared before the death of his father, the legal presumption is that he has not returned. More than fourteen years has elapsed between the date of the will and more than ten years between the probate of the will and the institution of this proceeding. After seven years, in the absence of express allegation that Samuel Walter Hiatt has been heard from, the legal presumption is that he is dead. We, therefore, conclude that the gift to the school district is a defeasible fee, subject to be defeated by the return and identification of the son. It seems to us that it can not be seriously argued that the gift is not a purely public charity. The fund is devoted to the education of the poor and indigent children of Minerva district, and in the event there is a surplus of income after complying with the provisions of the will, it goes to the district for educational purposes. The Minerva School District is as much an "institution of education" as the Kentucky State College, and, in our opinion, the fund in the hands of the trustees is exempt from taxation both on the ground that it is devoted to a purely public charity, and is a gift to an "institution of education" not used for private gain.

Judgment affirmed.

KENDALL, ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed October 28, 1908—Not to be reported.)

1. Action for damages for death of trespasser—Failure to show negligence—The only duty imposed by law on a railroad company towards a trespasser on its tracks is to avoid injuring him after discovering his perilous position. Where a person was seen by an employe of a railroad company a half hour before the train started sitting under a car smoking the reasonable presumption was that he appreciated the danger of his position and would get out before the train started, and the company was not liable for his injury in the absence of proof to show that those in charge of the train knew of his perilous position when it started.

2. Same—A railroad company is under no legal obligation to furnish medical attention to a trespasser who has been injured by one of its trains without fault on its part, and there can be no recovery on the ground of failure to give proper medical attention where the injured person was placed by the company in the hands of competent and reputable physicians and surgeons.

W. L. Dulaney and W. S. Pryor for appellant.

J. A. Mitchell, Edward W. Hines and B. D. Warfield for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Burnam.

Amos Kendall, a man about thirty years of age, was injured by a freight car in appellee's switch yard at Bowling Green, Ky., on the 20th of January, 1900, and died two days thereafter from the effect of the injury. And his administrator brought this suit on the 4th day of January, 1901, for damages for his death, alleging that the accident was due to the negligence of the defendant's servants in charge of the train which inflicted the injury. It is also alleged that defendant immediately, after the accident, took charge of the decedent and assumed to give him all necessary medical attention, but wholly failed to do so; and that he died from lack of proper attention on their part. The answer denied the alleged negligence of their servants, and plead and relied upon the contributory negligence of the decedent in bar of recovery. A trial before a jury resulted in the return of a verdict, pursuant to the direction of the court, in favor of the defendant, and plaintiff has appealed, and insists that there was sufficient evidence of negligence on the part of defendant's employes to require the submission of the case to the verdict of a jury.

The witnesses introduced by plaintiff to prove the alleged negligence of the railroad company were all its employes. Charles Johnson, defendant's switchman, testified that the injury occurred at about 9 50 o'clock in the morning; that he saw deceased about the yards about 6 o'clock in the morning when he went to get his engine out of the round house; that the deceased asked if any cops (policemen) ever came around there, and then asked at what time a train would be going North; that he told him that the regular passenger train left in about ten minutes and pointed it out to the deceased; that he then asked when a freight would leave; that he told him about 7:30 o'clock; that he then asked where a shoemaker's shop was situated, and he gave him the location of one; that about 8 o'clock he again saw deceased in the yard near the overhead bridge where the street cars

pass under the railroad; that decedent accosted him and wanted to know what time the next freight train would go out; that he told him somewhere from 9 to 9:40; and that he afterwards noticed him about the switch yard talking to different people. The witness further testified that a freight train, consisting of thirty-four cars, was standing on the siding, known as the Westbrooke track; but that no engine was attached to it; and that in passing along the side of this train about thirty minutes before the accident he saw the deceased sitting under one of the cars, with his legs over the rail, smoking, and that it was raining at the time; that deceased asked him something about when the train would leave, and that he responded to him that he did not know; and that about twenty-five or thirty minutes thereafter an engine was attached to this train and it was started forward; and that almost immediately he heard a brakeman call out to the engineer that a man was killed; that he went to the spot and found the deceased with both legs crushed above the knees; that it never occurred to him to warn the deceased that he was in any danger, as he supposed he had simply gone under the car to get out of the rain and would get out before the train started. William Peyton, a brakeman on the train, testified that he saw the deceased about ten or fifteen minutes before the injury sitting on the end of a cross-tie near the point where the injury occurred, and remarked to him that it was a rainy, bad morning; and he replied, "Yes, and very cold;" that he passed on down along the train as far as the caboose, and then crossed over between the side track on which this train was standing and the main track; and that in about ten or fifteen minutes the engine was attached to the train and started back; that before the train started deceased disappeared from his place at the end of the cross tie and was not in sight; that immediately after the train started he heard deceased call out, "Oh! Lordy, I am killed;" that he went to the point and found deceased caught under the brake beams of the car. After deceased was rescued he said that he had gone under the car to shelter from the rain and had fallen asleep, and was awakened by the wheels of the car passing over him. This was substantially all of the testimony for the plaintiff. The testimony of the defendant conduces to show that the deceased was at once placed in charge of competent surgeons and every necessary attention given him until his death, two days later. After his injury deceased told numerous persons that he had lost sleep the night before; had gone under the car to get out of the rain and while there fell asleep.

Deceased was plainly a trespasser and the only duty imposed by law upon the defendant was to avoid injuring him after he had been discovered in a position of peril. There is no proof that appellee's servants discovered his danger in time to prevent the injury. It is true that he was seen some half hour before the train started sitting under the car smoking, but the reasonable presumption was that he appreciated the danger of his position and would get out before the train started, and in fact he did so, and then seems to have deliberately gone back under the car, apparently for the purpose of stealing a ride.

The testimony fails to support the charge that the death resulted from a lack of proper attention on the part of the defendant. Being a trespasser at the time of his injury, appellee was under no legal obligation to give him

medical attention, but as a matter of fact they did put him in charge of competent and reputable physicians and surgeons. After a careful examination of the whole case we are of the opinion that the trial court did not err in sustaining the motion for a peremptory instruction.

Judgment affirmed.

GUENTHER & BRO. v. AMERICAN STEEL HOOP CO.

(Filed October 23, 1903.)

1. Service of process—Nonresident—Under the provisions of section 51, subsection 6 of the Civil Code, that "in actions against an individual residing in another State * * * engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action accrued," a service of summons on the agent of such a person is sufficient to bring him before the court, and that without showing that he was himself actually absent from the State at the time.

2. Same—Validity of statute—The provision of the statute authorizing the service of process on the agent of the nonresident engaged in business in this State is not invalid on the ground that it deprives citizens of other States of the rights and privileges of citizens of this State, as the laws of this State provide for substituted service as to residents in numerous classes of cases.

3. Entry of appearance to action—After the defendant has gone into the merits of the case by filing his answer, thereby entering his appearance to the action, an issue raised in the answer, that he was not a nonresident of the State, can not avail for the purpose of quashing the process.

4. Counterclaim and set-off—In an action to recover the purchase price of merchandise the defendant was not entitled to recover as a counterclaim against the plaintiff damages for the breach of a contract entered into between the defendant and a company which had been absorbed by the plaintiff corporation, where it appeared that the plaintiff had been organized and had absorbed the defaulting company after the date on which defendant's contract with the latter was to have been performed, and where there was no showing that the plaintiff had undertaken to answer and be liable for the past transactions of the defunct company as well as to carry out its contracts subsisting at the date of absorption.

Sweeney, Ellis & Sweeney for appellant.

Powers & Anderson for appellee.

Appeal from Davless Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, the American Steel Hoop Co., filed this action against Harry Guenther, doing business in the firm name of Harry Guenther & Bro., to recover \$647.43 for a carload of round bar iron sold and delivered by the plaintiff. It was alleged in the petition that the defendant is a nonresident of the State, and that John S. Wright is the agent and manager of his business in the State of Kentucky. A summons was issued on the petition, which was returned by the sheriff as follows: "Executed on the within-named defendant, Harry Guenther, by delivering to John S. Wright, man-

ager for said defendant, Harry Guenther, and in charge of said defendant's business in Owensboro, Ky., a true copy of the within summons."

Thereafter this order was entered: "Defendant moves that the court quash the return of summons, to which plaintiff objects. Having considered said motion, the same is overruled, to which defendant excepts."

The propriety of this order is the first question to be determined on the appeal. Subsection 6 of section 51 of the Civil Code is in these words: "In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

It is insisted that the statute was intended to apply to nonresident firms, associations or joint stock companies engaged in business in this State when all of the members reside in another State, and no more. But the first words of the section are: "In actions against an individual residing in another State." Where the business is done in this State by persons not residing here, but engaging in business here, the mischief intended to be remedied by the statute does not depend upon the number of persons running the business. The purpose of the statute is to afford some means of serving process upon this class of persons who engage in business in this State, carrying it on through agents having charge of the business, and not directing it in person. Both the language of the statute and its evident purpose over this case, as the defendant carries on a manufacturer's business in Owensboro.

It is also objected that it was not shown that the defendant was absent from the State when the process was served on his agent, and as it has been the policy of the State to require personal service, this must be shown. But the statute does not so provide. It is not presumed that a nonresident of the State is in the State. If the defendant desired to raise this question he should have shown the fact. This he did not do. It is also insisted that the statute is invalid, and in support of this proposition we are referred to *Moredock v. Kirby*, 118 Fed., 180; *Pennoyer v. Neff*, 95 U. S., 714; *Grover, &c., Co. v. Radcliffe*, 137 U. S., 287.

In *Carpenter v. Laswell*, 23 Ky. Law Rep., 686, and *Nelson, Morris & Co. v. Rehkopf & Sons*, 25 Ky. Law Rep., 362, it was stated by this court that the statute referred to is valid, but it is urged that the question was not before the court in either of those cases; and as the subject is important and not without difficulty, we will consider the question as a new one. In *Pennoyer v. Neff* an action was brought in the United States Circuit Court for the district of Oregon to recover a tract of land. The defendant claimed title to the land under a sheriff's sale made under a personal judgment in the State court against the plaintiff, who was a nonresident of the State of Oregon, upon constructive service by virtue of a statute of the State. The Supreme Court held the title bad, but in concluding its opinion after stating, to prevent misapplication of its reasoning that certain things were not meant, the court added this: "Neither do we mean to assert that a State may not require a nonresident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent

or representative in the State to receive service of process and notice of legal proceedings instituted with respect to such partnership, association or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the nonresidents both within and without the State, as was said, by the Court of Exchequer in *Vallee v. Dumergue*, 4 Exch., 290: 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.' "

In *Grover, &c., Co. v. Radcliffe*, 187 U. S., 287, a judgment had been entered in Pennsylvania without process of any kind on a bond for the payment of money which stipulated that if the bond was not paid, judgment by confession might be entered in any court without notice, and there was a Pennsylvania statute authorizing the proceedings. Suit was brought in Maryland to enforce the judgment. The Supreme Court of Maryland declined to enforce it against a citizen of that State, and the Supreme Court of the United States affirmed its judgment. After showing that the judgment was not valid under the laws of Maryland, the Supreme Court said: "And the distinction between the validity of a judgment rendered in one State, under its local laws upon the subject, and its validity in another State, is recognized by the highest tribunals of each of these States."

Further on in answer to the objection that the defendant must be presumed to have contracted in view of the laws of Pennsylvania, the court said: "But we do not think that the citizen of another State than Pennsylvania can be thus presumptively held to knowledge and acceptance of statutes of the latter State. What Bengé authorized was a confession of judgment by any attorney of any court of record in the State of New York or any other State, and he had a right to insist upon the letter of the authority conferred. By its terms he did not consent to be bound by the local law of every State in the Union relating to the rendition of judgment against their own citizens without service or appearance, but on the contrary made such appearance a condition of judgment. And even if judgment could have been entered against him, not being served and not appearing in each of the States of the Union, in accordance with the laws therein existing upon the subject, he could not be held liable upon such judgment in any other State than that in which it was so rendered, contrary to the laws and policy of such State. The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, thereby permitting the law of another State to override their own."

Neither of these cases seem to have any application to the question presented. The judgment complained of was not rendered on constructive service of process nor is the question now raised as to what effect should be given the judgment beyond the confines of this State where the statute authorizing the mode of service which was followed is without force. As the defendant was running his foundry in this State when the process was

served, and as the process was served on his manager in charge of the business, and the iron was bought for the business, the case seems to fall within the qualification made by the court of the rule laid down in *Pennyoy v. Neff*.

There is a vital distinction between constructive service of process under section 57 of the Code and substituted service of process under sections 51-54. By subsection 4 of section 51 the process may be served upon a common carrier in any county by delivering a copy to its chief officer or agent, and this section was upheld although the defendant was not incorporated. (*Adam's Express Co. v. Crenshaw*, 78 Ky., 186.) By subsection 3 a similar mode of serving process is allowed where the defendant operates a railroad, and by subsection 5 service of process against the owner is authorized to be had by delivering a copy to the agent of the person operating the railroad, where a lease has been made. This provision was held valid in *Maysville, &c., R. R. Co. v. Ball*, 108 Ky., 241. By section 52, if the defendant is under fourteen years of age the summons must be served on his father; or if he have no father, on his guardian; or if he have no guardian, on his mother; or if he have no mother, on the person having charge of him. By section 53 similar provision is made for the service of process on persons of unsound mind. By section 54, if the defendant is a prisoner in the penitentiary, a copy of the petition must accompany the summons; and the service must be on the keeper of the penitentiary, who shall deliver the copy of the petition and summons to the prisoner. By section 55, if the defendant be a community of Shakers, holding property in common, the service must be made by posting a copy of the summons at the door of its meeting house and by delivering a copy to some member of the community. Similar provisions to these have been in force in this State from the earliest times and in other States of the Union. In many of the States it is provided by statute that a copy may be left at the defendant's place of abode where it is impossible to obtain personal service. In New York, when substituted service is necessary, an order of the court is required and the order can not be attacked collaterally. In the Federal courts, without the aid of any statute, substituted service is allowed in an ancillary proceeding to bring in parties to the principal suit. (19 Ency of Pleading and Practice, pages 620, 631.) The general rule is that substituted service of process is equivalent to personal service, and warrants a personal judgment if made in the manner pointed out by the statute on the ground that the defendant is presumed to have received the notice. (*Sturgis v. Fay*, 16 Ind., 439; *Rauber v. Whitney*, 125 Ind., 216; *People v. House*, 4 Utah, 382; *Conwell v. Atwood*, 2 Ind., 299; *Bourbage v. American National Bank*, 95 Ga., 503.) Where a nonresident obtained a common law judgment and a suit was brought in equity to enjoin it, it was held that process might be served on his attorney without the aid of the statute. (*Chalmers v. Hack*, 19 Me., 124.) The same rule is followed in the Federal courts in actions for a new trial. (*Oglesby v. Attrill*, 14 Fed., 214, and cases cited.)

It is thus apparent that there have always been well-recognized exceptions to the general rule requiring personal service of the process on the defendant, and the competency of the legislature to provide for a substituted service, when necessary, has been generally recognized by the courts. In *Biesenthal*

v. Williams, 63 Ky., 331, a suit was brought in this State to enforce a judgment rendered in Ohio on a service of process by leaving a copy at the defendant's residence, the defendant being then a citizen of Ohio. The court held the judgment valid and enforced it, saying that this mode of service was, under the statute, in actual service of process, and that the laws of Ohio were binding upon the citizens of that State, although they could not operate extra-territorially. The nonresident of this State who comes into it and does business here does so subject to its laws, and when he carries on this business by a substitute the State may properly provide that the service of process on the substitute shall be legal. No sound distinction can be drawn between such a provision of the statute and that authorizing process against an infant under fourteen years of age, or a lunatic to be served on the person having charge of him, or against the persons operating a railroad on the agent in the county where the transaction occurs. If notice of the action does not in fact reach the defendant, ample remedy is also provided by the Code for the granting of new trials where, from unavoidable casualty or misfortune, the party is prevented from appearing or defending. (Code, section 518; *McCall v. Hitchcock*, 9 Bush, (6.)) In the case before us the defendant in fact received notice of the action, for he appeared and moved to quash the process.

In the case of *Moredock v. Kirby*, 118 Fed., 180, process served under the statute in question was quashed by the Circuit Court of the United States for the Western District of Kentucky upon the authority of *Pennoyer v. Neff*, and because it deprived citizens of other States of the rights and privileges of citizens of this State.

We can not see that section 2 of article 4 of the Constitution of the United States has any application. As shown, the statutes of the State allow substituted service of process on other classes of persons than nonresidents of the State. The rights and privileges guaranteed to the citizens of States by the Federal Constitution are their fundamental rights as citizens. What rights the guarantee includes the Supreme Court has declined to define, but legal remedies may be allowed against those who are domiciled without the State which are not allowed against those who are domiciled within it. Thus in *Cooley on Constitutional Limitations*, 490, 6th edition, after pointing out certain rights that are included, it is said: "But it is unquestionable that many other rights and privileges may be made, as they usually are, to depend upon the actual residence; such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like. And the constitutional provisions are not violated by a statute which allows process by attachment against a debtor not a resident of the State, notwithstanding such process is not admissible against a resident."

So it is held that a statute requiring security for cost from nonresident plaintiffs suing in the State is valid. (Ib., page 25, note; 19 *Ency. of Pleading and Practice*, 344, and cases cited.)

Under these principles the legislature of any State may classify litigants according to the impracticability of obtaining personal service of process and authorize substituted service when necessary to the administration of justice. This right of the States seems to be expressly recognized by the Supreme Court in *Pennoyer v. Neff*. We, therefore, conclude that the stat-

ute is not invalid, and that the motion to quash the process was properly overruled.

The defendant, in his answer, put in issue the allegation of the petition that he was a nonresident of the State. This was immaterial, for having gone into the merits of the case, as he did by his answer, he had entered his appearance to the action. In the first paragraph of the answer the defendant undertook to put in issue the allegations of the petition as to the purchase of the iron sued for, but the denials of this paragraph were insufficient, and the court properly sustained a demurrer thereto. The denial that the defendant was indebted in any sum was only a statement of a conclusion of law. The denial that the defendant agreed or promised to pay the plaintiff the money sued for was insufficient to constitute a defense, the allegations of the petition that the iron was sold and delivered at the defendant's special instance and request and at the prices set out in the itemized account filed being undenied.

In the other paragraph of the answer the defendant alleged that on the — day of March, 1899, he contracted with the firm of Taylor & Blackwell, at Lewisport, Ky., to manufacture for them one thousand plow fenders, to be delivered not later than April 15, 1899, and in order to enable him to comply with his contract he wrote to J. Paynter & Sons' Co., on March 6, 1899, at Pittsburg, Pa., offering to purchase the necessary material for the fenders, notifying them within what time he must have it in order to comply with his contract; that they answered on March 8, 1899, and agreed to furnish him the material within ten days or two weeks, and relying on this he closed his contract with Taylor & Blackwell; that about this time J. Paynter & Sons' Co. took stock in appellee and appellee undertook to carry out the contract of J. Paynter & Sons' Co., but failed to do so, and thereby he was disabled from carrying out his contract and sustained damages in the sum of \$1,000, which he plead as a counterclaim and set-off. The plaintiff, by its reply, put in issue the allegations of the answer, and then pleaded that it was incorporated on April 14, 1899, and had no existence before that date, and that the time within which the iron was to be furnished, under the allegations of the answer, had expired before it came into existence. A copy of the article of incorporation was filed with the reply, sustaining its allegation as to the time when the plaintiff was incorporated. To this reply the defendant filed the following rejoinder: "Defendants state that while it may be true that plaintiff was incorporated on the 14th day of April, 1899, they charge and allege the fact to be true that the said J. Paynter & Sons' Co. had previous to that time, with others, gone into and had agreed upon the terms upon which they would form a corporation known as the American Steel Hoop Co., and that the foundry, mills and plant, factories of J. Paynter & Sons' Co. had shut down for the purpose of taking stock with a view of delivering the same to said company, the plaintiff herein, and that the said company, the American Steel Hoop Co., had been formed for the purpose of, among other things, of taking the contracts, the assets and business, good will and liabilities of corporations, associations and firms and individuals, and did take pursuant to the agreement they had all the contracts of J. Paynter & Sons' Co., including the one plead by defendant in its answer, and undertook to carry the same out, knowing at the time and

having in its possession and under its control all correspondence between defendant and J. Paynter & Sons' Co. They further state that while the said J. Paynter & Sons' Co. agreed and contracted to furnish the material to defendant within ten days or two weeks after the 12th day of March, 1899, they state that after plaintiff had taken possession and control of the said J. Paynter & Sons' Co., it undertook and agreed to carry out said contract, and its incorporation was in part to enable it to carry out the contracts of the said J. Paynter & Sons' Co. with other contracts it had agreed and assumed to do at the time of the formation of the corporation and in pursuance of a plan that had been promulgated prior thereto."

The court sustained a demurrer to the rejoinder and entered judgment for the plaintiff, the defendant failing to plead further. By the terms of the defendant's contract he was to deliver the fenders on April 15. The plaintiff did not come into existence at Pittsburg until April 14. The material ordered of J. Paynter & Sons' Co. was a lot of steel, costing something over \$50, which was ordered to be shipped from Pittsburg to Owensboro by water. It was manifestly too late for appellee to comply with the contract of J. Paynter & Sons' Co.; that company became liable, under the pleading, when it failed to deliver the goods within two weeks of March 12.

The liability of J. Paynter & Sons' Co. for the contract which it had broken became absolute before appellee was incorporated. The rejoinder is not sufficient in its averments to show that appellee assumed all the liabilities of J. Paynter & Sons' Co., or that it assumed its liability to appellant. Its undertaking to carry out contracts which were subsisting was a very different thing from its undertaking to assume the liabilities of J. Paynter & Sons' Co. for past transactions. There is not enough in the rejoinder to show that appellee is answerable to appellant for the shortcoming of J. Paynter & Sons' Co., which had ripened into an absolute liability before appellee came into existence.

Judgment affirmed.

Whole court sitting.

Chief Justice Burnam dissenting on the question of the validity of the service of process.

BUTLER COUNTY V. JAMES.

(Filed October 28, 1903.)

1. County officer—Salary—Change during term—While it is the duty of the fiscal court of a county to fix the salary of the county judge for his entire term before his election or qualification, its failure to do so will not prevent its doing so thereafter. Where the fiscal court made an order fixing the salary for the first year of the term it operated to fix the amount for each subsequent year during the term, and orders fixing the yearly salary for succeeding years at a different amount from the first were in violation of the provisions of the Constitution, which forbid the changing of an officer's salary during the term for which he was elected. (Constitution, sections 161, 235.)

2 Same—Waiver of right to salary—The county judge waived none of his rights to the full amount of his salary as fixed in the order for the first year by accepting a less amount allowed by the fiscal court for subsequent years.

J. W. Harreld for appellant.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Hobson.

Appellee James was elected county judge of Butler county at the November election, 1893, and at the November election, 1897, was re-elected to that office. He served out his term. He was allowed by the fiscal court for his services as county judge \$400 for the year 1897; \$500 for the year 1898; \$400 for the year 1899; \$400 for the year 1900, and \$500 for the year 1901. He accepted his pay as allowed by the fiscal court, but after the conclusion of his term filed this suit to recover of the county \$200, on the ground that his salary had been fixed at \$500 a year, and that for two years of his term only \$400 had been paid to him. The county demurred to his petition. The demurrer was overruled. It then filed an answer, pleading the orders of the fiscal court in bar of the action. A demurrer was sustained to the answer, and judgment having been entered in favor of the plaintiff the county appeals. The orders of the fiscal court referred to are as follows:

"Butler Fiscal Court, October term, 23d day of October, 1896.

"Appropriated out of the county levy for 1897, for county judge's salary for the year 1897, same to be paid quarterly, as prescribed by law. \$400.

"Butler Fiscal Court, October term, 9th day of November, 1897.

"Appropriated out of the county levy 1898, \$500 for county judge's salary for year 1898, to be paid quarterly as prescribed by law.

"Butler Fiscal Court, 5th day of October term, 7th day of October, 1898.

"Appropriated out of county levy of 1899, \$100 for county judge's salary for year, 1899, to be paid quarterly as provided by law."

"Butler Fiscal Court, 5th day of October term, 6th day of October 1899.

"Ordered, that there be appropriated out of the county levy of 1900, for the purpose of paying county judge's salary for the year 1900, the sum of \$400, same to be paid quarterly as prescribed by law. Upon question of which allowance esquires present each voted 'yea,' except Esq. Taylor, who did not cast his vote upon the question."

Before the adoption of the present Constitution it was customary for the court of claims to make allowances annually to the county judge and county attorney; and it is apparent from the above orders that the fiscal court of Butler county has been proceeding in the same way since the adoption of the present Constitution, not observing its provisions:

"The compensation of any city, county, town or municipal officer shall not be charged after his election or appointment, or during his term of office; nor shall the term of any such officer be extended beyond the period for which he may have been elected or appointed." (Section 161.)

"The salaries of public officers shall not be changed during the term for which they were elected; but it shall be the duty of the general assembly to regulate, by a general law, in what cases and what deductions shall be made for neglect of official duties. This section shall apply to members of the general assembly also." (Section 235.)

Under these provisions it has been held that the fiscal court can not make any change in the salary of the county judge during his term of office, and that while it is the duty of the fiscal court to fix the salary of the county

judge for his entire term before his election or qualification, yet if it shall fail to do so it may fix his salary thereafter. (*Marion County Fiscal Court v. Kelley*, 22 Ky. Law Rep., 174; *Barret v. Falmouth*, 109 Ky., 151, 22 Ky. Law Rep., 667.)

The purpose of the constitutional provisions is to leave the officials, whose duty it is to fix the salary, free from the importunity and personal influence of the incumbent of the office and to secure to him for his term, when his salary is once fixed, the amount so agreed to be paid him, and thus make him more independent in the discharge of his official duty. Under these provisions of the Constitution it is the duty of the fiscal court to fix the salary of the county judge and other county officers, to be allowed by it, before their election, that is, there should be a general order fixing the salaries, and not an allowance each year for that year; and when the salaries are once fixed they can not be changed to affect those already elected or appointed, and any change will not take effect until after the next election or appointment.

The Butler Fiscal Court, before the election of appellee, should have made a general order fixing the salary of the county judge; but if they had failed to do this, they could fix it after his election, for else it could not be fixed at all; and the failure of the fiscal court to do its duty can not be permitted to deprive the county judge of his reasonable compensation guaranteed him by law; but when his salary was once fixed it could not be changed during his term so that he would receive a different amount for different years of his term. The order of the county court made at its October term, 1896, did not undertake to fix the salary of the county judge, or make any provision for it, except for the year 1897. It is substantially the same as the order in the case of the *Marion County Fiscal Court v. Kelley*, which was held only to apply to the year 1897. But the order made by the fiscal court on November 9, 1897, appropriated \$500 for the county judge's salary for the year 1898, and he was under this order entitled to have a salary of \$500 for the first year of his new term. If the court could, by a subsequent order, allow him a different amount, then his salary would be changed during his term, contrary to the express provision of the constitution. The difficulty with the orders made for the years 1899 and 1900 is that they change the salary of the county judge during his term of office.

The orders of the fiscal court are not a bar to the action. It is a body of limited power. One of the things which it has no power to do under the Constitution is to change the salary of county officials during their terms. Its attempt to change the salary of the county judge being in violation of the Constitution, was void; and being void, their order may be disregarded when pleaded in bar. (*Morgantown Deposit Bank v. Johnson*, 108 Ky., 507, 2 Ky. Law Rep., 210.)

The county judge waived none of his rights by accepting the \$400 allowed him for the two years in controversy. He was entitled to a term of four years under the Constitution. He was also entitled to the salary of \$500 a year, which, under the Constitution, could not be changed during his term. The acceptance of a part of a debt never estops one to claim the remainder. The case of *Lexington v. Renick*, 105 Ky., 779, 22 Ky. Law Rep., 609, rests on essentially different facts. There the city had the power of removal, and

the officers by accepting the sums paid them led the city to understand that they were willing to serve it therefor, and thus secured a continuance of their holding which was dependent upon the pleasure of the city.

Judgment affirmed.

SOUTHERN RAILWAY CO. IN KENTUCKY v. THURMAN.

(Filed October 28, 1903—Not to be reported.)

1. Bill of exceptions—Stenographer's transcript of testimony—A legislative act applicable to courts of continuous session, which provides that "the transcript or duplicate made by the reporter and filed in the clerk's office, when certified by the court to be correct, may be used in the Court of Appeals as a part of the record in the action or prosecution in which the notes from which it has been transmitted were made," does not obviate the necessity of a bill of exceptions filed by order of court; and such a transcript, which is certified only as containing all the oral testimony heard upon the trial and which is not filed by order of the court, can not be treated as a bill of exceptions.

2. Pleading—Sufficiency of petition—The petition in an action by a passenger for damages against a railroad company for being ordered out of the ladies' coach and into the negro coach of a railroad train is defective in failing to allege that the plaintiff was a white woman, and entitled to ride in the coach for white passengers.

3. Same—Where the petition alleged that an officer on the train had made certain statements as to her character in stating why she had been ordered into the negro coach to her additional damage, the failure to negative the truthfulness of the statements rendered it further defective.

Humphrey, Burnett & Humphrey and Thornton & Kerr for appellant.

W. C. Bell and Morton, Darnall & Wilson for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Barker.

The appellee, Louella Thurman, obtained a judgment in the trial court against appellant, the Southern Railway Co., for the sum of \$1,000 damages for being, as she claims, ordered out of the ladies' coach into the negro coach of one of its trains, upon which she was a passenger.

No bill of exceptions was signed by the trial judge, but in lieu thereof appellant has attached to the transcript a copy of the stenographer's notes, which is certified by that officer as containing a full and accurate transcript of the shorthand notes of the oral evidence heard in the case, and which was examined and approved by the trial judge. Prior to the submission of this case appellee, by counsel, entered a motion to strike the stenographer's notes from the record. This motion was not passed upon when made, but was submitted with the whole case. It is urgently insisted by counsel for appellant that the transcript of the stenographer's notes, certified and approved, as before stated, should be treated as the bill of exceptions, and much reliance is placed on section 8 of an act, entitled "An act to provide for stenographic reporters for courts of continuous session," in support of this view. This act applies to circuit courts of continuous session, in counties having a population of less than one hundred and fifty thousand, and which

constitute a separate judicial district, and, therefore, applies to the circuit court of Fayette county. Section 8 of this act is as follows: "The transcript or duplicate made by the reporter and filed in the clerk's office, when certified by the court to be correct, may be used in the Court of Appeals as part of the record in the action or prosecution in which the notes from which it has been transcribed were made."

This language does not obviate the necessity of a bill of exceptions filed by order of court, but merely authorizes the use of the transcript filed in the clerk's office in order to save the cost of copying it in the record. There is no substantial difference between this section of the special act and section 4644 of the Kentucky Statutes; and neither was intended to substitute the transcript of the stenographer's notes for the bill of exceptions.

In the case of *McGeever v. Kennedy*, 19 Ky. Law Rep., 845, it was said: "As to the bill of exceptions, the record shows that the official stenographer of the court below certifies that the transcript filed by him contains a full and accurate transcript of the shorthand notes of the oral testimony given on the trial of the case, and on page 67 he says that this was all the evidence offered by either party, or heard by the court and jury on the trial of the case. This transcript of the stenographer was examined and approved by the presiding judge of the court, who signed his name at the foot thereof, and this order was entered: 'The defendant, by counsel, tendered to the court a bill of exceptions, and transcript of the testimony herein, and the court, having examined, approved and signed same, orders that they be filed and made a part of the record and proceedings herein,' which was done."

As to the sufficiency of this bill the court said: "The Code of Practice, section 335, provides that no particular form of exceptions or bill of exceptions is required, and the transcript filed with the record is a sufficient compliance with the statute to entitle appellant to avail himself of the exceptions which it shows were taken upon the trial of the case, and may be properly treated, under the facts of this particular case, as a bill of exceptions."

In the case cited it was certified that the transcript contained all of the evidence heard upon the trial, and it was signed by the presiding judge, and filed as a bill of exceptions. Not so in the case at bar. The transcript of the stenographer's notes is not certified as containing all of the evidence heard upon the trial, but only all of the oral evidence introduced therein; nor was it filed by order of court; and, lacking these fundamental requirements it can not be treated as a bill of exceptions. It follows, therefore, that the motion of appellee to strike the stenographer's transcript from the record should be sustained, and the only question remaining to be considered is whether or not the pleadings support the judgment. (*Martin v. Richardson*, 14 Ky. Law Rep., 847; *C. O. & S. W. R. R. Co. v. Smith*, 19 Ky. Law Rep., 1826.)

The substance of appellee's complaint is that she was required, by the officer and servant of appellant, to leave the ladies' coach and go forward into the coach set apart for negroes; that when she discovered that the coach into which she had been ordered to go was occupied by negroes, she returned to the ladies' coach, and attempted to re-enter, but was prevented therefrom by the servant of appellant, who said to her that the reason he had ordered

her into the negro coach was that "there was where she belonged; that he knew her of old, and that she belonged to a disreputable class, and resided in a disreputable locality in the city of Lexington;" all of which was insulting to appellee, and greatly mortifying and humiliating to her, to her damage, etc.

The statute known as the "Separate Coach Law," Kentucky Statutes, sections 797 to 801, inclusive, requires railroad corporations, operating within this State, to provide separate coaches for the transportation of white and colored passengers, making their failure so to do a misdemeanor, punishable by a fine of not less than \$500, nor more than \$1,500 for each offense; it also requires the conductors, or managers, of all railroads to enforce these provisions, the language of the statute, upon this subject, being as follows:

"Section 799. The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment, and should any passenger refuse to occupy the car, coach or compartment to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off the train. And for such refusal and putting off the train neither the manager, conductor, nor railroad company shall be liable for damages in any court.

"Section 800. That any conductor or manager on any railroad who shall fail or refuse to carry out the provisions of section 799 shall, upon conviction, be fined not less than \$50 nor more than \$100 for each offense."

It will thus be seen that it was the duty of appellant and its officers and employees to enforce the provisions of the separate coach law.

This action was instituted by appellee to recover damages because appellant, and its officers, in undertaking to enforce the law, had required her to leave the ladies' coach and occupy a seat in the coach for negroes; but it is nowhere alleged in the petition that appellee was a white woman, or entitled to ride in the coach for white passengers; there is no allegation in the petition which shows that the officer, in requiring appellee to leave the one car and go into the other, was not strictly following his duty under the statute, nor is the matter alleged in aggravation of the main cause of action negatived. It is alleged that the brakeman said to appellee that the reason he had ordered her into the negro coach was because she belonged there; that he knew her of old; that she belonged to a disreputable class, and lived in a disreputable locality in Lexington; but there is no allegation that this was false in any part. Taken as a whole, there is nothing alleged against the appellant or its employees which is inconsistent with the discharge of their duty under the statute. It is a familiar rule that pleadings must be construed most strongly against the pleader, and it would seem to follow, therefore, that the failure of appellee to allege that she was a white woman, and entitled to ride in the coach for white passengers, raises the presumption that she was not white, and not entitled to ride in the coach set apart for white passengers. A general demurrer was filed by appellant to the petition, and overruled by the court. The answer does not cure the defects of the petition, and, therefore, the pleadings will not support the judgment.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

FARMERS BANK OF BEATTYVILLE'S ASS'EE v. PRYSE.

(Filed October 28, 1903—Not to be reported.)

Title to real estate—Champertry—Where a debtor, long prior to the creation of certain indebtedness, and while he was perfectly solvent, sold certain of his real estate for a valuable consideration and executed a title bond to the purchaser, obligating himself to execute a general warranty deed upon the payment of the purchase money, and the purchaser took possession of the property and thereafter continuously held and resided upon the same adversely to her vendor and all others, her title was good as against that of a creditor who purchased the same property at an execution sale made to satisfy the subsequent indebtedness of her vendor, his purchase being champeritous under section 210 of the Kentucky Statutes, and void.

H. L. Wheeler for appellant.

E. E. Hogg for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Barker.

On the 21st day of April, 1891, the appellant, G. D. Hieronymous, assignee of the Farmers Bank of Beattyville, Ky., recovered a judgment against David Pryse for the sum of \$5,000, with interest from April 6, 1891, until paid.

On the 18th day of September, 1894, execution was issued on this judgment, which, coming to the hands of the sheriff of Lee county, was levied by that officer on the land involved in this litigation as the property of the execution defendant.

On the 22d day of October, 1894, the sheriff sold the land, which was purchased by the execution creditor, for the sum of \$3,001. This property was afterwards conveyed by the sheriff to the purchaser.

On the 29th day of April, 1898, a writ of possession was issued in favor of the purchaser, requiring the sheriff to place him in possession. This writ the sheriff was proceeding to enforce, whereupon the appellee, S. E. Pryse, claiming to be the owner and in possession of the land, filed a petition in the Lee Circuit Court, seeking to enjoin the sheriff from executing the writ. To this action G. D. Hieronymous, assignee, by petition, was made defendant, and thereupon the issue as to whether or not the property belonged to S. E. Pryse, or to her brother-in-law, David Pryse, the execution defendant at the time the levy and sale were had, was made up. The facts, as claimed by appellee, are as follows:

In 1888, long prior to the creation of the debt to the bank, David Pryse then being the owner in possession of the property in question, which consisted of certain town lots in the city of Beattyville, Ky., sold it to appellee, by verbal contract, for the sum of \$2,200, thereafter to be paid, and at once placed her in possession. After being thus placed in possession appellee at once erected valuable improvements upon the property, at a cost exceeding the price to be paid for the lots, and thereafter openly lived in and occupied the same with her family, to the exclusion of David Pryse and all the world; that before the 30th day of June, 1890, she had paid to David Pryse the sum of \$2,021.41 of the purchase money; upon this day she executed and delivered to him her note for \$177.59, being the unpaid balance due him; at

which time he executed and delivered to her a bond for the title, fully describing the land by metes and bounds, reciting the payment made, and the delivery of the note for the balance, and covenanting, when the note was paid, to convey the property to appellee by deed of general warranty; that all this was prior to the creation of appellant's debt, and at a time when David Pryse was abundantly solvent, and owing appellant nothing; that the price paid for the land was fairly equal to its value, and the purchase was made in absolute good faith, and upon the consideration mentioned.

These facts were placed in issue by the pleadings of appellant, but they seem to us to be fully established by the evidence. It is indubitably shown that appellee has been in the actual, open occupancy of the land upon which she erected valuable improvements, using it as a home for herself and family, since 1888. The property is in the city of Beattyville, and if these facts had not been true they could have been readily disproved.

We have not been able, after a careful reading of the record, to discover any evidence of fraud in the transaction between the appellee and David Pryse; on the contrary, we are forced to the conclusion that the sale to appellee was made in good faith, for a sufficient consideration, at a time anterior to the creation of appellant's debt, and when the vendor was fully solvent. There is no evidence of any act on the part of appellee which would estop her from claiming the property as against appellant, even if estoppel had been pleaded.

Appellant was not an innocent purchaser. The record shows, as said before, that appellee was in the actual, open occupancy of the land, using it as a home, and claiming it as against all the world, from a time long anterior to the creation of appellee's debt. He was, therefore, under the provision of section 210 of the Kentucky Statutes, a purchaser at a champertous sale, which was null and void. These conclusions seem to have been reached also by the chancellor, who, upon final submission of the case, perpetuated the injunction prayed for by appellee.

Wherefore, the judgment is affirmed.

LOUISVILLE WATER CO. v. WEIS.

(Filed October 29, 1902—Not to be reported.)

Evidence—Proof of collateral facts—In an action to recover damages resulting from the flooding of a cellar by water from a leaking water meter, as alleged, proof that other cellars in the neighborhood had been flooded with water was not admissible in the absence of anything to show that those cellars were similar to the one in question, or that they were similarly situated with reference to the meter complained of.

Burnett & Burnett and Wallace Colter for appellant.

Forcht & Field and Gordon & Gordon for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 2.

Opinion of the court by Judge Settle.

The appellee sued the appellant in the Jefferson Circuit Court (Common Pleas Branch, 2d division) for damages sustained to his house, and other property, by the flooding of his cellar with water from the appellant's water

meter near the house, which leaked by reason of appellant's alleged negligent failure to mend it, and keep it in repair.

The answer denied that appellee's cellar was flooded with water from appellant's meter; that the meter was out of repair; that it leaked, or that appellant negligently or otherwise failed to keep it in repair, and also denied that appellee was damaged in any amount by water from the meter, and concluded by averring that appellee's damage, if any, was caused by his own contributory negligence. The affirmative matter of the answer was controverted by reply. The trial resulted in a verdict and judgment in appellee's favor for \$350, and the lower court having refused appellant a new trial, the case has come to this court by appeal. The only ground of complaint urged by counsel for appellant is that the lower court erred to its prejudice in excluding certain evidence which it sought to introduce on the trial, that is to say, appellant attempted to prove by several witnesses that other cellars in the neighborhood were flooded by water as well as that of appellee, and that such flooding occurred at different seasons of the year and from causes other than the leaking of the meter, but this, upon objection of appellee, the lower court refused to allow.

Counsel for appellant argue that this evidence was admissible upon the principle that all evidence that will aid in ascertaining a material fact, or from which a material fact may be inferred, or which may be inferred as a consequence of a fact proven, the existence of another fact is admissible, and in support of this proposition a number of authorities are cited. An examination of the cases cited will, however, show that they do not apply to the facts of the case at bar, for it is a maxim not to be disregarded, said Marshall, C. J., in *Cohens v. Virginia*, 6 Wheaton, 399. "that general expressions in every opinion are to be taken in connection with the case in which these expressions are used," and while the general proposition relied on by counsel for appellant is laid down in the cases cited in support thereof, the facts of those cases justified it. But none of these cases is similar to this one. The question here was as to whether or not appellee's cellar was damaged, and his property therein injured, by the leaking of the appellant's meter. It was neither alleged nor proven that other cellars in the neighborhood were in any way similar in character or situated with respect to the meter as was that of appellee, or that they were flooded from the leaking meter. Upon the contrary, the proof seemed conclusive that appellee's cellar was flooded from the leaking meter alone.

As announced in *Greenleaf*, volume 1, section 50: "The evidence must correspond with the allegations, and be confined to the point in issue," and in further commenting on this rule the same author, in section 52, says: "This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumptions or inferences as to the principal fact or matter in dispute; and the reason is that such evidence tends to draw the minds of the jurors away from the point in issue, and to excite prejudice and mislead them; and, moreover, the adverse party having had no notice of such a course of evidence, is not prepared to rebut it."

Hawkes v. Charlemont, 110 Mass., 110, and *Lincoln v. Fauntou, Mfg. Co.*, 9 Allen (Mass.), 181, are cited in a note following the above quotation, and in the latter case plaintiff seems to have sued for damages to his land, pro-

duced by noxious substances carried by water thereto from the defendant's factory, it was held that the trial court properly rejected testimony offered to show the bad condition of similarly situated meadows in the same vicinity and upon the same stream.

In *Hays v. Town of Burlington*, 38 Vt., 330, which was an action to recover damages for injuries caused to the plaintiff's land and buildings by the stoppage by defendant of a natural stream of water, whereby the water was backed upon plaintiff's land and filled his cellar, causing the walls of the building to crack and settle, the defendant offered to prove by a witness, Bens, that the walls of a nearby house owned by him, but which was not touched by the water, had been cracked by the action of frost. This testimony was rejected by the lower court, and its ruling in so doing was sustained by the Supreme Court, which said: "The rejection of the evidence as to the Bens house walls having been cracked by the action of the frost was correct. If the evidence of the action of the frost on the walls of other buildings was admissible at all, it does not appear that the location and surrounding conditions of these two buildings were so similar that one would be any fair test for the other." To the same effect are the following cases: *Dorn v. Ames*, 12 Minn., 451; *M. K. & T. Ry. Co. v. McGregor*, 68 S. W., 711; *L. & N. R. R. Co. v. Reutlinger*, 9 Ky. Law Rep., 814; *J. M. & I. R. R. Co. v. Esterle*, 13 Bush, 678.

In the latter case this court said: "The court erred in permitting appellee to prove that other houses, several squares distant, had been injured by smoke and cinders, and by being shaken by the passing trains. The evidence should be confined as nearly as practicable to property alleged to be injured."

So after all the competency of the evidence excluded depended upon the circumstances of the case, and the question of its admissibility was addressed to the sound discretion of the trial judge, and even if we were in doubt as to the correctness of his ruling in excluding it, in view of the convincing character of the evidence of the appellee, that his injuries complained of were caused alone by the leaking of the water from the defective meter, we are unable to see that its exclusion was prejudicial to the appellant.

Judgment affirmed.

O'MALLEY v. WAGNER, &c.

(Filed October 23, 1903—Not to be reported.)

Estoppel—A person who pays an installment of interest on a bond for the payment of which he is not legally bound is not thereby estopped to deny his liability.

Walter P. Lincoln for appellant.

Forcht & Field for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 1.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Jefferson Circuit Court in favor of appellees, wherein they were sued by appellant, in which action they sought to enforce a mortgage lien for the collection of bonds executed by appellees

to the German-American Title Co. The lower court determined that appellees were not responsible on these bonds only to the extent of \$800, the amount of money actually borrowed and received of the title company. We deem it unnecessary to give in detail the facts with reference to this transaction, or discuss the law applicable to the questions involved, except upon two points hereinafter referred to. The facts are similar, and the legal questions involved are the same, as in the cases of Louisville Insurance Co. v. Hoffman, 20 Ky. Law Rep., 2016; Schnable v. German-American Title Co., 21 Ky. Law Rep., 1063; Waggoner v. German-American Title Co., 22 Ky. Law Rep., 215, and Richie v. Cralle, 22 Ky. Law Rep., 160.

The appellant contends that this case differs from the cases referred to upon two propositions: First, he contends that appellants should have had a judgment rendered in their favor for the reason that they proved by one Leiber that some one of the officers of the German-American Title Co. told appellee, John Wagner, that they could not let him have all the money on his bonds until they sold them. It is true the record shows that Leiber made this statement, but appellee positively denied it, and stated that he understood at all times that the company was lending him the money, and the only reason given by the officials of this company for their failure to furnish him with the amount of the bonds was that their president, Ollie Speckert, was absent, and sick, and that the checks could not be signed in his absence. The evidence upon this point was conflicting, and we are not disposed to disturb the finding of the lower court thereon. Appellant also contends that appellee was and is estopped from making a defense to the collection of these bonds for the reason that, in October after the appellant purchased the bonds in April, 1896, he paid to appellant \$24, the first installment of interest thereon.

The appellant had already parted with her money for the purchase of these bonds long before this payment of interest, and her rights and interest were not prejudiced thereby. We do not understand that because a person pays a part of a debt for which he is not legally bound that he thereby becomes bound to pay the balance. (Goins v. Taylor, 18 Ky. Law Rep., 463.)

For these reasons the judgment of the lower court is affirmed.

SHANKS v. CITIZENS GENERAL ELECTRIC CO.

(Filed October 29, 1903—Not to be reported.)

Master and servant—Personal injury—Negligence—Where the foreman of a force engaged in stringing electric wires had received a warning that a certain pole was dangerous and for him to keep his men off it, it was negligence for the foreman to direct one of his men to get upon that pole to perform labor without giving him the information which he had received with regard to its dangerous condition; and proof to that effect was sufficient to authorize a submission of the case to the jury in an action for damages against the master by a servant who had been injured while at work on the dangerous pole.

Emory H. Lindenberger and W. J. O'Connor for appellant.

O'Neal & O'Neal for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 2.

Opinion of the court by Judge Nunn.

The appellant appeals from a judgment of the Jefferson Circuit Court on a verdict rendered against him on a peremptory instruction. The contention of appellant is that he was an employe of appellee, working under the orders and directions of a superior by the name of Holt; that they were repairing the electric wires of appellee at a point near Third and Jefferson streets in the city of Louisville; that near one of the poles of appellee stood a similar pole belonging to the Louisville Electric Light Co., and being unable to make the connection of appellee's wire by remaining on appellee's poles with the implements at hand, the foreman, Holt, ordered and directed this appellant to go over onto the pole of the Louisville Electric Light Co. and to walk out on one of the arms of this pole, where he could reach the wires of the appellee, so as to stretch the slack out of it; that he was able to reach the wire, but could not get the implement which he had for use, called a "come along," to take hold of the wire with the insulation on it; that his superior, Holt, directed him to take his knife and cut off the insulation, which he did, and then clasped it with this implement; that there were electric wires above his head and on the arm near his feet belonging to the Louisville Co., and in his effort to stretch appellee's wire there was an involuntary movement of one of his feet, which came in contact with one of the wires of the Louisville Co., which was a live wire, and his foot was severely burned; that he knew the position he occupied was a dangerous one, but had no thought of coming in contact with a live wire of the Louisville Co. He further stated the instrument which he had for such use, the "come along," was not a proper and safe implement for such use; that a rope with a knot in it was the proper and safe thing, but which had not been furnished.

This court is at a loss to determine certainly the meaning of the lower court in the bill of exceptions in the use of this language: "The official transcript of the evidence showing correctly all the objections and exceptions made and taken, and ruling of the court thereon, is filed herewith as a part of this bill, marked "transcript of testimony." Such testimony was taken down in shorthand and subsequently transcribed by the stenographer, and the transcript is a full, accurate and correct transcript of the testimony in the case except that it omits a statement which the plaintiff says was made by John Geywitz, a witness in his behalf, to the effect that he warned the defendant's foreman, Holt, that his men would be hurt if he sent them on the pole of the Louisville Electric Light Co. at Third and Jefferson streets. There appears in the record the affidavits of John Geywitz, Emory H. Lindenberger, one of the counsel for appellant, C. R. Dinwiddie, and Robert N. Krieger, to the effect that Geywitz gave such testimony on the trial of the action.

While it is not clear, we are of the opinion from the language of the court in the bill of exceptions that it intended to adopt this statement as a part of the testimony of Geywitz. There was no testimony offered by appellee, for at the end of appellant's testimony there was a peremptory instruction given to find for appellee. We are of the opinion that the lower court erred in the giving of this peremptory instruction. There was evidence tending to support appellant's claim.

In the case of *I. C. R. R. Co. v. Langan*, 25 Ky. Law Rep., 500, the court said: "There are certain risks which a laborer assumes as an incident of his employment. Among these is that of the ordinary negligence of his fellow servants. Although each servant in the common employment is a representative of the master to the extent that he is acting within the scope of his duties, yet for many kinds of ordinary neglect towards his fellow servants the master may not be liable for resulting injuries. However, there are certain duties which the master owes to his servants that are primary and personal in their nature, and which he may not delegate to another so as to escape liability for their nonperformance. Among these he owes to his servants to furnish them a reasonably safe place to do their work, and must furnish them reasonably safe tools and appliances with which to do it. * * * So where the master assigns or imposes upon one of his servants the duty of representing him in providing these means, the servant's acts are deemed to be those of the master, and for a simple neglect by such servant the master is responsible as though he acted in person."

The appellee contends that appellant's own testimony shows that he was aware of the danger incident to his work, and of the defective and insufficient appliances furnished him with which to do the work, and for these reasons the court was right in giving the peremptory instruction. Upon his subject the court, in the same case, said: "We understand the rule on his subject to be that if the danger or risk is such that a prudent man would have refused to do the work under the circumstances because of the danger, then the servant will act at his peril in undertaking it. But where the probability of injury is such that the minds and judgments of prudent men might well differ upon the certainty of its happening, or with regard to whether the force or appliances are reasonably safe or adequate to the performance of the task, and where the master insists, after objection, that the servant proceed with the work, or assures him that the force is adequate or the machinery safe, then the servant has the right to rely upon the master's presumed superior knowledge. The risk is thereby assumed entirely by the master, and he impliedly assures the servant, who relies upon his statement, or who obeys his positive direction, that if he, the master, is in error as to the safety, he would indemnify the obedient servant against the consequences."

If the foreman of the Louisville Electric Light Co. had given Holt, the foreman of appellee, information that this pole at the corner of Third and Jefferson was dangerous and for him to keep his men off of it; that they might get hurt, then it was certainly negligence for appellee's foreman to direct appellant to get upon this pole to perform labor, and especially without giving him the information he had received with reference thereto.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

PERRY COUNTY v. ENGLE.

(Filed October 29, 1903.)

Public roads of county—Contract for grading of—Where no supervisor of roads has been appointed by the fiscal court of a county the county judge has no authority to appoint a commissioner to let out by contract the grad-

ing and cutting down of hills upon public roads without the fiscal court first ordering the work to be done by the county judge or a commissioner appointed by him; and a contractor who performs the work under contract with a commissioner appointed by the county judge without such authority from the fiscal court is not entitled to recover the price thereof from the county. (Section 4339, Kentucky Statutes.)

F. J. Eversole and Cleon K. Calvert for appellant.

W. C. Eversole for appellee.

Appeal from Perry Circuit Court.

■ Opinion of the court by Judge O'Rear.

Appellee claims that Perry county is indebted to him in the sum of \$400 on a contract for certain work done by him on a public highway within the county. It is shown that the fiscal court of the county had not appointed a supervisor of roads. The county judge, sitting alone as the county court, appointed Squire Smith a commissioner to let to the lowest and best bidder the job of blasting out a portion of a cliff, so as to cut down a hill to a proper grade for changing a county road to that point. The commissioner reported to the county court that he had let the work at a public bidding, and that appellee was the lowest and best bidder at the price of \$400, and that the work had been let out to him, and the contractor's bond was filed with the report. The commissioner did not file the report until some months after he had let the work. The county attorney immediately filed exceptions to the report. He objected to it on the ground that the county court had not jurisdiction to appoint the commissioner or to make the contract on behalf of the county. The exceptions were sustained by the county court, and the report and action of the commissioner were not confirmed. Appellee went ahead with the work, and completed it. He filed his claim under the contract before the fiscal court and moved its allowance. It was rejected, and he appealed to the circuit court, where the claim was allowed and the county prosecutes this appeal.

By section 4306, Kentucky Statutes, the fiscal courts of the counties are given general charge and supervision of the public roads and bridges. The county court has no authority to let contracts concerning the repairs of public roads. Its jurisdiction is confined to laying the county off into road precincts, and allotting hands to work the roads, and appointing overseers. (Sections 4309-4310, Kentucky Statutes.) It may order new roads to be opened or the routes of old ones changed. (Section 4289, Kentucky Statutes.) But no authority is conferred upon it to incur any liability on behalf of the county except the fixing of the amount of compensation to the land owners whose land is taken for the new road. In case of an emergency only can the county judge contract for the repair of a bridge owned and kept up by the county. (Section 4345, Kentucky Statutes.)

Section 4339, Kentucky Statutes, governs the cutting down of hills upon public roads by contract. It provides that the road supervisor, upon the order of the county judge, may let the work to the lowest and best bidder. The section concludes: "If there be no supervisor, the fiscal court may order such work done in the manner provided in this section by the county judge or a commissioner appointed by it."

It is not claimed that the fiscal court of Perry county ordered this work done at all. The county judge had no authority to contract for the work on behalf of the county except under the order of the fiscal court. The action of the county court in appointing the commissioner, as well as the act of the commissioner in letting the work to appellee, was void, being in excess of the jurisdiction of the county court. Appellee is required to take notice of the law. He is bound at his peril to know the extent of the authority of an agent of the county in contracting with him. All persons must take notice that a county can contract only in the manner, and by the persons, and for the purposes, expressly provided by statute.

The judgment of the circuit court is reversed and cause remanded, with directions to enter a judgment for the county upon the claim and contract sued on.

BURKHART v. LOUGHRIDGE, &c.

(Filed October 29, 1903.)

1. Ejectment—When title papers need not be filed with pleading—A party, who claims under a title bond covering the land in controversy in an action in ejectment, is not compelled to file it with his answer before the trial, and it was error to strike his answer from the files for failure to do so.

2. Title bond—The recording of a title bond imparts to it no more legal force, except as serving as a notice to creditors and purchasers, than if it were not recorded; and the recording of it does not relieve the claimant under it from the necessity of affirmatively showing its execution when attacked.

3. Right to trial of issue joined—The defendant having alleged in his answer that the plaintiffs knew of the existence of his claim when they bought the land, he was entitled to a trial of the issue, as such purchasers could not be protected against the bond on the ground of their innocence if the allegation was true.

H. C. Clay for appellant.

H. E. Ross for appellees.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge O'Rear.

In this ejectment suit, brought by appellees against appellant, the latter set up claim of an equitable title to 100 acres of land by reason of a title bond alleged to have been executed by appellees' grantor, Wm. Turner, Sr., in 1874. Appellant claimed in his answer that the title bond had been executed by Turner, July 5, 1874, to one Ingle, and assigned by the latter to appellant in 1900; that owing to the loss of the title bond it could not be filed. Appellees claim by derivation from Turner's heirs. Appellant also averred that appellees had notice and knowledge of Ingle's claim when they bought from Turner's heirs. Appellant was ruled by the court to file his title bond with his answer. He responded that he could not because it was lost or misplaced, and after diligent search he was unable to find it, and did not know where it was. Appellees controverted the response, and pleaded that the alleged bond was a forgery, and was a part of a fraudulent scheme of appellant's and Ingle's to steal the timber from the land. The circuit court

heard proof at the bar concerning the alleged loss of the bond. Appellant testified that he had lost it since he had it recorded in the county clerk's office. His statements do not entirely satisfy the mind, and in some features tend to discredit his good faith in the matter. The circuit court made the rule absolute, and appellant failing to file the bond, his answer was stricken from the files, and judgment entered against him on the merits of the case. We are of opinion that the court erred in these rulings.

In the first place, appellant was not compelled to file the alleged bond before the trial of the action, or at least before some evidence was introduced by him bearing on its genuineness. This bond, or paper, was only evidence of appellant's title, as a deed or other writing tending to show title might have been. A party is not required to file his title papers before the time of trial, but may do so. (Section 128, Civil Code.) The only papers which a party is required to file with his pleadings are those mentioned in section 180 of the Code, to wit: "If an action, counterclaim, set-off or cross petition be founded on a note, bond, bill or other writing, as evidence of indebtedness, it must be filed as a part of the pleading, if in the power of the party to produce it; and if not filed, the reason for the failure must be stated in the pleading; if upon an account, a copy thereof must be filed with the pleading."

Under the old Code, section 155, required that "if either party shall rely upon any deed or other writing, he shall file with his pleading the original deed or writing if within his power, etc."

It was also provided that when filed they should "remain on file for inspection of either party until allowed to be withdrawn by the court." The present Code contains no such provision. It is true the genuineness of the bond relied on by appellant is attacked. Unlike a deed duly acknowledged and certified, or an official copy of such deed, the instrument does not prove itself, but its execution by the putative makers must be shown affirmatively by the party relying on it or claiming under it. Its being recorded, as allowed by section 500 of the statutes, does not change this rule. This section of the statute was not enacted to enable the transfer of title to real estate by title bonds as is done by deeds, nor was it designed to change the rules of evidence as to the genuineness of such papers. It was only to give notice to future creditors and purchasers of the equity created by the bond. The bond remained only a bond, to be enforced, rescinded, or defeated by the parties to it, or by any other person affected by it as if it had never been recorded. Its being recorded imparts to the bond no more legal force, except as serving as a notice to creditors and purchasers, than if it were not recorded. If the party claiming under a title bond fails to avail himself of the provision of the Code (section 128), allowing him to file it in advance as evidence on his behalf, the trial court has it in his power to allow the other party reasonable opportunity after it is filed to contest its genuineness, and to prevent surprises.

In the next place, appellant was entitled to a trial of the issue tendered, to the effect that appellees knew of the existence of this claim and title in Ingles when they bought. If they did know of it, then they could not be innocent purchasers, and protected against it as such.

The judgment is reversed, with directions to set aside the judgment, as

well as the order striking appellant's answer from the files, and for further proceedings not inconsistent herewith.

JETT v. FARMERS BANK OF KENTUCKY.

(Filed October 29, 1903—Not to be reported.)

1. Default judgment—Power of court to set aside—A trial court has power, in the exercise of a judicial discretion, to set aside a default judgment at the term at which it was entered, and to allow a defense; and it would be an abuse of discretion to refuse to do so where the reasons shown for not filing an answer in time presented a good excuse, provided the answer tendered presented a defense to the action.

2. Action on note—Sufficiency of answer—In an action to enforce the purchase money lien on real estate which had been conveyed to the purchaser by general warranty deed the allegation of the answer, that a third party was in the actual possession of a part of the land, claiming it under superior title, was insufficient in that it failed to allege that the party was in the actual, adverse possession at the time of the execution of the deed, or that he had been adjudged to have the paramount title.

Leland Hathaway and D. W. Lindsey for appellant.

J. J. C. Bach, John E. Patrick, Kelly Kash and John W. Rodman for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee conveyed to appellant a tract of land in Breathitt county, taking as evidence of the unpaid part of the consideration three of appellant's notes for \$650 each. The notes were secured by lien upon the land. Appellee executed to appellant a deed for the land, with covenant of general warranty of title, which was accepted and put to record. This suit was brought in the Breathitt Circuit Court by appellee after the maturity of the notes to enforce their payment by a sale of the land. Judgment was entered by default upon the calling of the cause upon the docket on June 4, 1902. On June 10, 1902, this order appears: "Motion by defendant to set aside judgment and file answer."

On November 5, 1902, the following order appears: "This cause having been submitted on the motion of the defendant to set aside judgment and file answer, and the same having been heard, and the court being advised overrules the said motion to set aside the judgment and file answer. The defendant excepts to the ruling of the court and prays an appeal to the Court of Appeals, which is granted."

At the March term, 1903, of the court the following order was entered: "It appearing that defendant offered to file an answer at the June term, 1902, of this court, and it appearing that an order was made herein at the November term, 1902, refusing to allow said pleading to be filed and making it part of the record, and it further appearing that it failed to recite the fact that said answer was made part of the record, it is ordered now for them that said answer be made part of the record, marked 'A' for identity, and plaintiff excepts."

The answer is copied in the transcript. The office of a nunc pro tunc order is to supply on the record something which has actually occurred in the court, but omitted to be noted of record. It has effect as of the former date. But it can not supply omitted action by the court. The record must be corrected, too, upon the evidences alone furnished by the records of the court. (*Martin v. Martin*, 6 Ky. Law Rep., 451.)

This answer shows that it was not sworn to till September 30, 1902. The orders of the court show that the defendant only moved to set aside the judgment and file answer. They don't show that an answer was tendered. However, on the back of the answer there appears an endorsement by the clerk, "tendered and offered to be filed June 11, 1902." Even accepting the difference in the dates, June 10, as shown in the order, and June 11, as shown by the clerk's memorandum, to be a mistake of the clerk, yet there is nothing in the record to show that on June 10, 1902, the court made the rejected answer a part of the record, or that he attempted to do so, or that a motion to that effect was entered. Unless the rejected answer was made part of the record, either by an order of court or by bill of exceptions, it will not be considered on appeal. (*Nolan v. Feltman*, 12 Bush, 119.)

We, therefore, question whether the answer now presented ever became a part of the record by the order of the court at the March term, 1903. But waiving that question we have considered the answer.

As an excuse for failing to file the answer within the time prescribed by the practice act of 1902 appellant, in this answer, says: "That he employed J. B. Marcum, a regular practicing attorney at this bar, to prepare and file an answer in this case, to defend same for him, and he relied on said attorney to make this defense; that he was not aware until two days after the judgment was entered herein that said attorney had not filed his answer. He has since learned that said attorney has left Jackson, and was afraid to attend court, in fear of personal violence."

The answer, under the practice act which became a law March 29, 1902 (Acts of 1902, page 273), was due to be filed in this case on June 1. Section 3 of the act contains this provision: "If any party shall fail to file any plea at the rule day at which the same is due, he may file the same at a subsequent rule day, and as soon as practicable, and he shall file therewith his affidavit, or other sworn statement, as to the cause of his delay, and if the court shall consider his excuse insufficient, it may, at the next regular term, strike such plea from the file."

This section regulates only the practice as to filing pleadings in vacation. The court has always had the power, and has yet, in the exercise of a judicial discretion, to set aside a default judgment at the term at which it was entered, and to allow a defense. The facts stated showing why the answer was delayed in this case were a good excuse, and if they had been sworn to, and if the answer tendered really presented a defense to the action it should have been allowed, and it would have been an abuse of judicial discretion to have rejected it. The only matter attempted to be set out in the answer as a defense is the allegation that one Miller was in the actual possession of about 100 acres of the land sold to appellant by appellee, claiming it under a superior title. The answer does not allege that Miller was in the actual, adverse possession of the land when appellee executed the deed to appellant,

nor does he claim that Miller had been adjudged to have the paramount title. For aught the pleading shows, Miller entered after the execution of appellee's deed, so that his act was a mere trespass, at most, against appellant. Or his possession might have been amicable to appellee's title at the time of sale to appellant, and, therefore, it could not be a defense to the notes because Miller, as tenant, had asserted an illegal claim of title against his landlord. (*Miller v. Farmers Bank of Ky.*, 25 Ky. Law Rep., 373.) The answer did not present a defense, and, therefore, its rejection by the court was not error.

Judgment affirmed.

LOUISVILLE RAILWAY CO. v. O'MARA.

(Filed October 29, 1903—Not to be reported.)

Excessive damages for personal injury—A verdict for \$1,100 compensatory damages for injury to the index finger of appellee's left hand, which resulted in breaking and mashing the bone and the consequential loss of two months from his business, at which he was employed at \$65 per month, but which resulted in no permanent diminution of his ability to earn money, was so excessive as to evidence passion and prejudice on the part of the jury and should be set aside.

Fairleigh, Straus & Fairleigh for appellant.

William A. Earl for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 2.

Opinion of the court by Chief Justice Burnam.

The bone of the index finger of the left hand of appellee was broken below the second joint, and the finger mashed while he was riding upon the rear platform of one of appellant's cars in consequence of the negligence of appellant's servants. He was employed as a stenographer and typewriter at a salary of \$65 per month before the accident. As a consequence of his injury he lost two months from his business, and was compelled to pay a surgeon \$125 for his services in dressing the wounded finger every day for about forty days. At the end of two months he resumed his employment at the salary which he had received previous to his injury, his finger in the meantime having gotten well. He sued the Louisville Railway Co., and recovered a judgment for \$1,100, which we are asked to reverse on the ground that the verdict is excessive.

The testimony in the case shows that there was no permanent diminution of plaintiff's ability to earn money in consequence of his injury, and the judgment, after compensating him for loss of wages and doctor's bill, awards him \$845 for pain and suffering resulting therefrom. Subsection 4 of section 340 of the Civil Code provides that a new trial may be granted on the application of the party aggrieved for excessive damages, appearing to have been given under the influence of passion or prejudice. In *L. & N. R. R. Co. v. Law*, 14 Ky. Law Rep., 851, a verdict of \$2,000 for an injury to appellee's thumb, which rendered its amputation at the first joint necessary, was held so excessive as to evidence passion or prejudice, and was set aside. In that case the court said: "The amount of damages assessed is so utterly unrea-

sonable and unjust, being at least four times more than it ought to have been, that the verdict clearly appears to us to have been given under the influence of passion or prejudice."

In *N. N. & M. V. Co. v. Walker*, 14 Ky. Law Rep., 175, it was held that a verdict for \$1,250 for the loss of one joint of the right thumb was so excessive that it should be set aside, the plaintiff not being entitled to punitive damages.

While appellee testifies that he suffered a great deal of pain as a result of his injury, it was not sufficient to confine him at any time, or to permanently impair his capacity to earn money. The proof in this case does not warrant an instruction for punitive damages, and none was asked or given.

We are of the opinion that a verdict for \$1,100 for compensation alone is so excessive as to indicate passion or prejudice.

The judgment is, therefore, reversed and cause remanded for a new trial consistent with this opinion.

CLAY'S GUARDIAN V. WALLACE.

(Filed October 29, 1903.)

Husband's right of homestead—Abandonment—Under the provisions of section 1708 of the Kentucky Statutes the husband is entitled to a joint occupancy with his deceased wife's infant children of her homestead until the infants arrive at twenty-one years of age, after which he is entitled to its use, and occupancy during his life; but it does not vest in him an unconditional vendible life estate therein, and an unconditional sale and conveyance or his ceasing to occupy it amounts to an abandonment, at which it reverts to her heirs at law. It was error for the court to order a sale of the homestead at the instance of the husband and to direct the payment of \$1,000 of the proceeds thereof to the husband upon the execution by him of a bond to the infant child of his wife for that amount, without interest, payable at his death.

C. F. Spencer for appellant.

Riddell & Riddell for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellee, James A. Wallace, brought this suit against the appellant, J. H. Hardwick, as guardian of Floyd G. Clay, an infant, asking a sale of a house and lot in the town of Irvine, under section 490 of the Civil Code. He alleges in his petition that on the second day of May, 1901, he married the mother of the infant defendant, Floyd G. Clay; that a short time after their marriage the wife advanced \$1,000 to be used in the erection of a dwelling house on a lot owned by him in Irvine, under an agreement that he should execute a deed to her for \$1,000 worth thereof; that pursuant to this agreement, on the 19th of September, 1901, he executed a deed with covenant of general warranty for \$1,000 of the value of the lot; that he and his wife and her infant son occupied the property as a home until her death, on the 8th day of May, 1902; that F. G. Clay is under fourteen years of age, and then resided in Powell county with his grandfather and statutory guardian; that as surviving husband, he was entitled to the use and occupation of that

part of the property which belonged to his deceased wife as a homestead; that it was insusceptible of division without materially impairing its value, and asked that it should be sold to the highest and best bidder, and the proceeds divided between himself and the infant defendant in accordance with their respective rights. The defendant, Hardwick, as statutory guardian of the infant, filed an answer, in which he denied that plaintiff was entitled to a homestead in that part of the house and lot which belonged under his deed to his deceased wife, and says that at the death of the wife plaintiff and her infant son were jointly entitled to the use and occupation of the property during the minority of the infant; and that when it ceased to be so occupied the infant was entitled to \$1,000 in the property, and asked that the interest of his infant ward be protected. Proof was taken showing that the property was insusceptible of division, and worth about \$1,500. The chancellor adjudged that the property should be sold by the master commissioner upon a day fixed by himself, after advertisement thereof, as similar property is required to be advertised when sold under execution, and should take bond for the purchase price, payable to himself as commissioner; and that out of the proceeds of the sale the defendant, Hardwick, as guardian of Floyd G. Clay, was entitled to \$1,000, subject to a life estate therein of plaintiff; and that plaintiff could retain the \$1,000 by executing in open court a covenant to the infant defendant with good security for the \$1,000, without interest, payable at his death. The defendant excepted to so much of this judgment as authorized Wallace to retain the \$1,000, and has brought the case up for review.

Section 1707 of the Kentucky Statutes provides: "The homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age; but the termination of the widow's occupancy shall not affect the right of the children. But said land may be sold subject to the right of said widow and children if a sale is necessary to pay the debts of the husband."

Section 1708 of the Kentucky Statutes provides that "the homestead of a woman shall in like manner be for the use of her surviving husband and her children situated as above; and when his and their interest ceases, it shall be disposed of in like manner, and the proceeds applied on the same terms to her debts; if none, divided among her children."

Under section 1708, the plaintiff, Wallace, and the infant, Floyd G. Clay, were jointly entitled to the use and occupation of the homestead of the deceased wife until the infant was twenty-one years of age. After that time Wallace was entitled to its use and occupation during his life. But the statute did not vest in him an unconditional vendible life estate in the homestead of his deceased wife. His homestead rights therein depend upon its occupation by him. Whenever he permanently ceases to occupy the homestead of his deceased wife, his right thereto ceases, and the property reverts to the heirs at law of the wife. And an unconditional sale and conveyance of the property amounts to an abandonment. (*Freeman, &c. v. Mills*, 101 Ky., 142; *Bryant v. Bennett*, 23 Ky. Law Rep., 1866; *Kimberlin v. Manson, Isaacs, &c.*, 28 Ky. Law Rep., 42.) But under section 2132 of the Kentucky Statutes he is entitled to have an estate for life in one-third of all the real estate

to which his wife, or any one for her use, was seized of an estate in fee simple during coverture, unless such right shall have been barred, forfeited or relinquished.

The judgment is reversed and cause remanded for proceedings consistent with this opinion.

LUCAS, &c. v. LUCAS' ASS'EE.

(Filed October 28, 1903—Not to be reported.)

Assignment for benefit of creditors—Where an assignment for the benefit of creditors was not impeached by a proceeding in bankruptcy instituted shortly thereafter the State court had the right to take charge of the property so assigned and to distribute it among the creditors, hence a sale of the property by order of court was proper, and the purchaser's liability on the purchase money bonds may be enforced.

D. D. Fields for appellants.

Salzer & Baker for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Paynter.

In 1890 W. M. Lucas made an assignment to J. D. Fitzpatrick for the benefit of his creditors, and there came into his hands, as assignee of the assigned estate, a stock of merchandise which he, as assignee, on the 28th of April, 1900, pursuant to an order of the Letcher County Court, sold to the appellant, B. M. Lucas, who executed a note for the purchase money with the appellant, Breeding, as surety. This action was instituted by the assignee to recover the unpaid part of the purchase money. The defendants filed an answer, in which they averred that W. M. Lucas, on the 5th of May, 1900, in the United States District Court was adjudged a bankrupt, and on the 5th of September, 1900, was discharged from his debts and liabilities; that in making the schedule of his assets he included the stock of goods for which the note was executed; "that by operation of law" the note in suit is in the hands of one Price, trustee of the bankrupt. The court sustained a demurrer to the answer.

The question here is, did the court err in doing so? There is no averment in the answer that any proceeding was instituted by the trustee in bankruptcy to recover as part of the bankrupt estate the merchandise for which the note was executed or the note. There has been no attack made in the Federal court on the assignment as an act of bankruptcy, hence the assignment has never been impeached as an act of bankruptcy, therefore, the State courts had the right to take charge of the property and distribute its proceeds ratably among all the creditors. This conclusion is supported by an opinion of this court in *Downer v. Potter*, ante, 571, and cases therein cited. The answer did not present a good defense, and the court properly sustained the demurrer to it.

The judgment is affirmed.

LANGDON-CREASEY CO. v. TRUSTEES OWENTON COMMON
SCHOOL DISTRICT, &c.

(Filed October 28, 1903.)

Taxation of property of corporations—Under section 4085 of the Kentucky Statutes the property of a corporation, which is not required to report its property to the auditor for assessment and taxation, must be assessed in the same manner as that of a natural person; and its personal property having been assessed for taxation at its residence and principal place of business, such property can not be assessed elsewhere although located in another county of the State.

Chas. Strother for appellant.

John W. Douglas for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Paynter.

The appellant is a corporation organized under the laws of this Commonwealth and is engaged in the retail grocery business. Its residence and principal place of business is Covington, Kenton county, Kentucky. It also has retail grocery stores in various places of the State, including one in Owenton, Owen county, Kentucky. Supposing it was its duty to do so, it listed all its property in Covington for taxation. The trustees of the common school district assessed the property in Owenton for taxation. The question here is whether the stock of goods in Owenton should have been assessed there or in Covington.

From the averments of the petition this is not an effort upon the part of the appellant to evade the payment of taxes, but to prevent its property from being assessed in two places, thus being subjected to the burden of double taxation. The law requires that the articles of incorporation should designate the principal place of business of the corporation. It was held in *Newport & Cincinnati Bridge Co. v. Wooley*, 78 Ky., 523, that a corporation can not have two domiciles at the same time, and that it obtains a residence not by its own act, but by legal authority. From the averments of the petition we conclude that its residence is in the city of Covington. This is not a corporation which is required to make a report to the auditor of public accounts for the purpose of being assessed. (Sections 4077 and 4078, Kentucky Statutes; *Louisville Tobacco Warehouse Co. v. Commonwealth*, 20 Ky. Law Rep., 1047.) Section 4085, Kentucky Statutes, provides that "the property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and for failure shall be subject to the penalties by this article provided; and so long as said corporation pays the taxes on all its property of every kind the individual stockholders shall not be required to list their shares in said corporation."

As this corporation is not required to report to the auditor its property for assessment and taxation, it is assessed "in the same manner as that of a natural person." The property sought to be taxed is personal property, and this court in *Wren v. Boske*, 24 Ky. Law Rep., 1780, held that personal property of a taxpayer should be assessed in the county of his residence, although

it was kept in another county of the State. The court went into details, pointing out various sections of the statute upon which it based its conclusion; that the situs of personal property for the purpose of taxation was in the county of the taxpayer's residence, the court holding that there was a legislative declaration to that effect. As appellant corporation has a legal residence, and not being in the class of corporations which are required to report to the auditor, it must be assessed in the same manner as that of a natural person. It seems to us that there is no escape from this conclusion. The legislature has the unquestioned authority to fix the situs of property for the purpose of taxation. This conclusion is not in conflict with the case of *Louisville v. Tatum, Embry & Co.*, 23 Ky. Law Rep., 1014. In that case the effort was to tax partnership property, and the court held that a partnership is a distinct entity, and its property is subject to taxation at the place where it conducts its business. In that case some of the members of the firm lived in and some outside of the municipality which sought to impose the tax. The case of *Wren v. Boske*, is made to turn upon the legislative intent, and this case is likewise made to turn.

The judgment is reversed for proceedings consistent with this opinion.

MAYES, & CO., TRUSTEES V. LANE, & CO.

(Filed October 28, 1908.)

1. Builder's contract—Liability of sureties on bond—Where a contract for the erection of a building provided that the contractor should furnish all material and construct the building "in strict accordance with the plans and specifications furnished," and a bond for the performance of the contract provided that the materials should be furnished and the building erected in "strict accordance with the terms and conditions of the contract," the sureties on the bond were liable for the failure of the contractor to finish the building in accordance with the plans and specifications.

2. Same—The sureties were also liable for claims of material men and for labor on the building which the contractor had not satisfied and which had been asserted as liens on the building.

3. Same—Where the contract provided for the payment of 85 per cent. of the contract price of the building from time to time as the work progressed, and the balance of 15 per cent. ten days after the work had been completed, "provided the property was free from all liens or rights of liens for debts due or claimed to be due," the sureties were not released from liability of the bond by reason of the application of a part of the 15 per cent. to the discharge of lien claims against the building after the contractor had quit work, but before the building had been completed according to contract.

4. Bill of exceptions—Time for filing—Where the court fixed a day in the next term for filing a bill of exceptions the intervention of a special term of the court did not affect the order previously made, which had reference to the succeeding regular term.

Hendrick & Miller, William Marble and John C. Gates for appellants.

Bloomfield & Crice for appellee Katterjohn.

J. D. Mocquot for appellee Hart.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Paynter.

The Christian Church at Princeton burned and the congregation, desiring to rebuild it, entered into a contract with the appellee, James E. Lane, a contractor, for that purpose. The contract price was \$4,300, but it was reduced to \$4,280. Article 4 of the contract reads as follows: "In consideration of the fulfillment of the agreement herein made by the contractor, the owners agrees to pay the said contractor the sum of \$4,300, in installments as follows, 85 per cent. of the cost of the labor and materials incorporated into the construction of the building from time to time as the work progresses, and the balance ten days after the entire work has been completed, provided the property is free from all liens or rights of liens for debts due or claimed to be due from the contractor, and satisfactory evidence thereof is furnished (if requested) to the owners. All payments shall be made upon written certificates from the architect to the effect that, in their opinion, such payments have become due, but no certificates or payments shall be considered as a waiver by the owners of any of the provisions of this contract, nor shall any waiver of any breach of this contract be held as a waiver of any other or subsequent breach."

Those representing the church being unwilling to rely upon Lane's obligation, required him to give a bond to secure the church, which he did, with George O. Hart and F. W. Katterjohn as sureties. The bond reads as follows:

"This agreement witnesseth, That whereas James E. Lane, of the city of Paducah, Ky., has entered into a contract in writing, of even date herewith, with E. M. Johnson, T. M. Powell and T. J. Johnson, as the building committee selected by the members of the Christian Church, of Princeton, Ky., through their board of officers, to supervise and direct and contract for the construction of a church building in Princeton, Ky., to furnish the material, build and erect for them a brick church building on the lot of ground on which the Christian Church, which was recently destroyed by fire, stood, for the sum of \$4,300, well and truly to be paid to said Lane, and said Lane to furnish said material and build and erect said church building in strict accordance with the plans and specifications furnished.

"Now, therefore, in consideration of the premises, and in order to secure said E. M. Johnson, T. M. Powell and T. J. Johnson, building committee, as aforesaid, in the faithful compliance by said Lane with the terms of said contract, said Lane and the undersigned, F. W. Katterjohn, Jr., and George O. Hart, his sureties, hereby declare and acknowledge themselves firmly bound and indebted to said E. M. Johnson, T. M. Powell and T. J. Johnson, building committee as aforesaid, in the sum of \$2,500; this obligation to be void, however, if said Lane shall well and truly furnish said material and build and erect said church building in strict accordance with the terms and conditions of said contract, otherwise it shall remain and be in full force and effect."

Pursuant to the contract Lane began the construction of the church. According to the claim of the representatives of the church, and which is sustained by the evidence, Lane did not construct and complete the church according to the plans and specifications and terms of his contract. It will be observed that 85 per cent. of the contract price was to be paid upon the

certificate of the architect as the work progressed, and 15 per cent. was to be paid in ten days after the building was completed, providing the property was free from all liens or rights of liens for debts due or claimed to be due from the contractor. The 85 per cent. was paid before the building was completed. After the contractor had quit the work, but before the building was completed, as required by the contract, the 15 per cent. was paid (less some thing over \$100) to persons having liens on the building for material and labor. After Lane quit work upon the building it was ascertained that there were several hundred dollars due from the contractor for material which had been used in the construction of the building and due laborers for work done in the construction of it. These sums the church was compelled to discharge. This action was brought against the sureties on his bond to recover damages for his failure to complete the building according to his contract, and for failing to discharge the debts for the material and labor, and for which liens existed on the building.

Defense is made chiefly upon the grounds, first, that the church was completed; second, that the bond of the sureties did not make them liable for the defective construction of the building, or to discharge any liens existing for material or labor in its construction; third, that as the church did not retain the 15 per cent. of the contract price the sureties are released from liability on the contract.

We must first determine what liability was imposed upon the sureties by their bond. Under the contract the sureties bound themselves that Lane would furnish the material and build the church "in strict accordance with the plans and specifications furnished" and "in accordance with the terms and conditions of said contract." Was the building "completed" in the contemplation of the agreement of the parties if it was not built in accordance with the specifications and terms of the contract? Our opinion is that it was not. The building committee representing the church desired the building to be erected according to plans and specifications agreed upon. This the contractor agreed to do, and the sureties guaranteed that it would be so built. The rule is that the sureties are only bound according to the terms of their bond. Certainly it would be an utter disregard of the language of the bond to hold that the church was completed when Lane failed to erect it according to the plans and specifications. The sureties guaranteed that Lane would furnish the material and erect the building. In the erection of the building Lane had to perform the labor himself or to employ some one to do it. It follows that the sureties guaranteed that the necessary materials and labor would be furnished to erect the building. But it is urged on behalf of the sureties that the terms of their bond were complied with when the material and labor was furnished; that their contract did not require them to protect the church against the cost of the material and labor. Reduced to the last analysis, their claim is that Lane complied with his contract by furnishing the material and labor, although the church was compelled to pay for such part for which Lane failed to pay. Lane did not comply with his contract when he furnished the material and labor, unless he paid for it, or released the building from liability therefor. The parties agreed that Lane was to draw 15 per cent. of the contract price for the purpose of paying his accounts for material and labor; and it may be added

here that the church was under no obligation to see to the application of the 85 per cent. to the discharge of such debts. Under the law a lien existed for the material which went into the building and for labor performed in its erection. It would be an extremely narrow view to take the contract to hold that the sureties were under no obligation to protect the church against the claims for material and labor for which a lien existed on it.

The next contention is, that they are released because the church paid out most of the 15 per cent. of the contract price before the church was completed according to the contract. We recognize the law to be that the relation between a creditor and one known to him as surety is one of trust and confidence, and demands the exercise of good faith upon the part of the creditor in dealing with him. Circumstances under which a surety may be released by the conduct of the creditor is well stated in *Sneed's Ex'or v. White*, 3 J. J. M., 526, where the court said: "But any settled agreement, or active interference by the obligee, whereby the surety may be injured, or subjected to increased risk, or deprived of, or suspended in the assertion of his equitable right, to force the obligee to sue the principal, or of his right to pay the debt, and occupy the attitude, in equity, of the obligee, will release the surety in equity."

It is perfectly manifest that the 15 per cent. was to be withheld until the church was completed, and to be applied to the discharge of any liens which might be ascertained to exist against the church. The evidence in this case shows that the 15 per cent. was not sufficient to discharge the lien claims against the church by several hundred dollars, but whatever part of it was so applied was disposed of as the contract required. The sureties can not complain of that disposition of it, as it was made according to the terms of the contract. Besides, that disposition of it released them pro tanto of their liability for the debts paid with it. Our conclusion is that the sureties guaranteed that Lane would furnish the material and labor necessary to complete the contract, and after he failed to do it they are liable to the church for the damage which was sustained by the breach of the contract, not to exceed the amount of their bond; that their obligation is not discharged until the building has been released of liens for material furnished and labor performed in the erection of the building.

Our opinion is, under the facts of this case, the appellants are not entitled to recover the \$10 per day for the delay in the completion of the building.

It was an action at law, and the law and facts were submitted to the court, and the testimony was heard in open court, but the court transferred the case to equity on his own motion while it was so being heard. The court extended the time until a day in the next term of court for filing a bill of exceptions. Afterwards the court called and held a special term. At the special term the appellants presented the bill of exceptions, but the appellee objected to having it signed and made part of the record, presumably because it was proper to have it done on the day in the next regular term fixed in the order of extension. The bill of exceptions was presented and signed and made part of the record at the time designated by the order of the court. Our opinion is that the intervening of the special term did not affect the order previously made extending the time for filing the bill of exceptions.

The judgment is reversed for proceedings consistent with this opinion.

HOWARD v. WESTERN UNION TELEGRAPH CO.

(Filed October 29, 1903—Not to be reported.)

Pleading—Motion to make petition more specific—In an action to recover damages of a telegraph company for failure to deliver within a reasonable time a telegram advising plaintiff of the dangerous wounding of his son, the allegations of the petition to the effect that the transmitting agent had so negligently delayed transmitting the message, and that the receiving agent had so negligently delayed delivering it, that the plaintiff had been deprived of the opportunity of reaching the bedside of his son until after his death, which occurred on a day stated in the pleading, were sufficiently definite and certain as to apprise the defendant of the exact nature of plaintiff's claim within the meaning of section 134 of the Civil Code; and it was error for the court to require plaintiff to state the hour at which his son had died and to dismiss the action on his failure to do so.

A. G. Patterson for appellant.

Richards & Ronald for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal from the judgment of the Bell Circuit Court dismissing appellant's petition because of his refusal to make the same more specific in obedience to an order of the court.

The object of the action was to recover of the appellee damages for its alleged negligent failure to transmit and deliver within a reasonable time a telegram sent from Devon, West Va., to the appellant at Pineville, Ky. which announced that his son had been shot and dangerously wounded. It is substantially averred in the petition that the telegram was received between the hours of 3 and 4 o'clock p. m., October 4, 1902, by the appellee's operator and servant at its Devon office, who undertook, in consideration of 40 cents, then paid him by the sender, to transmit it within a reasonable time to appellant at Pineville, but negligently delayed the sending of it for so unreasonable a time that it did not reach appellee's Pineville office until 11:50 o'clock p. m., of October 4, 1902, and that though appellant resided within half a mile of the Pineville office of appellee, and was then at home, its operator and agent there negligently failed to deliver him the telegram until October 5 at 8:05 a. m.

It is further averred that appellant's son died on October 6, 1902, of the gun shot wound received by him, and before appellant arrived at the place where he was; that if the telegram had been transmitted by appellee's agent at Devon immediately after he received it, or promptly delivered by its Pineville agent after it was received by him, it would have reached the appellant in time for him to have gotten to the bedside of his son, and to have been with him twelve hours before his death; but that the telegram was not delivered to appellant until 8:05 a. m., October 5, as already indicated, and after the departure of the last railroad train upon which he could have taken passage and reached his son before his death; that he was anxious to go to his son and be with and wait on him before he died, and would have done so if the telegram had been delivered to him on the 4th day of October, 1902, or on the morning of the 5th before the departure of the passenger

train, which was due to leave, and did leave, at 7:50 a. m. He did, however, after receiving the telegram, leave on the first train to go to his son's bedside, but upon getting as far on the way as Norton, Va., he received another telegram informing him of his son's death.

The question presented for our consideration is: Did the lower court err in requiring the appellant to make his petition more specific by setting out the hour of his son's death? If it did not err in so doing, the dismissal of the action was proper, as appellant's refusal to comply with the order to make the petition more specific in the particular indicated was an act of contempt. We are of opinion that the lower court erred in ordering the appellant to make the petition more specific, as it sufficiently set out the facts necessary to apprise the appellee of the precise nature of his claim, without an averment as to the hour of his son's death.

Section 134, Civil Code, which defines the duties and powers of courts of justice in the matter of requiring and allowing amendments in pleading, provides that "if the allegations of a pleading be so indefinite, or uncertain, that the precise nature of the claim or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

It is also provided in the same section that the court may in furtherance of justice "cause or permit a pleading to be amended by inserting other allegations material to the case."

The lower court, in requiring the appellant to state in the petition the hour of his son's death, must have assumed—not that the petition did not state a cause of action, for in that case the demurrer to the petition would have been sustained—but that its allegations are so indefinite and uncertain that the precise nature of his claim is not apparent. We do not so construe the averments of the petition. They present a state of facts which, if true, would entitle the appellant to recover. The facts alleged are that the message was delivered to appellee's agent at Devon for transmission, between 3 and 4 o'clock, p. m., October 4, 1902; that it was received by the agent of appellee at Pineville at 11:50 p. m., of the same day, and that it was not delivered by the latter to the appellant until 8:05 a. m. October 5, notwithstanding the fact that he lived in one-half of a mile of the appellee's office, and his place of residence was known to the agent.

These facts lead irresistibly to the inference or conclusion that there was unreasonable delay upon the part of both agents, for which the appellee, as master, is liable, provided their negligence prevented the appellant from reaching his son before his death, and that it did so *prima facie* deducible from the facts presented by the further averments, in substance, that the son did not die until some time during the day of October 6, and that if the message had been transmitted in a reasonable time after its receipt by the agent at Devon to the agent at Pineville, and delivered by the latter to appellant on the same day, or, notwithstanding the negligent delay of the Devon agent in sending the message and of the Pineville agent in failing to deliver it on the night it was received, if it had been delivered to appellant on the morning of October 5 before the passenger train, due to leave Pineville at 7:50 a. m., had taken its departure, appellant would have reached his son twelve hours before his death.

The rules of pleading require of the pleader a statement of the facts upon

which his cause of action or defense depends, and not the evidence of those facts, and where, as in this case, the plaintiff's cause of action seems to be sufficiently stated without an averment of a particular fact, which the opposite party, by motion, seeks to have the court make him add to his petition by way of making it more specific, he should not be made to do so merely for the purpose of disclosing in advance of the trial the evidence of a fact material to a recovery which is unknown to the maker of the motion.

In the case of *Bogard v. I. C. R. R. Co.*, ante, 624, this court, in an opinion by Bernam, C. J., held that it was error for the trial court in that case to sustain a motion requiring plaintiff to make his petition more specific by giving therein the date of the injury complained of, the number of the train producing it, and the parties in charge thereof, and in reviewing the numerous authorities bearing upon the question under consideration, quoted with approval from 8 *Ency. of Pl. and Pr.*, 5157, the following concisely expressed rule: "There is no inflexible rule as to the class of cases in which a bill of particulars will be granted, but it rests within the sound judicial discretion of the court, to be exercised only in furtherance of justice. But the rule is quite well established that a party will not be obliged to furnish facts already known to his adversary, nor when the means of ascertaining the facts are equally accessible to both parties."

Applying this rule to the case in hand, the court further said: "In our opinion the court erred in sustaining the motion to require the plaintiff to give the number of the train producing the injury, or the names of the parties in charge thereof. It is not at all probable that such information is in his possession; and if the identity of the train inflicting the injury is established, the means of ascertaining these facts are more accessible to the defendant than to the plaintiff. Nor should the motion have been sustained at all without some showing by the defendant, by affidavit or otherwise, that they did not have the information, or reasonable means of obtaining it."

The precise time of the death of the appellant's son may be shown in evidence, and it will doubtless be necessary that it be done, but it does not for that reason follow that it should be stated in the petition. It does not appear that the hour of the death of the appellant's son is unknown to the appellee. Upon the contrary, the presumption of such knowledge on its part is not unwarranted, for the reason that it could have been, and may yet be, readily ascertained by inquiry through its Devon agent of the persons who were with the deceased at the time of his death in that town. At any rate, there was no showing upon the part of appellee, by affidavit or otherwise, that such knowledge was not in its possession when its motion to require the petition to be made more specific was entered or sustained; consequently the action of the lower court in sustaining the motion was improper.

Because of the error of the lower court in sustaining the motion to make the petition more specific, and in dismissing the action because of appellant's failure to comply with the order to make the same more specific, the judgment is reversed and cause remanded for proceedings consistent with the opinion herein.

CITY OF LUDLOW v. PECK-WILLIAMSON HEATING AND VENTILATING CO.

(Filed October 30, 1903.)

1. Breach of contract—Guaranty—Evidence—In an action to recover damages for the breach of a contract, which provided for the installation of certain furnaces in a public school building of a city, and which guaranteed the furnaces to keep the building sufficiently heated for comfortable occupancy during the coldest winter weather, the city was not entitled, in the face of its refusal to comply with the contract, to introduce evidence upon the question of whether the guaranty would have been complied with had the furnaces been installed.

2. Measure of damages—The contract having provided that the contractor would furnish repairs for the castings of the furnace free of cost for a period of ten years, the measure of damages to the contractor upon the failure of the city to install the furnace was the difference between the contract price and what it would have cost to complete the work at the date of the breach of the contract, less such a sum as would be reasonably sufficient to furnish repairs for the castings for a period of ten years.

Furber & Jackson for appellant.

W. H. Mackoy and C. B. Matthews for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

The appellee is a corporation organized under the laws of the State of Ohio; in 1890 its corporate name was Bennett and Peck Heating and Ventilating Co., subsequently changed by law, and in that year it entered into a contract with appellant, by which it agreed to manufacture and install in a public school building then contemplated, being erected by the municipality, a system of air furnaces, for the purpose of heating it in winter, for which it was to be paid the sum of \$2,170. At the same time it made another contract with appellant, by which it agreed to place in the school building a dry closet apparatus, for which it was to be paid the sum of \$495. These contracts were in writing, and are filed as exhibits with the petition. They contain the following guaranty:

"We guarantee the castings, and will furnish repairs for the same, which may be needed, free of cost for a period of ten years following.

"We guarantee to heat all parts of the building to 70 degrees fahr., or comfortable occupancy in the coldest winter weather.

"We guarantee to change the air in the whole building at least four times per hour, or, in other words, to keep up continuous supplies of fresh air in each room, so that the same shall be replaced once in every fifteen minutes.

"We guarantee that there shall be no back-draughts from the dry closets into the school rooms, and that there shall be no connection between the ventilation of the rooms and the ventilation of the dry closets."

On March 3, 1893, the appellee addressed the following letter to appellant: "To the Mayor and Board of Council, Ludlow, Ky.:

"Gentlemen—We have been holding for some time a contract given us by your honorable body for erecting our complete system of warming, ventilation and dry closet in the proposed new school building which your city pro-

poses to erect. We wish to notify you of our readiness at any time to carry out this contract, and hope that the new board, which we understand has just been elected, can now see their way clear to commence the erection of the building. We will be glad to hear from you in this connection.

"Very truly yours,

"GEORGE PECK, Pres't."

To which the following response was made:

"City Clerk's Office, Ludlow, Ky., April 29, 1893.

"Bennett & Peck Heating and Ventilating Co.,

"Cincinnati, Ohio:

"Gentlemen—Your letter of recent date, advising us that you are holding contract for the placing of your system of heating and ventilation in the proposed new school house in this city came duly to hand. I am instructed, as city clerk, to inform you that your system will not be adopted nor placed in said school house when we order.

"Yours truly, J. C. RICHARDSON, City Clerk."

After the receipt of this letter appellee instituted this action in the Kenton Circuit Court, setting out the contract, and its breach, and praying judgment for damages therefor in the sum of \$1,840. To this appellant filed an answer, setting out a number of defenses, to some of which demurrers were sustained, and finally, under order of court, it filed a reformed answer, in which it denied the incorporation of appellee, or that it had ever been ready or willing to comply with its contract, and alleging that the contract had been mutually abandoned, and had become null and void; that the same had been entered into with reference to the issuance of certain bonds of the city, from the proceeds of which funds were to be raised to carry out the contract, and that afterwards the city had been required, by an act of the general assembly of the Commonwealth of Kentucky, to turn over the entire proceeds of the bonds to the board of education of the city, and that it now had no funds with which to carry out the same; that the entire matter of building and furnishing the school building in question had, since the making of the contract, been placed by law in the hands of the board of education. The answer further denied that appellee had been damaged in the sum of \$1,840, or in any other sum.

The issues having been made up by a reply, a trial was had by jury, which resulted in a verdict in favor of appellee in the sum of \$1,165, of which appellant is now complaining.

The making of the contract, and the authority so to do at the time it was entered into by the parties, was not, and could not be, denied. The proper incorporation of appellee under the laws of the State of Ohio, while placed in issue by the pleadings, was abundantly established by uncontradicted evidence. The municipality having authority to make the contract in question, and having made it, no subsequent legislation could abrogate, or invalidate, it, and, therefore, no change by legislative enactment in the status of the city, with reference to the control of the school building, could alter its responsibility to appellee under the contract. This has been elementary since the Dartmouth College case. Appellee fully established its willingness and ability to perform the contract, and, as to this, there was no contrariety in the evidence.

There is no allegation of fraud or corruption in reference to the making of the contract, either in the pleading, or the proof, and the breach, so far as the record shows, was wanton and arbitrary. The court, at the close of the testimony, properly instructed the jury peremptorily to find for appellee, and there was no error in its refusal either to allow evidence, or to instruct the jury upon the question as to whether or not the furnaces could, or would, if built and installed in the school, carry out the terms of the contract. This contention of appellant is based upon the guaranty that the furnaces, when installed, would keep the building sufficiently heated for comfortable occupancy during the coldest winter weather. We think this question too vague and speculative for consideration. Appellee had guaranteed in the contract what its furnaces would do when installed in the building; this guaranty had been accepted by appellant as sufficient; it could not, in the face of its arbitrary and wanton breach of the contract, go into a speculation as to whether or not the furnaces would have complied with the guaranty.

But we think the court erred in giving the measure of damages in instruction No. 2, which is as follows: "The measure of damages is the difference between the contract price and what it would have cost to complete the work by plaintiff at the date of the breach of the contract."

There should have been added to this, "less such a sum as will be reasonably sufficient to furnish repairs for the castings of the furnaces, operated with ordinary care, for a period of ten years."

In Sedgewick on Damages, section 618, it is said: "Where one engaged in the performance of a contract is wrongfully prevented by the employer from completing it, the measure of damages is the difference between the price agreed to be paid for the work and what it would have cost the plaintiff to complete it. Differently stated, the rule in such a case is recompense to the plaintiff for the part performed, and indemnity for his loss in respect to the part unexecuted. The plaintiff is to be placed in the same condition he would have been in if he had been allowed to proceed without interference."

In the Am. & Eng. Ency. of Law, 2d edition, 1116, the rule is thus stated: "In the cases of contract for the sale of articles to be manufactured, the actual damages suffered are the measure of recovery, and is frequently the difference between the cost of manufacturing and delivering the goods and the contract price, that is, the profit which the plaintiff would have made if the contract had been fully performed."

In the case of Hauser, Brenner & Path Co. v. Tate & Co., 105 Ky., 701, 20 Ky. Law Rep., 1716, the court said: "The general rule is that the measure of damages for breach of an executory contract includes loss of profits which grow out of the contract, and which would have been realized from its full performance."

In the light of these authorities, which we deem to state the correct rule, what would have been appellee's profit on the contract if it had been allowed to proceed to its full performance? Manifestly it would have been the difference between the cost to it of properly installing its system of heating and ventilation, etc., in the school building and the contract price, less such a sum as would reasonably keep the castings of the furnaces in repair during the contract period of ten years. This cost of repairing the casting

is neither vague nor speculative; common experience teaches that they would need repairs from year to year, and, under the contract, this expense was to be borne by appellee. His profit, upon the whole contract, therefore, can not be ascertained without deducting the reasonable value of these repairs during the contract period. We think, therefore, the court erred in refusing to submit the question of repairs of the castings in its instructions to the jury.

For the reason indicated the judgment is reversed for proceedings consistent with this opinion.

LOUISVILLE & ATLANTIC RY. CO. v. BENNETT & MORGAN.

(Filed October 30, 1903—Not to be reported.)

1. Action on contract—Trial as to part of defendants—Under section 363 of the Civil Code an action against two or more defendants may be tried as to one of them, although not ready for trial as to the others.

2. Carriers—Delay in delivering freight—Damages—A carrier is not responsible to a shipper for delay in unloading a shipment of live stock from the cars after reaching the destination arising from the refusal to receive a check of the shipper, and proof to show that the agent of the carrier at the shipping point had assured the shipper of the acceptance of the check at the other end of the line was not admissible, he having no right to make such assurance.

Wallace & Harris and J. Tevis Cobb for appellant.

Grant E. Lilly for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hobson.

Appellees shipped a car load of cattle from Valley View, Ky., to Bloomington, Ill., and brought this suit for damages on the ground that the cattle were not carried through in a reasonable time, and that the carriers failed and refused to stop the car for the purpose of allowing the plaintiffs to feed or water the stock, and failed and refused to water, feed or unload the stock; that the cattle were on the car from the afternoon of November 12 to the afternoon of November 15, but should have been carried through in twelve hours' time; and by reason of this the cattle were damaged \$567. The cattle were carried by the Louisville & Atlantic R. R. Co. from Valley View to Nicholasville, and there delivered to the Cincinnati, New Orleans & Texas Pacific Ry. Co., who carried them to Cincinnati, and delivered them to the Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., which took them to Bloomington. All three companies were made defendants to the petition and filed answer. The case, however, was tried as against the first-named company, it not standing for trial at that term as to the others.

The jury returned a verdict for \$225 in favor of the plaintiff, and the company appeals.

There is no doubt, under the evidence, that appellant took the stock from Valley View to Nicholasville on its train and delivered it there in good order in time for the first train on the connecting line which would take it to Cincinnati. The trouble, therefore, was due to no fault of appellant itself.

and it is not responsible unless as a through carrier. In its answer it set up a written contract signed by the shippers under which the stock was received, and by this written contract it undertook to carry the stock to Nicholasville, Ky., and forward it from there as agent of the shipper to Bloomington. It pleaded the contract in bar of any recovery beyond its own line.

In reply to this the plaintiffs alleged that the plaintiffs had not shipped over that line to Bloomington before, and before doing so they called on the defendant company for the routing and freight charges and the terms of the contract; that the freight charges given to them were the sum of \$57; that the routing was to Nicholasville, thence to Cincinnati, thence to Bloomington, and it was agreed that appellant would be liable for the cattle all the way through, and for any damages for delay or accident; that they refused to deliver the cattle until appellant had agreed to do this; that then the cattle were loaded on the train, and in a few moments after this the defendant produced the writing referred to in the answer, and asked the plaintiff, Morgan, who alone was present, to sign it; that he refused to do this for the reason that he was an unlearned man, and could not read understandingly the paper; that he then demanded of appellant to explain the same to him, and thereupon it repeated the contract above set forth, and he then signed the writing upon its assurance that this was what it meant, and thus his signature was obtained to the paper by appellant's fraudulent misrepresentation. Issue was joined on these averments, and the court, by its instruction, told the jury that if the plaintiff, Morgan, refused to sign the paper until the contents were explained to him, and that the defendant's agent explained to him that the paper contained the agreement above set forth, and he signed it upon the faith of such explanation, and without knowing its contents, and when he could not have learned what it contained by the exercise of such care as persons of ordinary prudence ordinarily exercise under similar circumstances, the plaintiffs were not bound by the paper. This instruction seems to us to have fairly submitted the case. The evidence was very conflicting. The testimony of the plaintiff, Morgan, as to what occurred between him and the agent at the time of the contract was made in these words:

"Q. State what occurred between this agent and yourself prior to sending them?"

"A. I wanted to send these cattle to Bloomington, Ill., and I go down there to get the train and route. He told me that he would ship them to Bloomington; that he would send them to Cincinnati for \$20, and that from there on it would be 15 cents. It made \$37.50 in all, I think. I came here and tried to get the rates on the other road, the L. & N."

"A. Did he explain the contract to you, or did you understand it?"

"A. I had taken the cattle down there to ship, and in making out the bill I didn't like it, and didn't understand it, and asked him to explain it to me; and he did explain it to me, and said that that bill would take my cattle to Bloomington safe and sound, and that it would take the boy there; and I told him that I didn't understand that at all, and he said he would vouch for it, and that the railroads would take my cattle there all right, and if they didn't, they would stand good for it." (Objection; overruled; exception.)

"Q. You say that this defendant company was to be responsible for any damage, or accident, or delay?"

"A. Yes, sir; he said that they couldn't take my cattle without being responsible; that is what he told me."

"Q. Now, when this writing was drawn up, what was said to you with reference to this written contract which you signed?" (Objection; overruled; exception.)

"A. He said they couldn't take my stock and damage them without paying for them; that they were responsible for all damage."

"Q. Did you understand by this agreement here that the Louisville & Atlantic R. R. Co. would take this stock to Nicholasville on its own line, and then, as your agent, forward the cattle on?"

"A. No, sir."

"Q. Did you understand it at all?" (Objection by defendant's counsel overruled by the court, to which ruling defendant excepts.)

"A. No, sir, I wouldn't have shipped them under any such contract if I had understood it as they now explain it."

While part of this is somewhat incoherent, and would seem to indicate that the stenographer failed to get down at one time at least all that was said, still, taking it altogether, we think it substantially sustains the averments of the reply as to the execution of the contract, and justified the submission of the question to the jury. The action was upon a contract within the meaning of the provisions of the Code, and, therefore, stood for trial as against appellant, although it was not ready for trial against the other defendants. (Civil Code, section 363; Pittsburg, &c., R. R. Co. v. Viers, 24 Ky. Law Rep., 358, and cases cited.)

In Richmond, &c., R. R. Co. v. Richardson, 28 Ky. Law Rep., 2234, there was no showing that the shippers were misled by any assurances of the agent, and induced to accept the contract by misrepresentations on his part as to what it was. But the agent has no authority to assure the shippers as to the acceptance of the check at the other end of the line, and proof of this should have been admitted. The defendants were not responsible for the delay in getting the cattle off the cars after they reached Bloomington by reason of the refusal of the company there to accept the check, and the court should have so instructed the jury.

For this error the judgment is reversed and cause remanded for a new trial. On another trial the court will, in instructing the jury, define the measure of damages.

WILLIAMS v. WILLIAMS' EX'OR.

(Filed October 30, 1903—Not to be reported.)

1. Division of decedent's estate—Deed to husband in trust for wife—Lands deeded to the husband in a division of the estate of the wife's deceased father are held in trust for her, and go to her children after the death of both the husband and wife as against the children of the husband by a second wife.

2. Limitation—The possession of the husband during the life of his wife was not adverse to her, and, after her death, he being entitled to the land by curtesy, his possession was not adverse as against their children so as to

start the running of the statute of limitation, in the absence of a notorious renunciation of the right under which he held.

8. Same—As to lands of the wife sold by the husband, during his tenancy by curtesy, to a bona fide purchaser, his estate is required to account to her children for the purchase price provided such sale was made within fifteen years next before the filing of a proper pleading to recover same, the sale being sufficient notice to set the statute in motion.

Waddill & Pratt and Bourland & Hanson for appellant.

F. M. Baker for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Hobson.

In the year 1847 David Cannady died a resident of what is now Webster county, leaving six children surviving him and owning two tracts of land and some negroes. One of his daughters, Prudence Cannady, married S. H. Williams. After this, about the year 1853, the land and negroes were divided between the children, all of whom were then of age; and in this division a tract of one hundred and three acres of land on Slover creek and sixty-two acres on Tradewater fell to Prudence. She and her husband moved on the land and lived on it from that time until her death during the Civil War. Before this, on July 16, 1853, the other children of David Cannady executed a deed to her husband, S. H. Williams, for the two tracts of land. He continued to live on the land and to hold it after her death, his two children by her living with him. One of these children died soon afterward, an infant and unmarried. Subsequently S. H. Williams married again, and by the second marriage had six children, who survived him. He died in the year 1901, and this suit was brought to settle his estate, which was considerable. Appellant, H. B. Williams, the only surviving child of the first wife, filed an answer, claiming the two tracts of land allotted to his mother in the division of her father's estate. He charged that his father, S. H. Williams, induced the other children of David Cannady to make the deed to him; that no consideration was paid for it and it was only a deed of division; that his father took possession of the land and held it under a deed in trust for his wife, and after her death as tenant by curtesy, his possession at all times being amicable. He prayed that he be adjudged the land. Issue was joined on these allegations. On final hearing, the court adjudged that he was not entitled to any part of the land, and he appeals.

The deed recites a consideration of \$525; but the proof is conclusive that S. H. Williams paid nothing for the land. It shows that he had nothing at the time and was in debt. It also shows conclusively exactly what property David Cannady left and what fell to each child in the division. The recited consideration of \$525 was plainly put in the deed because the land was valued in the division at this amount to Mrs. Williams. Although the testimony of a number of the children of David Cannady is taken, and they all agree on the above facts, none of them explain how the deed was made to the husband or seemed to know in fact that they had made the deed to the husband. The wife claimed the property as long as she lived as her own, and the proof would indicate that her husband recognized it as her property. Taking all the evidence, we conclude that the deed was made to the husband

as the representative of the wife, and that he held the property in trust for her. In *Black v. Black*, 21 Ky. Law Rep., 408, and *Jenkins v. Taylor*, 28 Ky. Law Rep., 1136, 23 Ky. Law Rep., 1574, on facts no stronger than those before us, this court held that land which had been deeded to the husband in a division of the estate of the wife's father, belonged to her children, and we reach the same condition here.

It is insisted for appellees that the claim is stale and is barred by limitation. The length of time that has elapsed since the transaction occurred is to be considered by the court in weighing the evidence, but where the facts are clearly established mere lapse of time will not defeat the claim unless it is barred by limitation, or there is some other reason making it inequitable. As the husband was tenant by the curtesy, and as such entitled to the possession of the land during his life, we do not see that the claim is stale.

As to the statute of limitation we have had more difficulty. Since the husband and wife both lived on the land and he held title for her, his possession was not adverse to the wife during her lifetime. After her death he was entitled to the land as tenant by the curtesy, and appellant had no cause of action against him to recover it. The rule is that the statute of limitation runs against all constructive trusts, and if S. H. Williams had not been tenant by the curtesy of the land the lapse of time would have barred the action. But as he was tenant by the curtesy his possession of the land was rightful, and as he entered as trustee, and evidently held as trustee for his wife during her lifetime, it must be presumed that he continued to hold in the same capacity after her death. Under all the evidence we conclude that there was no such notorious renunciation of the trust or notice of it brought home to appellant as should set the statute in motion after the wife's death or at least for a sufficient length of time to bar the action. The relation of father and son existed between the parties. The son naturally looked to his father as his friend. The most cordial relations existed between them, and the evidence does not make out a state of case sufficient to put the son on notice that the father was claiming the son's property by adverse possession. In a case of this character, where a trust is once established, clear proof of its renunciation and notice of it to the adverse party must be shown to set the statute in motion. S. H. Williams was a man of considerable property. No rights of creditors are involved. It is only a question between the children of the two marriages. It is to be presumed that a man occupying the station of S. H. Williams intended to deal fairly with his own children, and an intention to claim their property as his own, will not be imputed to him on doubtful evidence. We, therefore, conclude, under all the evidence, that the court should have adjudged the one hundred and three-acre tract of land to appellant.

As to the sixty-two-acre tract, it appears from this record, as we understand it, that S. H. Williams sold this in his lifetime to Foster Watson. As Watson was a bona fide purchaser to the extent that the legal title to the land was in S. H. Williams, he will hold the land, but S. H. Williams' estate should account to appellant for the purchase money as it does not appear that this sale was made fifteen years before the filing of appellant's answer and cross petition. If this sale had been made more than fifteen years before the filing of the answer and cross petition, then, as to this tract,

appellant would be barred by limitation, for the sale of it was sufficient to apprise him of an adverse holding.

Judgment reversed and cause remanded for a judgment and further proceedings consistent herewith.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED
STATES v. WARREN DEPOSIT BANK, &c.

(Filed October 30, 1903—Not to be reported.)

1. Life insurance—Paid-up policy—Laches—In considering the denial of the right of the assured to maintain an action against an insurance company for a paid-up policy because of his laches in instituting the action the court will attribute to him his laches from the first moment when he might have sued, and not merely from a given time from the end of a reasonable time within which he might have sued.

2. Same—Bankruptcy of assured—No deduction in favor of the assured will be made on account of an adjudication declaring him a bankrupt, as the assignee of the policy or his trustee in bankruptcy might have sued even if he could not have done so.

Humphrey, Burnett & Humphrey and Mitchell & DuBose for appellant.

John M. Galloway, John B. Rodes and W. B. Gaines for appellees.

Appeal from Warren Circuit Court.

Judge O'Rear delivered the following response to petition for rehearing:

Appellee presents, by a petition for rehearing, two arguments for an affirmance of the judgment appealed from, notwithstanding the rule announced in the opinion heretofore delivered.

Taking the rule of law announced by this court in *Spratley v. Mutual Benefit Life Insurance Co.*, 11 Bush, 447, and supported by the decisions of the courts of other States. It is assumed in the argument that it is in conflict with the original opinion herein.

In *Spratley v. Ins. Co.*, *supra*, the question decided was that an action to recover upon a life policy accrues within a reasonable time after the death of the assured within which to make up and present proof of death, and not upon the actual demand of payment, as in case of an ordinary obligation payable on demand; and that consequently the statute of limitation would begin to run from the end of such reasonable time. To the same effect are the other decisions cited by counsel. It should be borne in mind, though, that the rule adopted and applied in this State, in cases like this one, is not the law of limitation, but of laches. The policy required the demand for paid-up insurance to be made within six months. The court rejects that provision, as the time is held to be not of the essence of the contract. Instead, the court holds that the assured may demand a paid-up policy within a reasonable period, and decides that generally five years from the date when the assured might first have demanded it will be deemed the limit of such reasonable time. The denial of a plaintiff's right to maintain his suit, because of his laches necessarily and always involves the consideration of that right from the first moment when he might have sued. It may be more or less than a statutory bar applied in like cases at law. If laches.

should not be attributed to the delinquent litigant till after a given time from the end of a reasonable time within which he might have sued, it is plain that his indulgence would be doubled.

It is also argued that as Porter, the assured, had been declared a bankrupt during the five years, that he was "civilly dead," and at least one year should be deducted because no suit could be brought against him within a year. The bank, as assignee of the policy, might have sued. So could Porter's trustee in bankruptcy.

The petition is overruled.

Whole court, except Judge Paynter, considered petition for rehearing.

HUGHBANKS v. HUGHBANKS.

(Filed October 30, 1903—Not to be reported.)

Divorce from bed and board—Maintenance—In view of the very conflicting testimony this court is unwilling to disturb the decree of the trial court fixing the amount allowed for the maintenance of the wife and for her attorneys' fees.

Byron & Hargett and Rardin & Rardin for appellant.

W. S. Pryor and Geo. Doniphan for appellee.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by the appellee, Helena C. Hughbank, in the Bracken Circuit Court, against the husband, Patterson Hughbank, for a judgment of divorce *a vinculo matrimonii*. Pending the litigation she filed an amended petition, in which she withdrew her prayer for an absolute divorce, and asked for a separation *a mensa et thoro*. Upon the final hearing the court rendered a judgment in accordance with the prayer of the amended petition, and awarded appellee, for maintenance, the sum of \$150 per annum, payable quarterly, commencing October 8, 1901, and until further order of the court; and upon proof heard in open court an allowance of \$300 was made to the attorneys of appellee, to be taxed as costs. From this judgment this appeal is prosecuted.

The parties litigant were married in the year 1860, living together as husband and wife for more than forty years. They have reared a family of six children, all of whom are of age, and living, as the record shows, in prosperity and health. In the evening of their lives they have become estranged, and drifted apart. Their mutual troubles, criminations and recriminations are told in a record of more than 800 pages, a record unnecessarily voluminous and containing evidence unusually contradictory.

It is unnecessary to discuss this evidence in detail; it is sufficient to say that it exhibits a most lamentable condition of affairs, and fully sustains the learned chancellor in his judgment separating the parties. This was not an arbitrary judgment, as claimed by counsel for appellant; on the contrary, after reading the record, we are unable to see how any other judgment could have been rendered. The allowance of \$150 per annum for the support of appellee is not large, assuming it to be true that she has no

other income. On this subject the evidence is unsatisfactory, and we are not able to say that she possesses any independent income. It is true that she holds the title to seventy-two acres of land, which does not appear to be of great value; and this seems to be in possession of appellant, who claims to be entitled to it, and that the deed, by which it was conveyed to appellee, was wrongfully obtained by her. This question appears to have been raised in the pleadings, but was not passed upon by the lower court.

There is also some testimony of appellee's owning certain notes, which came to her from her father's estate; but the amount and value of these are not fixed with any degree of certainty. Appellee claimed that they were mostly worthless. Appellee should not be entirely supported by appellant if she has funds, for this record does not show her blameless, if it does not establish the fact that the preponderance of error is at her door. By its terms the judgment of allowance is in the control of the chancellor, and he, upon proper showing, may modify or withhold it, as justice requires, keeping in view that appellee is the wife of appellant, the mother of his children, and in frail and delicate health. The fee of counsel is reasonable, and we do not feel at liberty to disturb it.

On the whole the evidence is exceedingly conflicting, and we are more than usually disposed to follow the guidance of the chancellor, who, being on the ground, and probably acquainted with the parties and their witnesses, is far better able to judge of the truth of the testimony than we are.

For these reasons the judgment is affirmed.

ROWSEY v. COMMONWEALTH.

(Filed October 80, 1903.)

1. Practice in criminal cases—Reversal of judgment—Under sections 271 and 340 of the Criminal Code the Court of Appeals has no power to reverse a judgment of conviction in a criminal case upon the ground that there was not sufficient evidence to sustain the verdict, but is restricted to the single inquiry whether there was any evidence before the jury conducing to show the guilt of the accused. In this case there is evidence conducing to show the guilt of the accused, and the court properly left that question to the decision of the jury.

2. Homicide—Proof of jealousy—In a prosecution of one charged with having killed another it was competent to admit proof of statements made by the accused previous to the killing, which indicated jealousy on his part toward persons who showed attention to a girl with whom the deceased was walking at the time of the shooting, for the purpose of throwing light upon the conduct of the accused at the time of the shooting.

3. Instruction as to murder—The proof of jealousy on the part of accused being sufficient to show malice on his part, it was proper for the court to instruct the jury on the law of murder.

4. Instruction as to self-defense—An instruction on the law of self-defense which told the jury "that if deceased began the fight by first shooting the defendant, and that the defendant had reasonable grounds to believe, and did believe, from the acts and conduct of deceased, that he was in immediate danger of suffering the loss of his life or great bodily harm at the hands of deceased, and that he shot deceased to avert that danger, that he was entitled to an acquittal," was proper, in that it left to the determina-

tion of the jury whether the belief as to the danger of accused actually existed in his mind at the time of the shooting, and whether there were reasonable grounds for that belief, and otherwise conforms to the settled rule in such cases.

5. Dying declaration—The statements of a person desperately wounded, that he had no hope of recovery and that he was preparing to meet his maker, were sufficient evidence that he was conscious of his approaching death, and made his declaration with reference to the circumstances connected with his shooting admissible in evidence.

Robert Harding and Rawlings & Voris for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Chief Justice Burnam.

This is an appeal by William Rowsey from a judgment of the Boyle Circuit Court sentencing him to twenty-one years' confinement in the penitentiary for killing Sam Mastin by shooting him with a pistol. The testimony discloses that the accused, Rowsey, and the deceased, Mastin, had attended Sunday-school at a schoolhouse in Boyle county, and that after the Sunday-school was over they, in company with several other young persons of both sexes, were walking up the public highway toward their homes, laughing and talking; that the deceased, Mastin, was walking by the side of Eliza Johnson, carrying her bible, and the accused was walking immediately behind them, with Jack Johnson, a brother of Eliza Johnson, and Jess Mastin, a cousin of the deceased; that after the party had walked some distance Rowsey, who appeared to have been drinking, remarked to Sam Mastin: "Sam, I did not know that you were a preacher;" or, as detailed by another witness, "I see you have your bible; are you going to preach?" That Mastin replied, "I don't think I was cut out for a preacher," and asked Rowsey what had become of the team of horses which he had when he helped him to load some telegraph poles; that Rowsey responded: "Do you want pay for your work," and Mastin replied "no," and that Rowsey responded: "You needn't get mad about it, for I can whip you on the ground that it takes for you to stand on." At this point a shot was fired. Eliza Johnson says that she did not know who fired it, but that she then looked at Mastin, and saw him fire at Rowsey, and that Rowsey immediately replied with two shots, and Mastin fell. Jack Johnson testified that the first shot was fired by Rowsey into the ground, and that Mastin then fired his pistol at Rowsey, and then Rowsey fired two shots in quick succession. Jess Mastin testifies that he could not tell who fired the first shot, but that after he heard it he saw Sam Mastin draw his pistol and shoot Rowsey, who threw up his hands, and said "don't do that, Sam;" that Mastin then dropped his pistol to his side, turned and walked eight or ten feet away before Rowsey fired two shots at him. He also testified that a week before the shooting, while he was with Eliza Johnson, Rowsey said to him: "Eliza Johnson won't let me go with her, and by God, you shall not go with her." Ella Glascock testified that on the afternoon before she started to Sunday-school the accused said to her: "Take your knife along; I am going to raise such a smoke over in the hollow that you will need a knife to cut it away."

The testimony of the defendant is not materially different from that of

the witnesses for the Commonwealth as to the location of the parties, and he admits saying, jokingly, to the deceased that "you need not get mad about it, if you do, I can whip you." He says that in response to this remark the deceased drew a pistol from his right-hand pocket and immediately fired upon him; and that he thereupon drew his pistol and fired two shots at the deceased, and that he shot in self-defense; that the ball from the deceased's pistol struck his left arm and passed into his side. He also testifies that immediately after Mastin fell to the ground he took off his coat, folded it up, and put it under his head, and said to him: "Sam, you shot me first, didn't you? I never would have shot first." And that the deceased responded: "Yes, I shot you first." That he then went to Parksville to see a doctor, and that after he had dressed his wounds he sent him to care for the deceased. Dr. Pittman testifies that he dressed the wounds, both of the accused and of the deceased; that the accused was shot through the left arm, between the elbow and wrist, the bullet passing into the left side of his body about where his suspenders were fastened to his pants; that he found two bullet holes near the center of the back of the deceased and over the spine; that the shooting took place on the 11th day of May, 1902, and that Mastin died on the 9th of June thereafter. Before his death Mastin made a dying declaration, which was reduced to writing.

The first ground relied on for reversal is "that the verdict of the jury is flagrantly against the law and evidence." In response to this contention it is enough to say that it has been often held that under sections 271 and 340 of the Criminal Code this court has no power to reverse a judgment of conviction in a criminal case upon the ground that there was not sufficient evidence to sustain the verdict, but are restricted to the single inquiry whether there was any evidence before the jury conducing to show the guilt of the accused. We think it sufficiently appears from the summary of the evidence quoted supra that there was evidence conducing to show the guilt of the accused, and this question was properly left by the trial court to the decision of the jury.

The next ground relied on is that the trial court erred in instructing the jury as to the offense of murder. It being contended that there was absolutely no proof of malice, and in connection with this alleged error it is insisted that the trial court erred in permitting Jess Mastin to testify to the alleged conversation with the accused in regard to going with Eliza Johnson on the Saturday night preceding the killing, and in not excluding the testimony of Ella Glascock and her father, to the effect that Rowsey said on his way to the Sunday-school "that she had better take a knife to cut away the smoke," upon the ground that there is no proof that in either conversation that the defendant had any reference to Sam Mastin. There is no direct testimony of any previous bad feeling between the deceased and the accused. The only suggestion in the testimony as to a probable motive for hostility on the part of the defendant toward the deceased previous to the homicide is that of Jess Mastin; and this testimony is competent as throwing light on the defendant's motive for his conduct immediately preceding and at the time of the shooting. Jealousy is among the strongest and most uncontrollable of the human passions, and the facts on which it rests are always competent, in the absence of any other assignable motive, to show

whether it was the cause of the accused's act. (Wharton on Criminal Evidence, section 784; McCue v. Commonwealth, 78 Penn. St., 185.) And the testimony of the Glasscocks, father and daughter, we think is clearly competent to show previous malice. When we connect the threats testified to by these witnesses with the offensive and overbearing language and conduct of the defendant towards the deceased, who was at the time in company with Eliza Johnson, it is easy to believe that the real basis of his conduct was jealousy, arising from apparent preference on the part of Eliza Johnson for the deceased over himself, and furnish sufficient evidence of malice, taken in connection with the other evidence, to justify an instruction on murder.

Counsel for the defendant also complain of instruction No. 4, on two grounds: First, that it leaves out of view the defendant's right to shoot, based upon apparent danger; second, and that it makes the jury the final judges as to whether the defendant believed, and had reasonable grounds to believe, that the means resorted to by him to protect himself from impending danger were necessary at the time he fired the fatal shot. Whether there was actual necessity for resort to the means used by the accused was a question to be decided by him at the time, and if he in good faith believed, and had reasonable grounds for believing, that his only safety was to shoot the defendant, he was excusable. But whether this belief actually existed in his mind at the time of the shooting, and whether there were reasonable grounds for this belief, is always a question for the determination of the jury. (Meredith v. Commonwealth, 57 Ky., 46.) The instruction is drawn with special application to the facts deposed to by the defendant as excusing his action. It tells the jury "that if Mastin began the fight by first shooting the defendant, and that the defendant had reasonable grounds to believe, and did believe, from the acts and conduct of Mastin, that he was in immediate danger of suffering the loss of his life or great bodily harm at the hands of Mastin, and that he shot Mastin to avert that danger, that he was entitled to an acquittal."

The defendant testified that Mastin began the fight by shooting first, and that he only shot because he believed he was in danger of death or great bodily harm at the hands of deceased. The defendant's right to an acquittal is made to rest, in this instruction, upon his belief, based upon reasonable grounds, and not upon the actual existence of facts which produced the belief. The words "reasonable grounds to believe" embrace the idea that if there were such appearances of danger as to beget in the mind of appellant a reasonable belief of actual danger, that he was entitled to an acquittal, whether the appearances of danger were real or not. And this seems to be in conformity with the rule announced in Kennedy v. Commonwealth, 77 Ky., 353, and many other cases. In fact the instruction is more favorable to the defendant than a strict construction of the law authorized, as it does not tell the jury that the right of the defendant to kill the deceased depended also upon the additional fact that there was no other apparently safe means of averting the then impending danger. (Farris v. Commonwealth.) We conclude, therefore, there was nothing in this instruction prejudicial to the defendant.

The appellant also complains that the court erred in admitting the dying declaration of the deceased, for two reasons: First, because the testimony

did not sufficiently show that the deceased had given up all hope of recovery; second, because it was not limited to the immediate circumstances surrounding and connected with the shooting. The statement of deceased was written out by the county attorney of Boyle county, and two witnesses, who were present at the time it was prepared and signed, testify that Mastin said at the time that he had no hope of recovery, and that he was preparing to meet his Maker. Taken in connection with the desperate character of his wounds, we think these declarations were sufficient evidence that he was conscious of his approaching death, and made the declaration admissible. (*Jones v. Commonwealth*, 20 Ky. Law Rep., 355.) While there are some words in the statement that did not strictly refer to the circumstances of the killing, we are of the opinion that they could not have been prejudicial to the accused in the mind of the jury. Upon the whole case, after a careful reading of the testimony and consideration of the arguments of counsel, we have reached the conclusion that we would not be justified in disturbing the judgment of the lower court.

Judgment affirmed.

KRUEGER v. DAVIS.

(Filed October 30, 1903—Not to be reported.)

Construction of deed—Where joint owners of a town lot conveyed a part of it to a third person and fixed the line between the part conveyed and that retained, and afterwards partitioned the remainder between themselves, the deed to one of them calling for thirty feet next to the part previously conveyed and running back the entire depth of the lot that width, a purchaser of the third part of the lot was bound to take notice of the previous deeds and the established lines and was not entitled to recover from the owner of the second lot an alleged deficiency in the conveyance to him.

C. C. Williams and J. W. Alcorn for appellant.

White & Ray and Bethurum & Bethurum for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Fritz Krueger, and one White owned a lot in Mt. Vernon, Ky., fronting 100 feet on Main street. They sold and conveyed to U. G. Baker a lot 30 feet wide off of the west side of it. The lot sold to Baker fronts on Main street and extends back the full length of the lot to old Main street. After appellant Krueger and White sold to Baker they built him a house on the lot fronting on Main street, and placed the eastern wall of it on the eastern line of his lot. Afterwards Krueger and White agreed upon a partition of the remaining part of the lot, and executed deeds to each other for their respective parts. The deed was made to Krueger for 30 feet next to the property which had been conveyed to Baker, and as part of the description the deed recites: "This lot fronts 30 feet on Main street and runs back of equal width 225 feet to old Main street." Krueger erected a two-story brick building on his lot 26 feet wide and 70 feet long. It was placed within two inches of Baker's building, and he thus left unoccupied by his building on the east side of his lot a strip about four feet in width, on which he built

a stairway partly of stone, which is used in going to the second story of his building. On the back part of his lot he built a barn and another building, each of which is on his lot 41 feet wide. There is some question as to whether the fence which he built is located on that line. After the appellant had erected his house, and as much of the evidence tends to show the stairway and barn, White made a deed to the appellee, Davis, for the strip of land east of the property which had been conveyed to the appellant. In the deed which White made to the appellee this language appears: "One town lot, located in the west end of Mt. Vernon, Ky., and adjoining a lot of Fritz Krueger and being a part of a lot bought by Jas. I. White and Fritz Krueger from Agnes Herron. This lot fronts 40 feet on Main street, and is bounded on the north by Main street, and on the east by a lot owned by Mrs. Rosalind Nesbitt, on the south by old Main street and on the west by a lot owned by Fritz Krueger, etc."

It will be observed that the land conveyed to Davis, according to the recitation in the deed, fronts about forty feet on Main street. The width of it at other places is not stated in the deed. This conveyance recognizes that Krueger owns the lot on the west side, and only attempts to vest Davis with the title to the parcel of land between Main street on the north, old Main street on the south, the lot of Krueger on the west and that owned by Mrs. Nesbitt on the east. If Krueger's lot is 30 feet wide, then Davis' lot is only about twenty-nine and one-third feet wide on old Main street. Davis instituted this action to recover from Krueger the strip of land lying in a triangular shape, about ten and two-third feet wide at its base (old Main street), the two other lines run to a point on Main street at the apex of the triangle. The appellee's right to recover is based upon the claim that Krueger must surrender this triangular piece of land, so as to give him a lot 40 feet wide running from Main street to old Main street. The uncontradicted evidence shows that Krueger & White located the east line of the lot sold to Baker, because after selling Baker they built a house for him, placing the east wall of the house on the east line of the lot. White's deed to Krueger shows that Krueger was to have a lot 30 feet wide. White's deed to Davis shows that he only intended to vest Davis with title to the land situated between Mrs. Nesbitt's lot on the east and Krueger's on the west. Davis was bound to take notice that Krueger was entitled to a lot 30 feet wide. Davis and White's eastern line having been fixed by them when they owned the whole lot, that line must control in determining what they owned at the time the deeds of partition were made. It is evident White did not intend to invest Davis with title to any land west of Krueger's east line. Krueger's east line is 30 feet east of Baker's east line. The only question of fact to be ascertained is the location of this line, and it can be ascertained by measurement. If we were of the opinion that White intended to vest Davis with title to any part of Krueger's 30-foot lot, we would hold that, if Krueger was in the actual possession of it, claiming it as his own at the time the deed was made to Davis, the deed is champertous and void to the extent it included within its boundary any part of the Krueger lot. It results from our conclusion that both of the instructions given by the court were erroneous.

The judgment is reversed for proceedings consistent with this opinion

HAMILTON v. SPALDING.

(Filed November 5, 1908—Not to be reported.)

1. Quarterly courts—Constitutional provision—Section 1050 of the Kentucky Statutes, which authorizes quarterly courts to provide by order duly entered at a regular term for the holding of monthly terms or for continuous sessions of the courts, is not in conflict with section 139 of the Constitution, which establishes quarterly courts and provides that their jurisdiction shall be uniform and regulated by a general law, without attempting to fix the number of terms.

2. Res judicata—The action of a quarterly court in sustaining an attachment necessarily passed upon the question of the authority of the party who issued it to do so; and the question of his authority can not be raised in a separate action for damages by the defendant in the attachment suit against the plaintiff therein.

Lafe S. Pence for appellant.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted by the appellant against the appellee to recover damages on a state of facts averred in the petition substantially as follows: The appellee sued the appellant in the Marion Quarterly Court on a claim of about \$11; an attachment was obtained in the action; about \$16 was garnished in the hands of the Louisville & Nashville R. R. Co.; the quarterly court finally adjudged it to the plaintiff in the action. After the order of attachment was served on the railroad company it discharged the appellee, an employe, from its service by reason of the attachment. The appellant seeks to recover the \$16 which the appellee obtained under the judgment of the quarterly court, and also to recover \$500 damages because he was discharged by the railroad company on account of the attachment. The grounds upon which he seeks to recover is that the judgment is void because Oliver Kelly, Jr., who issued the attachment and accepted the attachment bond, had not been regularly appointed clerk of the quarterly court; and that the judgment was rendered at a monthly term of the quarterly court. It is argued by counsel for appellant that there could only be four terms of the quarterly court per annum. This argument is made upon the theory that section 1050, Kentucky Statutes, which reads as follows: "The quarterly court shall be presided over by county judge, and there shall be held in each county at least four terms of the quarterly court each year, at intervals of three months, and upon such days as the county judge may fix by an order entered upon the order book of said court; but the county judge may, by an order so entered, provide for the holding of monthly terms, or for continuous sessions of his said court, but such order must be made at a regular term of said court and not to take effect until sixty days thereafter. The terms of the court shall remain as now established until changed as herein provided. At each term the court shall remain in session as long as the business requires it," is in conflict with section 139 of the Constitution, which reads as follows: "There shall be established in each county now existing, or which may be hereafter created, in this State, a court, to be styled the quarterly court, the jurisdiction of which shall be uniform throughout the State, and shall be regulated by a general law, and until

changed shall be the same as that now vested by law in the quarterly courts of this Commonwealth. The judges of the county court shall be the judges of the quarterly courts."

Section 139 of the Constitution creates the quarterly courts, and provides that their jurisdiction shall be uniform, and regulated by a general law. It does not attempt to fix the number of its terms. It follows that the general assembly had the right to regulate the jurisdiction of the court and to authorize the holding of as many terms of the court as it saw proper. The general assembly authorized the quarterly courts by proper order to hold monthly terms or continuous sessions. So there was legislative authority for holding the term at which the judgment complained of was rendered.

When the quarterly court sustained the attachment it necessarily passed upon the question as to whether Kelly was authorized to issue it, and the court having jurisdiction of the parties and of the subject of the action, its judgment is necessarily conclusive of that question. The court might have erred in deciding that the party who issued the order of attachment was authorized to do it, still that judgment can not be questioned in this action, as that erroneous opinion would not make the judgment void which was rendered on the merits of the case. If the petition had averred that the attachment was maliciously sued out without probable cause, etc., and that he had been discharged, then we would have another question presented for our consideration. This action was based solely upon the claim that the judgment of the quarterly court is void.

The judgment is affirmed.

MILLER v. COMMONWEALTH.

(Filed November 6, 1903—Not to be reported.)

Liquor selling—Where several persons contributed to a fund with which they purchased more than five gallons of beer and afterwards divided it among themselves in proportion to their respective contributions, they were not guilty of selling liquor in violation of the local option law.

Jas. Sparks for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant and a number of others each contributed a small sum to a fund with which they bought from a brewery a quantity of beer, of more than five gallons. They then divided it among themselves in the proportion that each had contributed to its purchase. Upon this state of facts the jury found appellant guilty of violating the local option law. The court held that appellant did not sell any of the beer, by reason of the facts above stated. The trial court should have instructed the jury to find appellant not guilty.

The judgment is reversed.

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[Reported by Walter G. Chapman, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

SIMPSON v. CARR & PARRINGTON.

(Filed October 30, 1903—Not to be reported.)

1. Pleadings—Striking from answer—In an action on a contract in which the answer contains a denial of the allegations of the petition and also an affirmative defense setting out the contract as understood by defendant, it is not error to strike out the affirmative matter of the answer on motion of the adverse party, as proof of the contract as understood by defendant can be heard under the general denial.

2. Appeal—Reversible error—Alleged error of the trial court not made a ground for new trial can not be considered on appeal.

3. Variance—In an action to recover judgment for the sawing of lumber delivered to defendant, the allegations of an amended petition that the defendant had agreed to pay to plaintiffs the amount of their saw bill if they would turn over the lumber which they were sawing for another, who was defendant's debtor and had assigned the lumber to him, and that they had thereafter looked alone to defendant for payment, did not constitute a variance from the original cause of action.

4. Statute of frauds—Where a creditor, who had possession of a sufficient quantity of the lumber of his debtor to satisfy his saw bill against it, released the lumber to another creditor of the common debtor, to whom it had been assigned, under an agreement to pay the saw bill out of the proceeds, the contract so entered into did not come within the statute of frauds.

L. C. Winfrey, M. L. Jarvis and J. N. Sharp for appellant.

Stone & Stone and Sam C. Hardin for appellees.

Appeal from Clinton Circuit Court.

Opinion of the court by Judge Barker.

The appellees instituted this action against the appellant, in the Clinton Circuit Court, to recover judgment for the sum of \$684, for lumber sawed and delivered by them to him.

The answer controverted the allegations of the petition, and upon a trial by jury a verdict was rendered in favor of appellees for the amount claimed in their petition. Appellants (defendant) motion for a new trial was sus-

tained by the court, whereupon appellees (plaintiffs) filed an amended petition, in which they allege that they had been employed by one L. E. Clark to saw a lot of lumber for him, which they had done, and for which he owed them a bill amounting to \$684; that this lumber was in their possession, at their yard; that Clark was insolvent, and to secure themselves they had come to the town of Albany, Ky., for the purpose of suing out an attachment against him, and having the same levied upon the lumber; that in Albany they met appellant, and told him, fully, of their mission; whereupon he, claiming also to be a creditor of Clark, and that the latter had assigned to him his right to the lumber in appellees' yard, said to them, that if they would go on and finish the sawing, and turn over the lumber to him, he would convey the same to market, sell it, and pay them their debt out of the proceeds; that thereupon they desisted from suing out an attachment, finished the sawing, turned over all of the lumber to appellant, who conveyed it away, sold it, and refused to pay appellees any part of their debt; and that after the contract between them and appellant they ceased entirely to look to Clark for payment, and looked alone to the appellant.

To this amended petition appellant demurred, which was overruled, and also moved to strike it from the record, which was also overruled; thereupon he filed an answer in two paragraphs, the first controverting the allegations of the petition as amended, and the second pleading, affirmatively, the contract between him and appellees, as he understood it; whereupon appellees moved the court to strike from the record the affirmative allegations of the answer contained in the second paragraph, which motion was sustained.

Trial being had by jury upon the issues raised, a verdict was again rendered in favor of appellees for the amount claimed in their petition. Appellant's motion for a new trial having been overruled, the case is here on appeal. It is urged that the court erred in sustaining appellees' motion to strike from the answer the second paragraph; to this we can not agree. The second paragraph merely stated, affirmatively, the contract as appellant understood it, and only raised the same issues made by controverting the allegations of the petition. In the case of *Burke v. Shannon*, 19 Ky. Law Rep., 1170, the defendant filed an answer, containing two paragraphs, to a petition in an action on a contract, the first containing a denial of each allegation of the petition, and the second pleading, as an affirmative defense, facts which showed the contract to be different from that alleged in the petition. Upon motion the affirmative allegations of the answer were stricken out. This court, in its opinion, approved this action of the trial court, saying that "it (the affirmative defense) was simply a further denial by defendant, in another form, of the statement of plaintiff's petition, as proof of such contract could have been, and was, heard under the issues made by the allegation of the petition, and a plain denial thereof by the answer."

But even if this were not sound, appellant did not make this act of the court a ground for a new trial, and can not, therefore, be heard to complain of it here. It is strenuously contended by appellant that the court erred in permitting appellees to amend their petition, because, as amended, it sets up a different cause of action from that contained in the original petition, and thereby constitutes a variance. There are three classes of variances provided for by the Code: First, those which are immaterial; and as to

these section 180 authorizes the court to direct the fact to be found according to the evidence, and may order an immediate amendment; second, those which are material, and which mislead a party to his prejudice in maintaining his action or defense upon the merits; where this occurs, the injured party must show the fact to the satisfaction of the court, who thereupon may order the pleading to be amended, upon such terms as may be just; third, where the allegation of the claim, or defense, to which proof is directed be unproved, not in some particular or particulars only, but in their general scope and meaning, it is not then to be deemed a case of variance within the provisions of sections 139 and 180, but is to be deemed a failure of proof.

It seems to us that the variance complained of in this action belongs to the second category, and it was doubtless because the trial judge believed that appellant had been misled by the variance between the evidence and the original petition that he granted a new trial, and permitted the amendment conforming the allegations of the pleadings to the proof.

An examination of the original petition shows that there is no variance between its general scope and the cause of action set up in the petition as amended. The amended petition merely sets forth, with greater particularity and minuteness, the facts constituting the cause of action sought to be set up in the original petition. It may be conceded, on this appeal, that the original petition failed to set up, by reason of its vagueness, a good cause of action; the amended petition does not change the cause of action sought to be alleged in the original petition, but expands and amplifies it, by setting forth, minutely and particularly, the facts constituting it, thus making appellant fully aware of the issues he was to meet and defend. The trial court did not err in permitting appellees to amend their petition, and the amendment filed does not substantially vary from the original petition.

The contract constituting the basis of appellees' cause of action is not within the provision of the statute of frauds. Assuming the facts, as alleged, to be true, the agreement was not a collateral, but a direct, undertaking on the part of appellant to pay appellees' claim. Appellees had a common law lien upon the sawed timber in their possession for the sawing, and when they turned it over to appellant, who also claimed to be a creditor of Clark, upon his promise to pay their debt out of the proceeds, this promise was not within the pale of the statute. On this subject Parsons, in his work on Contracts, star pages 24 and 25, says: "It may indeed be stated as a general rule that wherever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, although the performance of it may incidentally have the effect of extinguishing the liability of another. There are several classes of cases which may perhaps be more satisfactorily explained upon this principle than upon any other. Thus, if a creditor has a lien on certain property of his debtor, to the amount of his debt, and a third person, who also has an interest in the same property, promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien, this promise is not within the statute. The performance of the promise, it is true, will have the effect of discharging the original debtor; but there is no reason to suppose that this

constituted, in any degree, the inducement to the promise, or was at all in the contemplation of the promisor."

The following cases are cited in the note supporting this text: "*Williams v. Leper*, 3 Burr., 1884. There one Taylor, a tenant to the plaintiff, being in arrear for rent and insolvent, conveyed all his effects for the benefit of his creditors. They employed the defendant, as a broker, to sell the effects; and accordingly he advertised a sale. On the morning of the sale the plaintiff came to distrain the goods in the house; whereupon the defendant promised to pay the arrear of rent if he would desist from distraining; and he did thereupon desist. Upon these facts the court held that the defendant's promise was not within the statute. To the same effect is *Houlditch v. Milne*, 3 Esp., 86. There the plaintiff had in his possession certain carriages belonging to one Copey, upon which he had a lien for repairs. The defendant, in consideration that the plaintiff would relinquish his lien, and give up the carriages to him, promised to pay the plaintiff the amount due him. And Lord Eldon held the case to be out of the statute, on the principle established by *Williams v. Leper*."

The principles laid down in the case of *Jones v. Walker*, 13 B. Mon., 357, and *Day v. Cloe*, 4 Bush, 563, do not militate against this conclusion; on the contrary, the former, when understood, fully upholds the principle here enunciated, and cites, with approval, the case of *Williams v. Leper*, decided by Lord Mansfield; it holds that when, as in the case at bar, there is a substantial transaction between the parties, independent of the contract between the promisee and the common debtor, the contract is not within the statute.

The court said: "If there be something substantial in the transaction besides the debt and the stipulations with respect to it, which is itself a sufficient consideration for the promise, and which may be assumed to be the real and principal inducement to its being made, then the promise, being founded on some new consideration arising between the creditor and the party promising, and collateral to the original debt, may, perhaps, be regarded as not being a mere promise to pay the debt of another, and as not being within the interdiction of the statute, although it be in terms a promise to pay the debt of another, and although its performance will discharge that debt. The payment of the debt of another may, in such case, be but the mode of paying the promisor's own debt incurred for an equivalent or sufficient consideration, not merely consisting in the original debt, or any disposition of it to be made by the creditor while he continues to hold the demand against his original debtor, but arising upon other parts of the transaction, and plainly appearing in it. Such a promise being founded upon a new consideration, independent of the debt to be paid, may, perhaps, be deemed as an original promise, and enforceable without being evidenced by writing. And if this be so, we should think the law of the case the same, though the party promising may have contemplated, and, perhaps, even stipulated, for some advantage or benefit to the original debtor."

In the case at bar appellees had a lien on the lumber to the extent of their claim; appellant desired to acquire possession, in order to make his debt against Clark, by the contract appellees surrendered possession, and, with it, their lien; appellant received possession, and, with it the opportunity to make his debt; this was a direct and original contract, which has nothing to

do with the statute of frauds, while, incidentally, it operated to pay Clark's debt, that fact does not place the transaction under the interdiction of the statute, and, therefore, the question as to whether or not Clark was released from his debt to appellees, or they thereafter looked to him for payment, is immaterial.

The verdict of the jury was not contrary to the weight of evidence. Two trials were had, the verdict being the same in each. Appellees had the possession of the lumber, and, with that possession, their debt was secured; it is not reasonable to suppose they would turn over the property, which absolutely secured their debt, upon a chance that the proceeds would, after the payment of appellant's debt, also pay theirs. Such an arrangement would have shown in them a lack of business acumen which two juries have, evidently, not believed.

The instructions of the court fully cover the law of the case, and this obviates the necessity of any discussion of those refused by the court.

Perceiving no error in the record the judgment is affirmed.

ADAMS & WESTLAKE CO. v. ROBINSON.

(Filed November 5, 1903—Not to be reported.)

Bills and notes—Assignment—Laches as against assignor—Where the assignee of a promissory note failed to institute suit on the note for more than thirty days after its maturity and allowed more than five months to elapse before an execution was issued on the judgment, he was guilty of such laches as discharged the assignor from liability.

Barnett & Barnett and H. H. Herr for appellant.

Gibson, Marshall & Gibson for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division, No. 1.

Opinion of the court by Chief Justice Burnam.

On the 18th day of May, 1887, the Hopkins & Robinson Manufacturing Co., by O. E. Robinson, treasurer, executed their note to the Union Brass Co. for \$1,760, due two years after date, without interest. O. E. Robinson signed his name across the back of this note, and it was subsequently transferred to the Adams & Westlake Co., who, thirty days after maturity, on the 18th of June, 1899, instituted suit thereon against the Hopkins & Robinson Manufacturing Co. The company defended, and it was continued by consent until the 2d of July, 1892, when it recovered a judgment against the makers in the Jefferson Common Pleas Court. After a delay of nearly five months an execution issued on this judgment, which was returned no property found, and on the 31st of August, 1893, this action was instituted by the appellant against O. E. Robinson, to obtain a personal judgment against him on the note. A demurrer was interposed by the defendant, and the case lingered on the docket without any steps being taken until the 20th of April, 1901, when it was transferred to the ordinary docket, and appellee filed an answer denying liability, setting out the foregoing facts, and plead that he had been released from all liability thereon in consequence of the negligence and laches of the plaintiff. Plaintiff, by way of avoidance of

this defense, replied that appellee was the manager of the manufacturing company, and that the delay complained of was due to his refusal to pay the obligation of the company. A demurrer was filed to the reply and sustained, and plaintiff declining to plead further, its petition was dismissed, and it has appealed to this court.

Section 481 of the Kentucky Statutes provides that "every person who shall sign his name upon the back of a promissory note shall be deemed and treated as an assignor to the party holding it, unless in writing a different purpose be expressed, or the note can be legally placed on the footing of a bill of exchange."

There is no contention in this case that the note belongs to the category of commercial paper, and [before an assignee can recover against the assignor he must institute his action against the payor at the first term of the court after the maturity of the note, obtain judgment, have execution issued, and return of no property found, without unreasonable delay. (*Francis v. Gant*, 80 Ky., 190.)

In this case more than thirty days elapsed after the maturity of the note before suit was instituted, and more than five months elapsed after judgment before execution was issued. This was such laches as to discharge appellee from liability as assignor. The facts in this case are exactly the reverse of those in the case of *Smallhouse v. American National Bank*, 28 Ky. Law Rep., 2385. In that case Smallhouse, the president of the bank, when the note became due, delayed its collection by repeated promises that he would see the makers of the note, and either have it paid or secured. While in this case the appellee from the very start denied all liability of either the manufacturing company or himself. He did nothing to lull appellant into inaction. We are unable to see any reason which would take this case out of the statute.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. SULLIVAN'S ADM'R.

(Filed November 5, 1903—Not to be reported.)

1. Fellow servants—The engineer of a railroad train is not a fellow servant with a brakeman, and the fireman, who handles the engine in the temporary absence of the engineer, is the engineer for the time and not a fellow servant with a brakeman, and the doctrine of fellow servants does not apply as to the right of recovery for the death of the brakeman resulting from the negligence of the fireman while in charge of the engine.

2. Laws of other States—The laws of another State, when relied on, must be pleaded and proven as any other fact.

3. Action for damages—Instruction—In an action for damages for the death of a railroad brakeman, resulting, as alleged, from the negligence of the engineer in charge of the engine, in which the claim for recovery was based on evidence conducing to show that there was a collision between some loose cars and the remainder of the train, an instruction which authorized a finding for the plaintiff if the jury believed from the evidence that deceased was "killed by the negligence of defendant's agents or servants in charge of the engine in the running, management or operation of same," was too vague and indefinite in fixing the liability of defendant, and was erroneous.

4. Same—Where the engineer was acting under the signals of the brakemen, who had devised a running switch, the conductor not being present, the railroad company was not liable for injury to one brakeman resulting from the negligence of another brakeman; and it was error to submit to the jury the question of negligence in the management of the train under such circumstances.

5. Measure of damages—The measure of damages for the death of a person from the negligent act of another is such a sum as will compensate the intestate's estate for the destruction of his power to earn money.

B. D. Warfield for appellant.

C. J. Waddill and Johnson & Worthington for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Hobson.

Appellee's intestate, John Sullivan, was a brakeman in the service of appellant on a freight train running between Nashville, Tenn., and Irvington, Ky., and was killed at Ridge Top, Tenn. The train was a heavy one, and at the foot of the hill was cut in two; the hill engine was then coupled behind the first section of the train and this was taken up the hill. When they reached the top of the grade the hill engine was uncoupled and returned to get the hind section of the train. In the meantime the road engine was pulling on down to the station with the cars attached to it. The four hind cars of this section had air brakes, and it was desired to put them next to the engine when they left Ridge Top. To do this they cut these four cars loose from the cars in front of them and undertook to make a running switch, throwing these four cars in on the side track and leaving the engine with the other cars on the main track. The intestate was on the front of the four cars that were cut loose. The other brakeman was on the cars that were attached to the engine. In making the running switch, or attempting to make it, the intestate in some way fell, or was thrown, from the car on which he was riding, and was run over and killed.

The case for the plaintiff rests on the idea that the four loose cars collided with the front part of the train from the negligence of the fireman, who had charge of the engine, in not keeping out of their way, and also by reason of the negligence of the engineer of the hill engine in giving these cars a kick before he cut loose, it being a down grade from this point to the place where the intestate was killed. On the other hand, the evidence for the defense is to the effect that there was no collision between the cars, and that the intestate fell by reason of his own misconduct in negligently sitting on the brake wheel and turning around on it as one would on a piano stool. The jury returned a verdict for the plaintiff in the sum of \$3,900, and the defendant appeals.

It is earnestly insisted for appellant that there was no proof of negligence, and a peremptory instruction should have been given to the jury to find for it. While the evidence is fragmentary, still, taking it altogether and the circumstances shown by it, we think there was some evidence to go to the jury that the two sections of the train collided, and thus caused the intestate to be thrown from his place of duty to the track in front of the cars on which he was riding. The engineer of the train is not a fellow servant with a brakeman, and when the fireman for a time acts as engineer in his ab-

sence from the engine, he is then engineer, and is not a fellow servant of the brakeman. If, therefore, there was a collision between the two sections of the train by reason of the negligence of the person in charge either of the road engine in failing to keep out of the way of the loose cars, or if there was negligence on the part of the engine of the hill engine in giving the cars such a kick as to cause the collision, the doctrine of fellow servants would not apply under the rule in this State, and there is no proof that the rule in Tennessee is different. The law of another State, when relied on, must be pleaded and proven as any other fact.

The court instructed the jury as follows:

"No. 1. The court says to the jury that if they believe from the evidence that John Sullivan was killed by the negligence of defendant's agents or servants in charge of its engine, in the running, management or operation of same, and they further believe from the evidence that he was using ordinary care for his own safety, then they will find for plaintiff.

"No. 2. Although the jury may believe from the evidence that defendant's agents or servants in charge of its said engine and train were negligent in the management and operation of same, yet if the jury believe from the evidence that John Sullivan, by his own negligence, caused or contributed to cause his own death to such extent that but for such negligence on his part his death would not have occurred, then the jury will find for the defendant.

"No 3. Negligence is the absence of ordinary care, and ordinary care is such care as a person of ordinary prudence would usually exercise under the same or similar circumstances.

"No. 4. If the jury find for plaintiff, they will award such a sum in damages as they believe from the evidence will compensate the decedent's mother and his brothers and sisters for the destruction of his power to earn money. but the total damages shall not exceed \$20,000, the amount claimed in the petition."

Instruction No. 1 is too vague and indefinite in setting out the defendant's liability. The only grounds shown by the evidence upon which the liability of the defendant can be predicated is that the intestate was killed by reason of the collision of the loose cars against the forward portion of the train. It will be observed that the instruction sets out no facts, but simply left the jury to determine the question of negligence generally on all the evidence. The making of a running switch, or the leaving of the engine in charge of the fireman, who had not a certificate of competency, or the absence of the engineer and conductor, may have been regarded by the jury as negligence, making the defendant liable although there was no collision of the cars. In lieu of instruction 1 the court should have told the jury that if they believed from the evidence that the cars, which had been cut loose from the forward part of the train, collided with it by reason of the negligence of the defendant's servants in charge of the engine pulling the train, or the hill engine behind, and thereby the intestate was thrown from the car, or caused to fall from it while he was exercising such care for his own safety as may be usually expected of persons of ordinary prudence, situated as he was, they should find for the plaintiff.

Instruction 2 should not have submitted to the jury any question of negli-

gence in the management of the train. The conductor of the train was with the rear section at the foot of the hill. The fireman was acting under the signals of the brakemen. The running switch was devised by them, and the company is not liable for the negligence of one of the brakemen if by reason thereof the other brakeman was injured.

In instruction 2 the jury should have been told that unless the defendant's fireman in charge of its front engine, or the engineer of the hill engine behind, was negligent in the management and operation of the same, and thereby caused a collision of the cars; whereby the intestate was thrown or caused to fall under the cars; or if the intestate failed to exercise such care for his own safety as may be usually expected of a person of ordinary prudence situated as he was, and but for this would not have been injured, they should find for the defendant. The measure of damages is such sum as will compensate the intestate's estate for the destruction of his power to earn money.

Judgment reversed and cause remanded for a new trial.

Judge Nunn not sitting.

CLARK COUNTY COURT, &c. v. WARNER.

(Filed November 6, 1903.)

1. Ferry privilege—Jurisdiction of courts—Where a river at a point where it is sought to establish a ferry is the dividing line between two counties the county courts of the two counties have concurrent jurisdiction to grant the ferry privilege, but where one of those courts assumes jurisdiction for that purpose and the proceeding is still pending and not finally adjudicated, the other has no jurisdiction of a subsequent application by another person for the privilege at the same place.

2. Writ of prohibition—The first application for the ferry privilege having been appealed to the circuit court, and being still undetermined in some particulars, it was proper for that court to issue a writ of prohibition against the county court which had taken jurisdiction of the subsequent motion for the privilege.

Pendleton & Bush and J. A. Sullivan for appellants.

Beckner & Jonett for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Settle.

The appellee, Anse Warner, on May 6, 1901, entered motion in the Madison County Court for a license to operate a ferry across the Kentucky river between the town of Ford, in Clark county, and a point where the Stony Run and Ford turnpike ends on the opposite side of the river, and on his land in Madison county. The motion was based upon the statutory notice, a copy of which was duly filed at the time.

On the same day, and in the same court, a like motion was made for the ferry privilege at the same place by one J. C. Richards, who claimed to be the grantee of the Ford Lumber and Manufacturing Co., which owned the land on the Clark county side of the ferry, and this claim was confirmed by J. M. Thomas, the president of the company, by written grant, which he

filed in open court. The county court, upon the trial of the two motions, rejected the application of appellee, and granted the ferry license to Richards. Appellee thereupon took an appeal from the judgment of the Madison County Court to the circuit court of that county, and the latter court, on June 29, 1901, upon the hearing of the appeal, rendered judgment reversing the county court, and deciding that the appellee was entitled to the ferry privilege, instead of J. C. Richards. So much of the judgment as it is necessary to make a part of this opinion is as follows: "The court being advised, is of the opinion that the Madison County Court had no power under the evidence in this case to grant a ferry privilege to J. C. Richards, but that Anse Warner was, and is, entitled to the grant of such privilege, absolutely. If it should turn out that there is a public highway at the point of landing upon the Clark county side; but if there is no such public highway upon the Clark county side, the said Warner is entitled to said grant only after the right of way from the point of landing on the Clark county side to a public highway shall have been properly condemned and paid for as required by law."

The same judgment continued the cause until the next term of the court for the introduction of evidence on the question as to whether or not the landing on the Clark county side of the river is an established highway, and for such other proceedings as might to the court be deemed proper after the determination of that question.

At a subsequent term of the circuit court the appellee filed an amended statement, in which it is averred that the ferry sought to be established lands upon the Clark county side of the Kentucky river at and upon one of the streets of the town of Ford, but that the Ford Lumber and Manufacturing Co. is claiming to own the ground upon which the ferry landing will be located in Clark county, for which reason it was made a party to the proceedings, though it is doubtful whether such a step was necessary, as the company had practically made itself a party by appearing in court as the grantor of Richards, and filing the writing confirming his right to the ferry landing on the Clark county side of the river. But a little over a month after the reversal of the judgment of the Madison County Court by the circuit court of that county, with full knowledge of the fact that the appellee, instead of Richards, had been granted a license by the circuit court to operate the ferry at Ford, and that the proceeding was still pending in the circuit court, to the end that appellee's right to the ferry landing on the Clark county side of the river might be adjudicated, the Ford Lumber and Manufacturing Co. filed notice, and moved the Clark County Court to grant it a license to establish a ferry at the same point on the Kentucky river.

The motion in the Clark County Court was resisted by appellee only for the purpose of objecting to the jurisdiction of that court, and to the extent of setting up the pendency of the proceedings in the Madison Circuit Court; the fact that the ferry sought to be established by the Ford Lumber and Manufacturing Co. in Clark county was the same that had been granted appellee by the Madison Circuit Court; the further fact that the Ford Lumber and Manufacturing Co. had been made a party to the proceedings in the Madison Circuit Court, and in addition that appellee had filed in the Madison Circuit Court a petition for a writ of prohibition to be directed to the

judge of the Clark County Court, forbidding him to proceed further in the hearing of the application for a ferry privilege made by the Ford Lumber and Manufacturing Co.

These objections were all overruled, and a continuance of the case refused by the Clark County Court. On the same day a temporary writ of prohibition was granted by the judge of the Madison Circuit Court, which was duly served on the judge of the Clark County Court upon the morning of the following day, after he had resumed the hearing of the motion of the Ford Lumber and Manufacturing Co. in his court. Subsequently the appellants, Clark County Court and J. H. Evans, county judge of Clark county, waived notice and entered their appearance to the petition and motion for the writ of prohibition, moved to set aside the writ, and filed special and general demurrers to the petition, which motion and demurrers were overruled, and judgment duly entered making the writ of prohibition absolute, and from that judgment this appeal is prosecuted.

It is conceded by the appellants that the ferry privilege sought at the hands of the Clark County Court by the Ford Lumber and Manufacturing Co. is the same as the ferry granted to appellee by the Madison Circuit Court on the appeal from the Madison County Court in the controversy between him and J. C. Richards, and that the Ford Lumber and Manufacturing Co., applicant in the Clark County Court for the ferry privilege, had granted to J. C. Richards the right to occupy and use its land on the Clark county side of the river, for a landing and passway to the ferry.

Appellants do not deny that if the Clark County Court had no jurisdiction of the motion pending there for the ferry privilege to the Ford Lumber and Manufacturing Co., then the judgment appealed from was correct. For the appellee it is insisted that as the Madison County Court on the original motion, and the Madison Circuit Court on appeal, first acquired jurisdiction of the matter of the ferry, no other court could consider the question of establishing this particular ferry until the proceeding then pending in the Madison Circuit Court had been determined, and especially that this is true in view of the fact that a judgment had been rendered by the Madison Circuit Court granting the ferry privilege in controversy to the appellee.

In other words, it is contended that as the Kentucky river at the point where it is sought to establish the ferry is the dividing line between the counties of Clark and Madison, the jurisdiction of their respective county courts is concurrent, that is, the county court of either county may grant a ferry license at the point in controversy, but that where one of these courts assumes jurisdiction for that purpose, the other can not thereafter do so, for the reason that the court first acquiring jurisdiction will retain it, to the exclusion of all other tribunals, until a final adjudication in reference to the subject of the action results.

We must sustain this contention of the appellee, as it seems to us to be sound in principle, and consonant with reason. Indeed no doctrine is better settled than that "where two courts have concurrent jurisdiction, whichever court first acquires jurisdiction of a case will retain it throughout." (Am. & Eng. Ency. of Law, 1st edition, volume 12, page 292; Wells on Jurisdiction of Courts, 156; Ober v. Ballinger, 98 U. S., 199)

In *Hawes, &c. v. Orr, &c.*, 10 Bush, 439, this court said: "We recognize

the doctrine that the court first acquiring jurisdiction has a right to go on until it has performed its office in reference to the subject-matter in litigation, and will not allow itself to be ousted of its jurisdiction, or permit the thing in lite to be wrested from it so that it can not execute its judgment."

Manifestly this doctrine should be applied to the case at bar. The subject-matter of the proceedings in each of the two courts is the same; the parties or privies the same; at any rate, if the Ford Lumber and Manufacturing Co. was not actually made a party to the proceedings in the Madison Circuit Court, it is well settled that "notice of an intended application for a grant of ferry privilege is equivalent to service of process on all persons interested." (*Stahl v. Brown*, 84 Ky., 328; *Combs v. Sewall*, 25 Ky. Law Rep., 172.)

The statutory notice was given by the appellee in this case, and its publication was duly proven. In addition, the Ford Lumber and Manufacturing Co., by its president, voluntarily went into the Madison County Court and presented a written transfer to Richards of the use of its lands on the Clark county side of the river where the proposed ferry will be established, by which the latter was made its privy. Furthermore, it was formally made a party to the proceedings in the Madison Circuit Court, of which it had notice before the issue of the writ of prohibition.

It is contended by counsel for appellant that if the Clark County Court was in error in holding that its statutory power to grant a ferry license was stayed by the pendency of a previous motion to establish a ferry in the Madison County Court, at the same point, the only remedy is by appeal, and in support of this contention the decisions of this court in *Arnold v. Shields*, 5 Dana, 18, and *Sasseen v. Hammond*, 18 B. M., 673, are relied on. These decisions indicate the caution exercised by the courts in resorting to a remedy, which in that developing period of our jurisprudence was so rarely needed, but latterly this court has found that cases sometimes arise where the right of appeal does not afford a plain, speedy and adequate remedy, hence the aid of the writ of prohibition is more frequently invoked and allowed than was formerly the case. Indeed this fact seems to have been recognized by the makers of our present Constitution, for section 110 of that instrument confers upon the Court of Appeals the power "to issue such writs as may be necessary to give it general control of inferior jurisdictions."

In *Hindman v. Toney*, 97 Ky., 413, 17 Ky. Law Rep., 286, this court, in construing the provision of the Constitution *supra*, held that it gave the court plenary power to issue the writ of prohibition in every case when necessary to give it general control of inferior jurisdictions, but said that it would not be exercised when adequate relief could be obtained by appeal.

In *Weaver v. Toney*, 21 Ky. Law Rep., 1167, it was said: "In view of these cases it must be recognized as settled law that in proper cases where the inferior tribunal is proceeding out of its jurisdiction, the power of this court may be invoked to stay the exercise of such jurisdiction; and it would also seem in certain classes of cases that even where the inferior tribunal has jurisdiction this court may likewise interfere, if the remedy by appeal is not entirely adequate, or if the court, in the exercise of its discretionary power, shall deem it necessary to so interfere."

In *McCann v. City of Louisville*, 28 Ky. Law Rep., 558, the magistrate

courts against which the writs of prohibition issued undeniably had jurisdiction of the suits which they were forbidden to try. The circuit court which issued the writs had first acquired jurisdiction, and if the inferior courts had been allowed to proceed, the result would have been tedious litigation, unnecessary costs, and in other respects confusion and conflict, which would have been highly prejudicial to the party in the right, and to the State as well. The parties in the Jefferson Circuit Court were not the same as those in the various actions brought in the courts of Magistrates McCann and Adams, against whom the writs of prohibition were issued, but all could have been heard in the circuit court which granted the writs of prohibition, therefore, the action of the circuit court in granting the writs of prohibition was sustained by this court, which held that prohibition furnished the only adequate remedy in that case.

The same doctrine has been followed by the courts of last resort in many of the States. (*Havmeyer v. Sup. Court*, 10 L. R. A., 646; *State v. Aloe*, 47 L. R. A., 899; *Bullard v. Thorpe*, 25 L. R. A., 606.)

By section 497, Civil Code, the writ of prohibition is defined to be "an order of a circuit court to an inferior court of limited jurisdiction prohibiting it from proceeding in a matter out of its jurisdiction." We do not understand from this definition that the writ will lie only in a matter which was never, or could not ever, have been within the jurisdiction of the court prohibited, but includes also "a matter" which may have been, but at the time the writ was issued had passed out of its jurisdiction. For instance, when an appeal has been taken, the jurisdiction once possessed by the lower court has passed from it, and it can be prohibited from considering it further; so when the jurisdiction is concurrent, or co-ordinate, and one court acquires it, the matter has passed "out of the jurisdiction" of the other court which might have entertained it, had its power been first invoked.

In the case at bar the necessity for a ferry at Ford had been established by the judgment of the Madison Circuit Court, and appellee granted the right to operate it, and the case had been continued only for the purpose of determining his right to the landing on the Clark county side of the river, which that court had jurisdiction to determine, even by awarding a writ of *ad quod damnum*, if necessary, which judgment, and steps taken and contemplated, were fully known to the Ford Lumber and Manufacturing Co. It is manifest that the urgency of that company in pushing a trial of its application for the same ferry in the Clark County Court was for the purpose of trying to forestall the action of the Madison Circuit Court, thinking that pending the delay in ascertaining whether or not there was a public way to the street in Ford from the ferry on the Clark side, or in condemning one, it could get a judgment in Clark which might be pleaded in the Madison Circuit Court in bar of the proceedings in that court. To allow such a conflict between courts of concurrent jurisdiction would beget confusion and cause delay, that might, and doubtless would, result in great injustice to the party in the right, and also to the general public.

Being of the opinion that the writ of prohibition will afford appellee the only "plain, speedy and adequate remedy," and that the facts of this case justified the circuit court in granting it, the judgment is hereby affirmed.

Whole court sitting.

ENDICOTT v. TRIPLE-STATE NATURAL GAS AND OIL CO.

(Filed November 6, 1908—Not to be reported.)

Negligence—Peremptory instruction—Where in an action for damages for personal injuries received by falling into an excavation on a public highway it appeared from the evidence that the excavation was more than 900 feet long and that it had no barriers or lights along it to warn the traveling public of its existence, except a light at either end, the court erred in taking the question of negligence from the jury by peremptory instruction.

W. F. Cain, A. Copley and G. W. Castle for appellant.

Kirk & Kirk and Hager & Stewart for appellee.

Appeal from Martin Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was brought by the appellant, Samuel Endicott against the Triple-State Natural Gas and Oil Co. to recover damages for personal injuries alleged to have been sustained by him in consequence of the negligence of the appellee in failing to place proper barriers and lights along an excavation made by them in one of the public streets of the town of Inez for the purpose of planting a pipe line for the transportation of natural gas. The defendant denied the alleged negligence and plead contributory negligence by the plaintiff, but for which the accident would not have occurred. The defense of contributory negligence was controverted by reply. The jury returned a verdict for the defendant, in pursuance to a peremptory instruction given by the court to that effect. It appears from the testimony that the defendant had excavated a trench 325 feet long, 3 feet deep and 15 or 20 inches wide, on the preceding Saturday, the accident occurred on Sunday night, for the purpose of laying a pipe for the transportation of natural gas. The appellant lived some eight or ten miles from Eden in the country, and shortly before dark left his home for the purpose of going to Eden to procure the services of a physician, residing in Eden, for his sick child. While riding along the street his horse stepped into the excavation, and as a consequence he was thrown violently against the sidewalk and fence, and received painful and serious injuries, which incapacitated him for labor for a long time and caused him great pain and suffering, and imposed considerable expense on him for medical attention, drugs, etc. He testified that he did not know of the existence of this excavation; that the night was very dark and a drizzling rain was falling; that there was no barrier around the excavation, and its presence was only indicated by two small lanterns located at each end of the trench; that the place where his horse fell into the trench was 170 feet from one lantern and 155 feet from the other. And his testimony was supported as to the character of the excavation, and the notice given of its location, by a number of other witnesses.

"Public highways belong to the public from side to side, and from end to end," and must be kept safe for the purposes for which they were created; the mere fact that the appellee had a license to plant its pipe line and dig the trench for this purpose along the highway or in the streets of Eden did not exempt them from the duty of taking proper precautions to prevent injuries therefrom to persons using the street. The obligation remained on them to place proper barriers around their trench or lights along the ex-

cavation at such points and in such manner as to apprise persons using the streets of the existence of the excavation. (American and English Encyclopædia of Law, volume 15, page 435, 2d edition, and authorities there cited.) And the question of whether it was guilty of negligence or not in the discharge of this duty, or whether the plaintiff contributed to his injury by negligence on his part, was a question for the determination of the jury under the testimony in the case. This court has often announced the rule that where the testimony conducted in any degree to establish the right of recovery it was improper to give a peremptory instruction for the defendant, even though the court may be of the opinion that if there should be a verdict for the plaintiff it would set it aside. (*L. & N. R. R. Co. v. Howard*, 82 Ky., 212; *Shelby v. C., N. O. & T. P. R. R. Co.*, 85 Ky., 224; *Eskindge v. C., N. O. & T. P. R. R. Co.*, 89 Ky., 387.)

In our opinion there was sufficient evidence conducing to show negligence in the erection and maintenance of the lights, which were intended to give notice of the location of appellee's trench, to have authorized the submission of this case to the jury.

For reasons indicated the judgment is reversed and cause remanded for a new trial consistent with this opinion.

RILEY v. BUCHANAN.

(Filed November 6, 1903.)

1. Private passways—Prescriptive right—Where the claimant of a private passway over the lands of another had owned the lands to which the alleged right of passway was appurtenant for only five years and his grantor had not claimed the right to use the passway, no private right existed by prescription.

2. Public highway—Presumptive dedication and acceptance—Where a passway has been used by the public continuously for more than fifteen years without let or hindrance from the owner of the lands over which it runs, both a dedication by the owner of the lands and an acceptance by the proper legal authority of the passway as a public highway will be conclusively presumed to have taken place.

3. Passway through woodland—While ordinarily the use by the public of a passway through an unenclosed woodland is deemed to be by the permission of the owner and not to be adverse to his title, the facts of this case do not authorize the application of the principle.

J. P. O'Meara for appellant.

W. H. Marriott and L. A. Faurest for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge O'Rear.

This appeal involves the sufficient dedication of a public highway. Appellee claims that he, as a member of the public, has the right to use a certain designated passway over appellant's land. He also claims the right to use it as a private passway. But the record shows that he has owned the adjacent land to which it is claimed as an appurtenant for only about five years. His vendor did not claim the right to use this passway, although he owned the land for fifteen years.

The doctrine in this State of acquiring private passways by prescriptive use requires a continuous, adverse user by the claimant, or by him and those under whom he holds, for at least fifteen years. (*O'Daniel v. O'Daniel*, 88 Ky., 185.)

Appellee's standing is alone upon the claim of the right of the public, of which he is one. It is clearly established that the passway in question has been used by the public for purposes of neighborhood travel, for travel to and from a church, and for much of the time to and from a railway station and postoffice, for more than fifty years. The use has been at the pleasure of the public, without let or hindrance from the owner of the servient estate, and by all means and for all purposes of travel. There are other roads that might be, and that frequently are, used by the public in passing between the same points. But this way is most traveled by a certain neighborhood to reach the points mentioned. The circuit court held that the passway was a public highway, used for such a length of time by the public as to raise a presumption of its dedication to the public by the original owner.

Counsel for appellant insists that the judgment is erroneous, because he asserts a right in the public can not be created by prescription; also that a dedication of a road to the public, to be valid, must first be accepted by public authority. Technically prescription presupposes a grant. There can not in fact be a grant without some person in esse to take as the grantee. Therefore, generally when the term "prescriptive right" is used by the courts, it refers to the personal right to the use of real property which has been acquired by the claimant, or some one under whom he holds, and which has been created by operation of law. If in fact there was a grant by the owner of the fee, the grantee and his heirs and assigns, if it were a perpetual grant, or one for a term of years, would hold according to its terms. However, from a continuous user under claim of right for such a length of time, formerly where the memory of man ran not to the contrary, but later, for such time as was equivalent to the statutory period of limitation applicable to real estate, the fiction was adopted that the existence and loss of a grant would be presumed by law. It came first to be applied to claims of individual or private rights. It was deemed that a grant "to the public" would be void for want of its competency to take by grant. (*Jones on Easements*, section 422; *Washburne's Easements and Servitudes*, page 219.) Appellant, therefore, criticises certain opinions of this court where it has spoken of the public's having obtained the right to use a passway by prescription. If the terms employed were to be limited to their ancient use and meaning the criticism would not be inapt. But they have long since come to be used in describing the right of the public in such passways, and how created. Not alone by this court, but by other courts and text-writers. Appellant's very earnest argument, that a right can not be created in the public by prescription, rests upon the narrowest employment of that term, and is extremely technical. But we understand him to contend as well that long user by the public of a passway can not create the right to continue the use, by whatever name it may be called.

A highway is commonly understood to be a turnpike road, gravel road, or plank road, or the common thoroughfare established and maintained by public authority for travel by the public generally. Its establishment is by

the dedication of the land to the use of the public as a highway, and its acceptance and use by the public for that purpose. Ordinarily the dedication is by statutory proceedings, showing both the dedication and the acceptance. But it is not essential that the evidence of either should be established by the records. If the owner of the fee sets apart to the use of the public a passway over his land, intending to dedicate it to the public use, it is not required to be in writing. A dedication of land to public use may be by parol. (*Trustees of Dover v. Fox*, 9 B. Mon., 201; *McKinney v. Griggs*, 6 Bush, 405; *Griffey v. Bryars*, 7 Bush, 473; *Hall v. McLeod*, 2 Met., 104; *Beall v. Clore*, 6 Bush, 677; *Spurrier v. Bland*, 20 Ky. Law Rep., 1340; *Wickliffe v. City of Lexington*, 11 B. Mon., 155.)

It is sufficient if his intention and express act are clear and coincide. In that event the dedication will be effective immediately upon its acceptance by the public. (*Elliott on Roads and Streets*, 127.) If, however, there is not an express dedication, but the owner suffers the public to use the passway, knowing it is claiming it as a matter of right, the law presumes a dedication to the public, and presumes the dedicator's intention to be in accord with the public's use. This does not depend upon whether there has in fact been an actual dedication to the public, but it is founded upon the principles of estoppel in pais. If the real owner suffer the public generally to so use his land as a passway under a notorious claim of right, for a great length of time, whereby others may have been induced to buy property in that vicinity, relying upon the apparent right of the public to use this passway, and by which the purchase price of their lands may have been affected, it is unfair that the owner should be permitted to gainsay the truth of it. The law operates upon his conscience, and makes effectual that which he has suffered for so long to appear to be so by raising the conclusive presumption that he has actually done what he allowed the public to believe he had done, dedicated the passway to the use of the public. (*Elliott on Roads and Streets*, 132; *Jones on Easements*, 422.) A dedication by the owner to the public use is not alone sufficient. A dedication sometimes imposes burdens upon the public as well as grants privileges. It would not do to allow one of his own volition merely to thus impose an onerous burden upon an unwilling public. It is, therefore, necessary that there should be an acceptance by the public as well as a dedication by the owner. As already indicated, this acceptance may be signified by the action of those officials whose duty it is to represent the public in those matters. A formal order upon the records of the proper official body would of course be the most satisfactory manner of acceptance. But much less may be equally effective. As, for example, it has been held the appointment of overseers, the allotment of hands, or the maintenance of the highway at the public expense are sufficient evidence of the acceptance. (*Commonwealth v. Abney*, 4 Mon., 479; *Gedge v. Commonwealth*, 9 Bush, 64; *Greenup Co. v. Maysville & B. S. R. R. Co.*, 14 Ky. Law Rep., 699; *L. H. & St. L. R. R. Co. v. Commonwealth*, 104 Ky., 35, 20 Ky. Law Rep., 371.) The cases from this court cited just above all raised the question of acceptance of public roads, by implied dedications by long user, where it was shown that the county officials had by some overt act, and generally of record, recognized and adopted the dedicated highway as a public road. In none of these cases does

it seem that the question has been raised whether a sufficient acceptance on behalf of the public might have been by any other method than those just mentioned. A number of unreported cases decided by this court have assumed that it could. (*Gatewood v. Cooper*, 18 Ky. Law Rep., 869; *May v. Blackburn*, 15 Ky. Law Rep., 705; *Burch v. Blair*, 19 Ky. Law Rep., 641; *Potts v. Clark*, 23 Ky. Law Rep., 332; *Wright v. Willis*, 23 Ky. Law Rep., 537; *The Eastern Cemetery Co. v. City of Louisville*, 13 Ky. Law Rep., 279.)

These cases are criticised by counsel for appellant, and claimed to have been not well considered, and in conflict with those reported cases holding an acceptance by the public authority to be essential to the complete dedication of a public road. That an acceptance of a public highway, as distinguished by some eminent authorities from a mere public passway, may be by acts less than the recognition of the dedication by an order of record, or by the appointment of overseers, or the allotment of hands by the county court, or the expenditure of public funds to keep them in repair, there is abundant authority. On this *Jones on Easements*, section 449, says: "Such acceptance, however, need not be formal, but may be shown by circumstances, such as long-continued use by the public, by improvements or repairs of the way, by grading, macadamizing, building, or the like, or by the taking charge of the road by the proper public officials. Where there has been a dedication of the highway, and this appears to be beneficial to the public, acceptance will be presumed from slight circumstances."

Same, section 450: "In some cases an acceptance by the public of land dedicated to use as a highway has been established by use alone, without any action on the part of the municipal officers."

The Supreme Court of Wisconsin, in *Buchanan v. Curtis*, 25 Wis., 99, 3 Am. Rep., 23, held that an acceptance of a highway dedicated by implication would be presumed from the travel upon it by the public for such a time and such an extent as to show that the public convenience and accommodation require the road.

The rule is the same in Missouri. In *Bauman v. Boeckeler*, 119 Mo., 189, the Supreme Court said that there must be an acceptance of the dedication by the public, "either by user for a length of time, more or less, according to circumstances, or by its adoption by the public authorities." (*Brink v. Collier*, 56 Mo., 164; *Kansas City Milling Co. v. Riley*, 133 Mo., 574.)

In *Washburne's Easements and Servitudes*, 219, it is declared upon authority that "length of enjoyment may be regarded when the evidence of a dedication having been made depends on user by the public of the thing dedicated. But as all that is requisite to constitute a good dedication is that there should be an intention and an act of dedication on the part of the owner, and an acceptance on the part of the public. As soon as these concur the dedication is complete. Ordinarily there is no other mode of showing an acceptance by the public of a dedication than by its being made use of by them, and this must be sufficiently long to evince such acceptance."

Judge Elliott, in his work on *Roads and Streets*, page 117, says: "There has been much diversity of opinion as to whether user by the public will amount to an implied acceptance and cast the burden of maintenance upon the local government. * * * This uncertainty is removed by the later authorities, and it may now be considered as the prevailing opinion that an

acceptance may be implied from a general and long-continued use by the public as of right."

In *Manderschid v. City of Dubuque*, 29 Iowa, 73, the Supreme Court of Iowa, in applying the same doctrine, said: "It is probably the settled doctrine in England that no formal acceptance, other than public use, is necessary in order to make the dedication of a highway effectual. (Angell on Highways, section 158.) While this rule is not uniformly recognized in this country, yet it is believed that the weight and prevailing current of authorities support it." (Quite an array of cases cited in support of the statement.)

The rule in Connecticut is that the convenience to the public of a highway in question, coupled with use by the public, when dedication is sufficiently shown, will support a presumption of acceptance. (*Green v. Canaan*, 29 Conn., 157; *Guthrie v. New Haven*, 31 Conn., 308.) A number of other cases examined, and which support the general doctrine of an acceptance by the public being presumed from its long-continued use of the highway, are appended. (*Cook v. Harris*, 61 N. Y., 448; *People v. Loehfelm*, 102 N. Y., 1; *Ross v. Thompson*, 78 Ind., 90; *Steele v. Sullivan*, 70 Ala., 589; *Eureka v. Croghan*, 19 Pac. Rep., 485; *Carter v. City of Portland*, 4 Ore., 339; *Commonwealth v. Morehead*, 118 Pa. St., 34, s. c., 4 Am. St. Rep., 599; *Warren v. Jacksonville*, 15 Ill., 233; *Grube v. Nichols*, 36 Ill., 92; *State v. Fisher*, 117 N. C., 733, 23 S. E. Rep., 158; *Buchanan v. Curtis*, 25 Wis., 99, 3 Am. Rep., 23; *Atty. General v. Abbott*, 154 Mass., 323, 28 N. E. Rep., 346, 13 L. R. A., 351; *Smith v. Flora*, 64 Ill., 93; *Los Angeles Cemetery Co. v. Los Angeles, Cal.*, 32 Pac. Rep., 240; *Harrison Co. v. Seal*, 66 Miss., 199, 3 L. R. A., 659; *Bauman v. Boekeler*, 119 Mo., 189; *Kansas City Milling Co. v. Riley*, supra; *Pomfrey v. Village of Saratoga Springs*, 34 Hun., 607; *Porter v. Village of Attica*, 33 Hun., 605; *State v. Elsele*, Minn., 33 N. W., 785.) There are but few cases which we have found to the contrary, especially of modern promulgation. Among these are *Commonwealth v. Kelly*, 8 Gratt., 632; *Manberry v. Inhabitants, &c.*, 56 Me., 342; *Bowers v. Suffolk, &c., Co.*, 4 Cush., 332.

The former opinions of this court do not necessarily hold that an acceptance by long-continued use alone by the public of a highway in question would not be a sufficient acceptance. In *Gedge v. Commonwealth*, supra, which was an indictment for obstructing an alleged highway, the court found as a matter of fact that the supposed highway had never been used as such by the public. What the court decided was that an acceptance, "either express or by implication," was necessary to constitute the way into a public street.

Greenup Co. v. Maysville & B. S. R. R. Co., 14 Ky. Law Rep., 699, was an indictment for obstructing a public road. As to how the road might be dedicated the court said: "It seems to be settled that a grant of a right of way and its acceptance by the proper authority and in the proper manner will be conclusively presumed from an uninterrupted and adverse use by the public as a right, and not the effect of indulgence or permission for the period of fifteen years or more."

The cases of *Gedge v. Commonwealth*, supra, and *Wilkins v. Barnes*, 79 Ky., 323, were cited in the opinion. *L., H. & St. L. Ry. Co. v. Common-*

wealth, 104 Ky., 35, 20 Ky. Law Rep., 371, was also an indictment involving the question of the establishment of a public highway by common law dedication. Although the court found that the county court had appointed overseers over the road and had allotted hands to work it, the court took occasion to say: "A continued, uninterrupted and adverse use of a highway as such by the public as a right for the period of fifteen years creates a conclusive presumption of dedication and acceptance of it."

But it is urged that the case of *Wilkins v. Barnes*, supra, is in conflict with the doctrine being discussed; that it expressly decides that an acceptance by the public officials, by some overt official act, indicating a purpose to accept the road, is necessary. *Gedge v. Commonwealth* and *Commonwealth v. Kelly* supra, are mainly relied on as authorities. Whatever may have been the extent of the court's views in that opinion, it is clear that, beginning with *Eastern Cemetery Co. v. City of Louisville*, supra, *Greenup Co. v. Maysville & B. S. R. R. Co.*, supra (decided in 1891 and 1893), it has never since been applied with the same strictness. It is not in accord either with the weight and current of the authorities, nor do we believe it is, in its extremity, sound in principle. As all highways are established for the public, to meet their demands and necessities in traveling, it ought to be that they should be permitted to accept a dedication of a roadway given to them by grant, if they deem it to their interest to do so. The statutory method of opening new roads is better suited if not intended for cases where there may be objection to the proceeding on the part of the land owner, or where his grant is involuntary, and a condemnation must be resorted to. On the other hand, if the owner sees proper to voluntarily grant or dedicate a right of way to the public, and if it is necessary to the public travel and accepted and used for that purpose, we can not see that it should be either denied or discouraged. The fact that such a road is persistently and generally used by the public for a great number of years proves its necessity; that the public officials, in this State, the fiscal and county courts, should have it in their exclusive power to deny the public the right to accept the road, by merely neglecting to provide for its maintenance by having hands allotted to keep it up, the hands being generally those members of the public most interested in it, or by refusal or failing to note their approval by an order on their records, is not reasonable. As a matter of fact, the road may not need work or repair. Why should the county officials be compelled to do a vain thing then in allotting hands for the purpose?

We feel constrained by reason and authority to hold that while an acceptance by the public is essential to a complete dedication of a public highway or passway, the acceptance may be either by formal ratification by the proper official board of the municipality, or by implication by it, where it takes charge of the road by directing improvements on behalf of the public, or otherwise by overt act recognizes it as a public road; or it may be by the public by such protracted and continued use as to clearly indicate its acceptance, when the road dedicated is a benefit to the public and not a burden. In the last-named state of case a formal acceptance by the proper legal authority will be conclusively presumed to have taken place.

Should the road become a burden to the public, it may be discontinued in the method pointed out by the statutes. It is claimed in argument that the

road passes through "woodland," and that, therefore, the public does not acquire a right by its use for whatever length of time it may have been continued. While it is true that a part of the road is shown to pass through a woodland, it is not shown that this woodland is not enclosed. From all the evidence it seems probable that it is. Ordinarily the use by the public of a passway through unenclosed woodlands is deemed to be by permission of the owner, and not to be adverse to his title. (*Wilkins v. Barnes*, ubi. supra.) But this may or may not be so, according to circumstances. (*May v. Blackburn*, 15 Ky. Law Rep., 705.) There is no apparent reason for extending the exception as to unenclosed woodland to this case.

Perceiving no error in the record the judgment of the circuit court is affirmed.

Whole court sitting.

BOUGHNER, &c. v. LAUGHLIN'S EX'TX, &c.

(Filed November 10, 1903—Not to be reported.)

Appeal from Bracken Circuit Court.

Original opinion ante, —.

Judge Nunn delivered the following response to petition for rehearing and extension:

After a careful consideration and rehearing of this case we see no cause for changing the opinion rendered, except that it is extended to say that John W. Boughner shall be required to account for all that he and his wife owe the Laughlin estate before he is allowed to receive anything on the claim adjudged to him.

Whole court sitting.

Judge Paynter dissents.

LOUISVILLE CITY NATIONAL BANK v. WOOLDRIDGE, &c.

(Filed November 10, 1903.)

1. Married woman—Power to devise personal estate—A married woman has the power, with the consent of her husband, properly evidenced, to dispose of her separate personal estate by last will and testament, and such consent on his part is no fraud upon the rights of his creditors.

2. Construction of will—Remainder—Where the testatrix gave to her daughter a certain sum of money for her separate use and benefit and free from the control, debts and marital rights of her husband, with power and authority to dispose of it by last will and testament or in any other manner, with the provision that in the event the daughter should die before her or her husband the legacy should pass to and vest absolutely in the surviving husband, the bequest in remainder would take effect only in the event the daughter died before the testatrix; and the testatrix having died during the lifetime of both the daughter and her husband, the latter took no remainder interest in the bequest.

Kohn, Baird & Spindle and C. H. Shield for appellant.

E. L. McDonald and Humphrey, Burnett & Humphrey for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch.

Opinion of the court by Chief Justice Burnam.

On the 29th of March, 1898, the Louisville City National Bank brought a suit in equity against Charles F. Johnson, in which they allege that they had previously recovered a judgment against him for \$11,979.10, with interest from the 18th of November, 1897, on which execution had issued directed to the sheriff, and which had been returned by him endorsed "no property found out of which to make this fl. fa. or any part thereof." The petition alleged that the defendant had in his possession, and in the possession of other persons whose names were unknown to the plaintiff, money and property which was liable for their debt, and asked that he be required to appear before the court for examination as to the whereabouts of his property, and that same be subjected to their demand. They at the same time sued out a general attachment against the property of the defendant. On the 8d day of June, 1898, and while the suit of the bank against Charles F. Johnson was still pending, the wife of the defendant, Mary Lawrence Johnson, died, leaving her husband and Mary C. Wooldridge, her only child and heir at law, the wife of Powhatan Wooldridge. The will of Mary Lawrence Johnson was duly probated by the Jefferson County Court on the 8th of June, 1898, with the consent of her husband, Charles F. Johnson, and is as follows:

"I, Mary Lawrence Johnson, do make this my last will and testament, revoking all others.

"In view of the fact that my daughter, Mary C. Wooldridge, will inherit a large estate left me by my father and mother, I bequeath to her the small sum of \$500. I make this explanation in the beginning, that my will may not be considered unjust and peculiar. I leave my daughter, Mary C. Wooldridge, my carriage and horses, and the entire contents of my house during her life; at her death to be divided equally between my grandchildren. To each one of my four grandchildren, Powhatan Johnson Wooldridge, Annie Mary Wooldridge, Mary Tyler Wooldridge and Charles F. Wooldridge, I give and bequeath thirty shares of stock in the 'Columbia Finance and Trust Co.' At the death of any one of the four (being unmarried) his or her share is to go to the surviving brothers and sisters. The remainder of everything that I possess I leave as a sacred trust to my daughter, Mary C. Wooldridge, knowing that she will faithfully carry out my wishes regarding it. I desire that no inventory shall be taken of my effects.

"MARY LAWRENCE JOHNSON.

"Witness: C. B. SEYMOUR,

"GEO. D. TODD.

"I appoint my daughter, Mary C. Wooldridge, my executor without bond.

"MARY LAWRENCE JOHNSON."

Endorsed below the signature of Mrs. Johnson were these words:

"I consent to all my wife has written in her will.

"CHARLES F. JOHNSON."

Simultaneously with the execution of this will Mrs. Johnson executed in writing a paper defining the sacred trust referred to in the will, which reads as follows:

"I want Chamie (Mrs. Mary C. Wooldridge) to keep two pews in Christ Church as long as her father shall live, just as I have done, and I want one of them kept in his name. I want her to give \$100 to the Home of the Innocents in her father's name as long as he lives. I want her to use for her father's personal support such a part of the income from what I leave as in her judgment shall seem fit, but she shall be the sole judge as to how much or how little, or whether any, shall be applied in this way. I want her to care for my old servant, Ammie Wright, when she shall become unfit for work, either from age or infirmities. The balance of the income I want her to use for the education of my four grandchildren. At the death of her father I want the principal put in trust for my four grandchildren. Chamie may sell and reinvest any part of my estate as she may see fit."

Mrs. Johnson, at her death, owned and was in possession of, besides her household furniture and belongings, stocks in various corporations, worth in the aggregate about \$35,000 or \$40,000. Mary C. Wooldridge declined to qualify as executrix of her mother's will, and her husband, Powhatan Wooldridge, was appointed administrator with the will annexed, and on the 17th of November, 1898, brought suit in the Jefferson Circuit Court against her heirs and creditors for the purpose of settling his accounts and distributing the estate in accordance with the will of testatrix. Powhatan Wooldridge, after the institution, resigned as administrator with the will annexed, and J. W. E. Bailey was appointed in his place. Subsequently the defendants, Mary C. and Powhatan Wooldridge, filed an answer and counterclaim against the plaintiff, Bailey, as administrator de bonis non, in which they allege that Robert Tyler, the father of Mary L. Johnson and grandfather of Mary C. Wooldridge, had died possessed of a large estate, which he disposed of by will; and that after making certain specific devises to his wife, Mary L. Tyler, proceeds as follows: "All the rest and residue of my estate, that is, my real estate, I give and devise to my beloved wife, Mary L. Tyler, as trustee and in trust for each one of my daughters, share and share alike, and for their separate use during their lives, and after their deaths respectively then for such child or children as they may respectively leave, with full power to my said wife at any time to sell any part of said real estate and invest the proceeds in other real estate whenever she may think it best to do so; but any purchaser shall not be bound to see the money invested, and any property she may so purchase shall be held in trust as herein provided, and as to the balance of my estate I give the same to my said daughters, share and share, alike forever."

They state that prior to 1859 a partition was made of the real estate subject to the trust, situated in Jefferson county; and that there was allotted to Mary L. Tyler, as trustee for her daughter, Mary Lawrence Johnson, six separate lots and tracts of land; and that thereafter, at the request of Mary L. Johnson, all of these pieces of real estate were sold by the trustee, Mary L. Tyler, and the proceeds thereof turned over by her to Mary L. Johnson, and were by her appropriated to her own use, with full knowledge of the provisions of the will of Robert Tyler, deceased; that Mary C. Wooldridge was an infant under twenty-one years of age and a married woman when the property was converted, and charges that the purchase money realized from the sale of this trust real estate aggregated \$58,974, which she asserts

as a claim against the estate of her mother. The answer also sets up other claims, aggregating \$8,500, for money advanced for the use and accommodation of Mary L. Johnson during her life.

The Louisville City National Bank filed their answer in the settlement suit, which they made a counterclaim against the administrator and a cross petition against the Wooldridges and Charles F. Johnson, in which they controvert the claims asserted both by Mr. and Mrs. Wooldridge on several grounds: First, they deny the alleged conversion by Mrs. Johnson of the trust estate devised by the will of Robert Tyler; second, they plead that the claim is stale and barred by the lapse of time and statute of limitation; third, that even if the trust estate devised to Mary L. Johnson by her father, Robert Tyler, had been lost, that it was through the negligence of Mary L. Tyler, the testamentary trustee, and the cause of action was against her and not against Mrs. Johnson, who was a married woman; and that Mary L. Tyler had, in her will, devised a large amount of property to Mrs. Wooldridge upon the condition that she should not call in question the manner in which she had discharged the duties imposed upon her as trustee by the will of her deceased husband with reference to the trust estate; and that Mrs. Wooldridge had accepted the provision made for her and was estopped from questioning the manner in which the trust had been administered. They also allege that Charles F. Johnson was by law entitled, as tenant by the courtesy, to one-half of the surplus of his deceased wife's personal estate; and that in addition to this interest, which descended to him under the statute, he was by the tenth clause of the will of Mary L. Tyler entitled to have paid over to him from the estate of his deceased wife \$20,000.

The tenth clause in the will of Mary L. Tyler is as follows: "I give to each of my daughters, Mary Lawrence Johnson, Ann Eliza Bent, Alice Bacon, Fannie S. Bayley and Roberta Tyler, \$20,000, for their sole and separate use and benefit, to be forever free from the control, debts and marital rights of their present husband, and any either of them may ever have; and each of my said daughters shall have, and is hereby given, power and authority to dispose of the same by last will, or in any manner they may choose. But in the event that any one or all of my said daughters shall die before her or their present husband or husbands, the legacy given by this clause of my will to such daughter or daughters so dying shall pass to and vest absolutely in the surviving husband of such deceased daughter."

They allege that Mrs. Johnson had no power, neither under the statute which prevailed at the time she received the property disposed of, nor at the time of her death, to make a will cutting out her husband; and charge that the will attempting to do so was the result of a fraudulent conspiracy in which she, her husband and the Wooldridges had participated, for the purpose of defrauding the creditors of Charles F. Johnson, and ask that the interest of Charles F. Johnson in the personal estate devised by the wife be subjected to the payment of his debts.

The Wooldridges replied to the answer and counterclaim, and allege that their father, Charles F. Johnson, had been paid \$10,300 from the fund devised in the tenth clause of the will of Mary Tyler, which had been accepted by him in full discharge of any rights or claims which he might have by virtue of the devise contained in the tenth clause of the will of Mrs. Tyler.

They deny the alleged fraudulent conspiracy to cheat the creditors of Charles F. Johnson in the making of the will of Mary L. Johnson, or that she was not authorized to dispose of her personal estate. The pleadings were made up by rejoinder, surrejoinder, etc., and upon final submission the trial court sustained the will of Mrs. Johnson and held that neither her husband, Charles F. Johnson, nor the bank, as his creditor, had any interest in or claim thereon, and dismissed the claim of the bank, and the bank has appealed. The record discloses that in 1856, Charles F. Johnson married Mary L. Tyler, the daughter of Robert Tyler; that after his death, in 1862, the real estate devised by Robert Tyler was partitioned between his devisees; and that before the death of his widow, executrix, and testamentary trustee in 1891, she had sold and conveyed real estate which belonged to Mary L. Johnson during her lifetime, and at her death to Mrs. Wooldridge, for which she realized \$68,974.25, which fund was not reinvested by the trustee as provided in the will, but was turned over to Mrs. Johnson and her husband, Charles F. Johnson, who spent it. It appears that in 1890 Mrs. Tyler gave to her daughter, Mrs. Johnson, \$100,000, \$50,000 of which was invested in real estate, and the remaining \$50,000 in stocks in Mrs. Johnson's name, and which constituted the greater part of the personal estate owned by her at her death and disposed of by her will. It is also shown that Mrs. Tyler died in 1891, leaving a large estate, which was devised to trustees for her children for life, with remainder over, exclusive of the \$20,000 devised by the tenth clause of the will referred to above. It is shown by the testimony of both Charles F. Johnson and Mr. Wooldridge that \$10,833, devised by the tenth clause of the will of Mrs. Tyler, was paid over to Johnson under an agreement with his wife that it should be accepted in full of his interest in this fund.

The record presents many interesting legal questions, all of which, however, it will not be necessary for us to discuss. The first and most important one to be decided is whether Mrs. Johnson had the power, with her husband's consent, to make a valid disposition of that part of her personal estate to which he would have been entitled if she had died intestate. The right of a married woman to dispose of personal estate by will has often been the subject of inquiry at the hands of the courts. The common law with reference to this power is thus stated by Mr. Blackstone: "Among the Romans a married woman was as capable of bequeathing as a feme sole. But with us a married woman is not only incapable of devising lands, being excepted out of the statute of wills, 34 and 35 Henry VIII. chapter 5, but also she is incapable of making a testament of chattels without the license of her husband, for all her personal chattels are absolutely his. It would, therefore, be extremely inconsistent to give her a power of defeating that provision of the law by bequeathing those chattels to another. Yet by her husband's license she may make a testament, and the husband upon the marriage frequently covenants with her friends to allow her that license. But such license is more properly his assent, for unless it be given to the particular will in question it will not be a complete testament, even though the husband beforehand has given her permission to make a will. Yet it shall be sufficient to repel the husband from his joint right of administering his wife's effects, and administration shall be granted to her ap-

pointee with such testamentary paper annexed." (Blackstone's Commentaries, 497 and 498.)

It has been held in numerous decisions by the court in England and the United State that the husband could waive his marital rights in the personal property of the wife by consent to her will. In *George v. Bussing*, 54 Ky., 448, the question of the power of the wife to make a valid disposition by will of her personal estate and slaves was directly involved, and this court, in a very carefully considered opinion by Judge Simpson, said: "The doctrine is well settled that the wife may dispose of her separate estate by will, and may make a will in pursuance of a power given her for that purpose. It is also settled doctrine that she may, with the consent of her husband, make a will to dispose of her personal estate. The principle upon which the power of the wife to make a will in such a case is founded, seems to be this: That the husband may waive the interest in her property which the law confers upon him, and empower the wife to dispose of it by will. The grant of such a power is implied from his consent that the will should be made. A general assent that she may make a will is not sufficient. It must be proved that he has consented to the particular will which she has made, and his consent should be given when it is proved. The reason for this is that he may revoke his consent at any time during his wife's life or after her death before probate."

It was decided that the will of the wife was valid with respect to her separate estate and also her personal property, but that it was ineffectual to dispose of her slaves or any personal property which belonged to the husband at the time it was executed. When this decision was rendered the revised statutes were in force, which gave to the husband the entire personal estate left by the wife, nor could a married woman dispose under the statute by will of any estate not secured to her separate use by deed or devise or pursuant to a written power. The whole question turned upon the application of the common law to the facts of that case. So far as we are advised the rule there announced has never been curtailed by statute or decision, and has been distinctly recognized in other cases in this State and in numerous decisions of courts of other States. (*Hiram v. Griffith*, 71 Ky., 262; *White v. Sale*, 7 Ky. Law Rep., 570.) The tendency of legislation on the subject has been in the opposite direction. Both by the revised and General Statutes a married woman was authorized to make a will disposing of estate secured to her separate use by deed or devise, and in the exercise of a written power. Section 15, chapter 53 of the General Statutes provide that "if any stock in any bank or other corporations of this State is taken for or transferred to any feme sole, and it is expressed on the certificate or transfer book that it is for the use of such feme sole, no husbands of her should take any interest in such stock or in the dividends thereof, and that at her death it should pass to her heirs; and that she could dispose of it by will with the consent of her husband, or without his consent if provided in the deed or will creating the trust."

The act of 1894 still further extends the power of married women and converts all their personal property into separate estate, and confers upon her the power to dispose of her estate by last will and testament, subject to the provisions of the act. (Kentucky Statutes, section 2147.) We do not refer

to these successive provisions of the statute for the purpose of resting thereon our conclusions that Mrs. Johnson had the power to dispose of her personal estate by will with the consent of her husband, because, in our opinion, the right existed at common law, but to show that it was in no way changed or abridged by these various statutory provisions.

During the life of Mrs. Johnson her husband had no vested interest in the personal property disposed of by her. He could not have reduced it to possession without her consent, and she could have sold it, given it away or disposed of it in any way she saw fit without his consent. It is, therefore, hard for us to understand how he perpetrated a fraud upon his creditors when he consented that she should do by last will and testament what she had the undoubted right to do during her life. Section 1906 of the Kentucky Statutes, provides that "every gift, conveyance, etc., of any estate with intent to delay, hinder and defraud, shall be void as against such creditors."

This statute refers to property owned by the debtor and which his creditors had the right to subject (*Crozier v. Young*, 19 Ky., 158.) In *Hickman v. Brown*, 88 Ky., 377, the husband did not consent to the execution of the will, but contested its probate, and it came to this court on a verdict rejecting the will. There is no reference in the opinion in that case to *George v. Bussing*, *Hiram v. Griffith*, or *White v. Sale*, and no intimation that the court intended to depart from the well-established common law doctrine, and it must, therefore, be considered as simply deciding the question which the court had before it. In *Smoot v. Hizer's Ex'or*, 23 Ky. Law Rep., 2401, there was no question of consent by the husband to the wife making a will involved. And the court in that case decided that under the act of 1844 the wife could not dispose of her property by will without the consent of the husband so as to deprive him of the interest in her property secured to him by the statute. We, therefore, conclude that Mrs. Johnson had the power, with the consent of her husband properly evidenced, to dispose of her separate personal estate by last will and testament, and that such consent was no fraud upon his creditors.

The contention of the appellant that Charles F. Johnson had a remainder interest in the devise of \$20,000 made in the tenth clause of the will of Mary Tyler to her daughter, Mrs. Johnson, appears unsound. In this clause of her will Mrs. Tyler gives to each of her daughters, for their separate use and benefit, \$20,000, free from the control, debts and marital rights of their husbands, with power and authority to dispose of it by last will in any manner they may choose. The section then provides that in the event any one of her daughters should die before her, or their husbands, the legacy given by this clause should pass to and vest absolutely in the surviving husband of such deceased daughter. In somewhat similar provisions in wills devising both real and personal estate this court has uniformly held that the bequest in remainder only took effect in the event the first taker should die before the testatrix. This seems to be the only possible construction which reconciles the first and last part of the clause. The principal is well stated in *Jarman on Wills* (2d edition), volume 1, page 398, where the author says: "Sometimes where an estate in fee is followed by apparently inconsistent limitations, the whole has been reconciled by reading the latter disposition

as applying exclusively to the event of the prior devise in fee dying in the testator's lifetime, the intention being, it is considered, to provide a substituted devise in the case of lapse."

On page 399 the same author says: "It is clear, however, that words and passages in a will which are irreconcilable with the general context may be rejected, whatever may be the local position which they happen to occupy; for the rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein."

The same doctrine is announced in *Baxter, &c. v. Isaacs, &c.*, 24 Ky. Law Rep., 1618; *Pol v. Benning*, 48 Ky., 623; *Trackton v. Woodson*, 84 Ky., 206; *Duncan v. Kennedy*, 72 Ky., 582; *Ferguson v. Thompson*, 87 Ky., 519; *Wills v. Wills*, 85 Ky., 430; *Dickerson v. Ogden's Ex'or*, 89 Ky., 162; *Prewett v. Hooland*, 92 Ky., 641; *Banks v. Ballard's Ass'ee*, 88 Ky., 481; *Aultman v. Gibson*, *Guardian*, 23 Ky. Law Rep., 2296.

It will be unnecessary for us to consider the alleged agreement by which Colonel Johnson received \$10,827 of this bequest at the death of Mrs. Tyler in consideration of a full release by him of any claim to the residue at the death of his wife, or the competency of the testimony by which this agreement is attempted to be established, although we have no doubt that such an agreement could have been made by the parties, and if properly evidenced, enforced. Our conclusions upon the question which we have considered make it unnecessary to extend this opinion, as there is no issue raised by the pleadings except with the bank, and it is not important to it whether Mrs. Wooldridge takes the estate of her deceased mother as devisee or creditor.

For reasons indicated the judgment is affirmed on original and cross appeal.

Whole court sitting.

FINERAN v. THE CENTRAL BITULITHIC PAVING CO., &c.

(Filed October 21, 1903.)

1. Municipalities—Construction of streets—Competitive bidding—Where a city of the second class, in compliance with the provisions of its charter that it should adopt a uniform system to govern and regulate the construction and reconstruction of all public ways and sidewalks of the city, passed an ordinance by its common council requiring that in the construction and reconstruction of its streets the contract for same should be let, after advertising, to the lowest and best bidder, a compliance with the form of the ordinance by receiving bids when the members of the council knew that only one of them could be bona fide, and that the other was made pursuant to an agreement between the bidders that it should be higher than the first, was not such a compliance therewith as is contemplated by law.

2. Validity of ordinance—An ordinance of the city council requiring the reconstruction of a street with a patented composition, which is under the exclusive control of one person or corporation and on which there can be no competitive bidding by reason of such exclusive control by one party, with-

out placing it in competition with other like or equally good material for such purposes, is void.

Stricker & Johnson and Samuel C. Bailey for appellant.

C. J. & W. W. Helm and Aubrey Barbour for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Nunn.

This appeal is from a judgment of the Campbell Circuit Court sustaining a demurrer to the petition of appellant. The petition is in two paragraphs. After setting forth the usual and formal averments, we quote in substance such portions as is necessary for the determination of the question before us:

That on May 8, 1902, the property holders owning more than two-thirds of the front feet of all the property fronting upon Columbia street, in Newport, Ky., between Third and Fourth streets, petitioned the general council of the city, in a written petition, for the reconstruction of Columbia street, between Third and Fourth streets, with cement curb and gutter and a roadway constructed of brick or other improved material; that after this petition was presented to the council it, by a vote of two-thirds of the members elect of both boards, the vote in each case being recorded on the journal of the board, passed the following resolution: "Be it resolved that the reconstruction of Columbia street, between Third and Fourth streets, by grading, combination cement curb and gutter, and bituminous macadam roadway, is hereby declared a necessity, and that the same be done pursuant to the provisions of the act governing cities of the second class and the ordinance of May 7, 1894, of the city of Newport, regulating the same; and that the city engineer report a grade for said part of Columbia street, plans and specifications for the reconstruction of same, and an estimate of the cost and rate per foot of property fronting or abutting thereon."

Thereafter the city engineer, in the manner prescribed by law and the ordinances of the city, advertised for bids for the reconstruction of this street, according to the provisions of this ordinance, and thereafter, to wit, on the 4th day of June, 1902, two bids, and no more, for the reconstruction, in conformity with this ordinance, were duly received and opened by the committee appointed by the general council to receive and open bids, and reported same to the general council. The bids are as follows: The appellee, The Central Bitulithic Paving Co., \$4,114.25, and Joseph Collopy, \$4,214.60, and it was thereafter resolved by the general council that a contract for the reconstruction of this street, with cement curb and gutter and bituminous macadam roadway, be awarded to the appellee paving company at its said bid. This contract was entered into, and the city's and abutting lot owners parts each cost more than \$2,400, and that the paving company was then engaged in paving the streets under this contract. It is alleged that by an ordinance of the city, a copy of which was filed, entitled "An ordinance prescribing the method of procedure, governing and regulating the construction and reconstruction of all public ways and sidewalks in the city of Newport, Ky.," approved May 7, 1894, then in force and continuously in force since that time, it was provided that a contract for the reconstruction of any street in the city should be awarded to the lowest and best bidder therefor; that bituminous macadam was then, and had been continuously since

March 18, 1902, a patented composition; that the machinery for making and laying this composition is patented; that the Central Bitulithic Paving Co. then had, and continuously has had since last mentioned date, exclusive control of this patented composition and the machinery for making and laying same, and the sole right to construct roadways of that material in that city and vicinity; that the method of making this bituminous macadam and constructing roadways therewith was known only to those having control of this patent, and that no one except the Central Bitulithic Paving Co. could make, or could have made, a bona fide bid for the reconstruction of this street with this material; that bituminous macadam is greatly inferior to vitrified brick for the reconstruction of a roadway; that the bid offered by Joseph Collopy for \$4,214.60 was a sham bid; that this bid was made by Collopy in pursuance of a conspiracy entered into between him and the Central Bitulithic Paving Co., by which it was agreed that Collopy should offer a higher bid for the reconstruction of this street than that offered by the paving company; that each and all of the members of the general council, at the time this bid of Collopy was received, knew that it was a sham bid, and that neither Collopy, nor any one except the Central Bitulithic Paving Co., could construct the bituminous macadam roadway in that city; that each and all of the members of the general council well knew, and had continuously known since May 8, 1894, that the manufacture of bituminous macadam and the construction of the roadways therewith was and is exclusively controlled by the Central Bitulithic Paving Co., and that no one except the Central Bitulithic Paving Co. could make a bona fide bid for the reconstruction of this street with this material; that this contract between the city and this paving company was in violation of the ordinance of May 7, 1894, particularly that part thereof which provides that a contract for the reconstruction of a street of the city shall be awarded to the lowest and best bidder, and is void, etc.

It is admitted that the city council of Newport had duly passed an ordinance May 7, 1894, providing that a contract for the reconstruction of a street of that city should be awarded to the lowest and best bidder, and that this ordinance was still in effect and had never been repealed or modified.

In view of this admitted fact the sole question presented upon this appeal for determination is whether or not the resolution of date, May 8, 1902, requiring the reconstruction of Columbia street to be made with bituminous macadam, and the contract with the paving company with reference thereto, were or not authorized and valid. In other words, had the city council of this municipality the power to award a contract for the paving of a street with a patented composition to a corporation having the control of the patent and the exclusive right to lay streets with the patented composition, and which was the sole person that could make a bona fide bid therefor, under an ordinance which precluded competitive bidding and required the street to be paved with this patented composition?

In effect it is contended that the ordinance of May, 1894, requiring competitive bids for the reconstruction of streets, was passed by the city council only; that the charter of cities of the second class being silent with reference thereto, the council had the power and right to disregard the requirements of this ordinance. And it was also contended that even if this re-

quirement of competitive bidding had been in the charter, that a compliance with the forms, as was done in this case, would have been sufficient. But even if a compliance with the form was not sufficient, still it was not applicable to a case like this, where there could be no competitive bidding, as competitive bidding would deprive the city of availing itself of the benefit of patented articles.

By the charter governing second class cities in this Commonwealth it is provided that the general council shall by ordinance adopt a uniform system to govern and regulate the construction and reconstruction of all public ways and sidewalks of the city. Under the authority given them by the charter the general council of the city of Newport passed such ordinances, and one requiring that in the construction and reconstruction of its streets that the contract for same should be let, after advertising, to the lowest and best bidder. These laws or ordinances were as binding on the council as if the same had been inserted in the charter, until modified or repealed by the council in the way and manner provided by law. This provision in the ordinance was evidently inserted for the benefit and protection of the taxpayers and all the citizens, and especially those owning abutting property on streets to be constructed and reconstructed, and, in our opinion, the council had no right and power to ignore the provisions of this ordinance.

We can not agree with the contention that if the requirement of competitive bidding was necessary that a compliance with the forms, as was done in this case, would have been sufficient. It is admitted by the demurrer in this case that Collopy, the other bidder, agreed and entered into a conspiracy that they would go through the forms of a bidding, and that Collopy was to offer a higher bid for the work, and that each and all of the members of the council knew this fact and also knew that appellee, Central Bitulithic Paving Co., could only make a bona fide bid for the reconstruction of this street with this material, and that they knew this when they passed this ordinance of May, 1903, fixing bituminous macadam as the only material for the reconstruction of this street. To say the law requiring competitive bidding was binding, and to accept such competitive bidding as a compliance therewith, would be a farce.

The other proposition, and the only real question to be decided, is more serious, and that is whether or not the law requiring competitive bids was intended to be, and can be, made applicable to things or material for the construction or reconstruction of streets where it is impossible to have competition, as in this case, and thus prevent patent processes from being used and the city from using such material when it deems it to be for the best interest of the city so to do.

This court has never passed upon this question, and the courts of other States are divided upon it. The right of a city to avail itself of patented inventions in the improvement of streets, etc., where the law required the letting of contracts to the lowest bidder, has been before the courts of several States, and the adjudications thereon are not uniform, and the courts are not unanimous in their opinions.

In Wisconsin, California, Louisiana, New Jersey and Illinois the right has been denied, while in Michigan, Kansas, New York and Missouri it has been sustained. These cases appear to discuss ordinances or charters that

required the city council to accept the bid of the lowest responsible bidder, not giving any discretion to the council except as to solvency. Unlike the ordinance in this case, which required the council to accept the lowest and best bid, which gave the council the discretion to accept the bid of the lowest and best bidder after considering all the questions involved, such as price, quality and durability of material, responsibility of the bidders, the interest of taxpayers of the whole city, and especially of those who owned abutting property. (*Trapp v. City of Newport*, 25 Ky. Law Rep., 227.)

The substance of the reasons given in the cases decided by the courts of Michigan, Kansas, New York and Missouri in upholding an ordinance requiring a street to be constructed or reconstructed with a patented article, and where, from the nature of the case, there could be no competition, are given in the case of *Hobart v. The City of Detroit*, 17 Mich., 246, 97 Am. Dec., 185, decided by a divided court. In that case a plaintiff sought to enjoin a tax levied on a lot owned by him for the purpose of paying the expense of paving in front of it with Nicholson pavement, upon the ground that the contract for the pavement was illegal. The charter of the city of Detroit provided that no contract for any public work, where the amount of such contract exceeded \$200, should be let or entered into except to and with the lowest responsible bidder. The right to lay the Nicholson pavement in Detroit at the time this contract was let was owned exclusively by the firm of Smith, Cook & Co., the contractors, who alone, therefore, could and did bid for the contract, and there being no possibility of a competitor, the contract was awarded to them on their own terms. In denying the plaintiff the relief sought the court, by Cooley, C. J., said: "The doctrine of the complaint leads to this conclusion, that wherever, from the nature of the case there can be no competition, the city can make no contract, however important or necessary, for the interest of the city, since contracts, except by public letting, are forbidden by the express terms of the statute, and those by public letting, are forbidden by an implication which is equally imperative. And, if applied in this case, however much the mode of paving may exceed all others in utility, it can not be adopted in the city of Detroit, or in any other city with like provisions in its charter, even although the proprietors of the patent might be willing to lay it on terms more advantageous to the city than those on which pavement of less value could be procured."

On the other hand, the substance of the cases deciding against the validity of such ordinances and contracts by the courts of Wisconsin, California, Louisiana, New Jersey and Illinois is given in the case of the *State of New Jersey v. The City of Elizabeth*, 35 N. J. L., 351. The city council of the city of Elizabeth had passed an ordinance "that Morris avenue, from the track of the Central Railroad Co. of New Jersey to the city line, should be paved with 'Stow foundation pavement.' Sealed proposals for paving, in accordance with the ordinance, were received from John Bryan & Co., and they being the only bidders, the contract was awarded to them at their bid. John Bryan & Co. owned the exclusive right to lay the Stow foundation in the city of Elizabeth. Section 123 of the charter of 1893 of Elizabeth directed that contracts exceeding \$100 "shall be advertised, and shall, at all times, be given to the lowest bidder." In that case the court said: "This section of the statute contemplates the public advantage of an open, free competi-

tion in doing work, and furnishing materials for all public improvements, which is inconsistent with the exclusive right to sell a patented article previously selected, and alone acceptable. In the case of *John Coar, &c. v. Jersey City*, at the present term of this court, it is decided that, where the resolution of the city council was to pave with the Nicholson pavement, that being a patented pavement, and the right to use it in Jersey City exclusively, held by the only bidder for the work, there was not, and could not be, any competition within the intent of the charter, and for that reason the resolution and proceeding, in awarding the contract to such bidder, should be set aside. It requires considerable ingenuity to avoid such a reasonable conclusion from such plain and direct statutory requirements. No one can compete on equal terms with a man who controls the sale of the thing needed. Bidding under such a condition is but a form, and the result must almost necessarily be deceptive and injurious to persons who are to be assessed for payment. There can hardly be a lowest bidder, within the intent of the charter, where there can be, in reality, but one bid. This question does not appear to have been considered in *State v. Ayers*, June term, 1871, for the reason, probably, that there are other provisions in the charters of many of our cities taking patented processes out of the operation of a similar section. The policy of such exception is not within our province to determine, after legislative authority is given, but I must give a hearty approval of the expression used by Judge Campbell (dissenting opinion), in the *Detroit* case, where he says: 'I can conceive no more fruitful source of possible inducements to corruption than the monopoly of paving the streets of a large city.' "

It is unnecessary for this court to determine which doctrine is correct, that of Michigan or that of New Jersey, for the reason that the charter ordinance under consideration in these cases required the council and made it imperative that it should accept the bid of the lowest responsible bidder. The ordinance in the case at bar required the council to accept the bid of the lowest and best bidder, and the reasoning given by the court in the case of *Fishburn v. Chicago*, 171 Ill., 388, 39 L. R. A., 482, decided February 14, 1898, is peculiarly applicable to the case under consideration. The court, in that case, said: "If the requirement that the asphaltum to be used in the improvement should be obtained from Pitch Lake, in the Island of Trinidad, tended to restrict competition among those who might desire to become bidders for the performance of the work of improving the street, or tended to create a monopoly in favor of any one having for sale the asphaltum necessary to be used in the work of paving the street, it would fall under the ban of this general rule of the law, and must be declared inoperative and void. But it may be said that cities, in the construction of public improvements, ought to have, as have individuals in the construction of private structures, the right to select for use the article or substance best fitted and adapted to the purpose, and that to deprive the public of the right to select and use such superior articles is opposed to public policy and positively disadvantageous to the public. The force of this argument must, of course, be admitted; but upon reflection it is readily seen it is not necessary to foster and create a monopoly and prevent competition in the letting of public contracts, by providing in ordinances that a certain substance or article, and

no other, shall be used. If it be the judgment of the city council that the most suitable and best materials to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance or compound the standard of quality or fitness, and to require that material equal in all respects to it should be employed. An ordinance making it indispensable that an article or substance in the control of but a certain person or corporation shall be used in the construction of a public work must necessarily create a monopoly in favor of such person or corporation, and also limit the persons bidding to those who may be able to make the most advantageous terms with the favored person or corporation. If all the ordinances adopted by the city council of the city of Chicago providing for the paving of the streets and public places in the city should select the stock in trade of a particular firm or corporation as the only material to be used in making such street improvements, the evil would be intolerable; and if they may lawfully select such article in an ordinance, it can not be unlawful to make it the settled policy of the city that material for paving the streets shall be purchased from but one seller."

The ordinance in the case at bar directed that this street be improved with bituminous macadam, and it is admitted that the appellee, The Central Bitulithic Paving Co., had the complete and exclusive control of this substance, and that no one but it could have made a bona fide bid for the construction of this street with this material, and that each member of the council knew these facts at the time the ordinance was passed.

In *Bench on the Modern Law of Contracts*, volume 2, section 1106, it is said: "Whatever tends to prevent competition between those engaged in an employment or business impressed with a public character, is opposed to public policy, and, therefore, unlawful; and whatever tends to create a monopoly is unlawful, as being contrary to public policy. All grants creating monopolies, and acts tending to prevent proper competition, are, by common law, illegal and void."

For the reasons given we are of the opinion that the ordinance requiring the street to be improved with bituminous macadam, without placing it in competition with other like or equally as good material for such purposes, was and is void, and the court erred in sustaining a demurrer to appellant's petition.

Wherefore, the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

Judge Paynter dissenting.

FRAZER v. FRAZER.

(Filed November 10, 1908—Not to be reported.)

1. Person of unsound mind—Committee—Party to action—The committee of a person adjudged of unsound mind is a necessary party to an action by the wife of the person of unsound mind for the recovery of alimony; and upon the failure of the plaintiff to make the committee a party it is proper to dismiss the petition.

2. Judgment—Collateral attack—A judgment adjudging a person to be of unsound mind can not be collaterally attacked in an action by his wife against him for alimony, especially where she had married him after the entry of the judgment.

3. Validity of judgment—The failure of the county attorney to sign the information for the inquest, or to state therein to what class of diseased or unsound minds the defendant belonged, did not affect the validity of the judgment adjudging him of unsound mind and an imbecile.

D. Bradley Shawhan and W. S. Cason for appellant.

Daniel Durbin for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Settle.

The appellant, Mary Frazer, is the wife of the appellee, Joe Frazer, against whom she instituted this action in the lower court to recover alimony, but without praying for a divorce. It is averred in the petition that she was abandoned by the appellee, without fault on her part, and without provision on his part for her support, though he is able to labor for and support her.

It is further averred that appellee owns in his own right, and wholly unincumbered, a house and lot in the town of Cynthiana, worth not less than \$1,600, and of the rental value of \$175 per annum. The amount of alimony demanded by appellant is \$10 per month.

After the appellee was served with summons in this case he appeared in court in person, and by Daniel Durbin, the latter styling himself appellee's committee, solely for the purpose of entering a motion to quash the summons, which motion was thereupon duly entered, and in support thereof the affidavit of Durbin was filed, wherein it was stated, in substance, that the appellee, by inquisition in and judgment of the Harrison County Court at a term held March 28, 1894, had been found and declared a person of "unsound mind, and an imbecile," and that one W. S. Hardin was duly appointed, gave bond and qualified as his committee by order of court, in which capacity Hardin acted down to June 28, 1900, when he was, by the court, permitted to resign, and Daniel Durbin, by appointment of the court, took his place, and at once executed bond, and duly qualified as such committee, and has ever since acted in that capacity; that Hardin, the former committee, during his period of service, and the present committee as his successor, have continuously had possession and control of the estate and property of the appellee for his use and benefit; and further, that his unsoundness of mind has continued ever since the date of the inquisition, and yet exists.

The trial court overruled the motion to quash the summons, but adjudged that appellee's committee was a necessary party to the action, and required appellant to amend her petition by making the committee a party defendant, in order that a summons might be served upon him. Appellant refused to comply with this order of the court, the committee was not made a party, and for the disobedience of the order to so make him the appellant's petition was dismissed by the court, to which she excepted, and the case has come to this court by appeal.

Section 33, subsection 1, Civil Code, requires that defense for an "infant or person of unsound mind must be made by his guardian, or committee, or

by a guardian ad litem." Subsection 8 provides that "no judgment shall be rendered against an infant, other than a feme covert, nor against a person of unsound mind, who is summoned in this State, until the regular guardian or committee, or guardian ad litem, of such defendant shall have made defense, or have filed a report stating that after a careful examination of the case he is unable to make a defense." * * *

Section 53, Civil Code, provides that "If the defendant be of unsound mind the summons must be served on him and on one of the following-named persons, if residing in the county, viz., on his committee." * * *

It is manifest that the lower court in requiring that the committee of the appellee be made a party to this action was endeavoring to comply with the provision of the Code supra. It is, however, insisted for appellant that the proceeding and judgment of the Harrison County Court relied on as purporting to cast disability upon the appellee is void because the information for the inquest filed by the county attorney was not signed by him, nor did it show to what class of unfortunates the appellee belongs, whether an idiot, lunatic or imbecile; and further, that the record from the county court does not show the presence of the appellee at the inquest.

The jury found the appellee to be of "unsound mind, and an imbecile; that the unsoundness of mind was from infancy." The verdict also gave the date and place of his birth, the kind and location of his property, and such other facts as they were required by statute to find and report. So far as the failure of the county attorney to sign the information is concerned, that we take to be a mere mistake, or inadvertence, which can not affect the validity of the inquest. The record shows that he was present and performed his official duties at the inquest, and it must be presumed that the proceeding was instigated by the information filed by him with the county court. It was not necessary for the information to indicate to what class of disease or unsound minds that of the appellant was thought to belong, as that was to be determined by the verdict of the jury. It has, however, been held by this court that the presence of the person sought to be declared of unsound mind can not be dispensed with at the inquest, unless it be made to appear by the oath or affidavit of at least two physicians that it would be unsafe for his health to bring him into court. (*Taylor v. Moore*, 23 Ky. Law Rep., 1572; *Stewart v. Taylor*, 23 Ky. Law Rep., 577.)

It appears from the record that since the institution of this action by the appellant the appellee, acting through the attorney that now represents the appellant, filed a petition in the Harrison Circuit Court, in which he asked that a jury be impaneled to ascertain whether or not the condition of his mind is now as it was at the time of the inquest of March 28, 1894, and pursuant to the prayer of his petition appellee was given the desired hearing before a jury duly sworn, at which hearing he was present, and the jury upon hearing the evidence, and being properly instructed by the court, found by their verdict that "he is not competent to manage his estate," whereupon an order was entered by the court dismissing his petition. It does not appear that the committee of appellee was a party to the last proceeding and trial, but whatever doubts may exist as to the legality of either inquest, with the occurrence of the last one before him, and the evidence produced to him of the first inquest, by the affidavit of the committee, Durbin, we are not sur-

prised that the circuit judge seemed to come to the conclusion that appellee is a person of unsound mind.

It is to be remarked that the appellee is not himself complaining of the result of either inquisition. We do not doubt that in a proper action or proceeding instituted by him in a court of justice the proceedings whereby he was found and adjudged to be of unsound mind would have to be declared void, as was done by this court at the instance of the alleged incompetents in *Meniffee v. Eads* and *Taylor v. Moore*, *supra*, but it does not for that reason follow that the same proceedings or judgment can be collaterally attacked by others as being irregular or void. At any rate, we can recall no case in which this court has permitted such a judgment to be collaterally assailed by a creditor, or any stranger to the record; nor do we see any reason for the wife's being allowed to do so where, as in this case, her marriage to the imbecile husband took place after he had been adjudged of unsound mind. If it should be decided by the court that she is entitled to alimony, the property of the husband in the hands of his committee could, if liable therefor, be subjected to its payment.

One may be of unsound mind without being so declared by the verdict of a jury. The courts frequently appoint committees to defend for persons whose unsoundness of mind or want of capacity are made to appear merely by the affidavit of some party to the action. In this action a persistent attempt seems to have been made to ignore the appellee's committee. The object of the action is to wrest from the hands of the committee a small house and lot owned by the appellee. It is disclosed by the record that it is all the property he owns. The committee not having been made a party, by the affidavit filed in support of the motion to quash the summons, properly disclosed to the lower court his appointment and qualification as committee for the appellee, and the further fact that he had then, and for years had held, the possession and control of the latter's property; it was, therefore, the duty of the court to at least hold him to be a committee *de facto*, and to require that he be made a party defendant to the action as such, without stopping on a mere motion, and at the instance of the appellant, to determine whether or not his *cestui que trust* had been properly adjudged a person of unsound mind in another and wholly different proceeding.

It was not, therefore, error for the court to require appellant to make the committee a party, and upon her refusal to comply with the order to do so to dismiss her petition, as was done.

Wherefore, the judgment is affirmed.

ROSE, &c. v. CAMPBELL, &c.

(Filed November 10, 1908—Not to be reported.)

Voluntary conveyance—Validity of—A voluntary conveyance of real estate by the grantor to his wife is not void as to a creditor whose debt was created some three years after the conveyance in the absence of anything to show that there was in the mind of the grantor at the time of the conveyance a fraudulent intent to create the debt.

James M. Sebastian for appellants.

E. E. Hogg for appellees.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Settle.

In this action brought by appellees to recover of the appellant, R. W. Rose, a debt of \$400, created in 1901, the lower court set aside as voluntary and fraudulent a deed of conveyance from the appellant to his wife, executed and recorded April 3, 1897, and subjected the land to the payment of appellees' debt. This appeal was taken from that judgment, and the only question presented for our consideration is, is the deed in question a fraud upon the rights of a creditor whose debt was created after the execution of the deed?

Section 1907, Kentucky Statutes, provides: "That every gift, conveyance, assignment, transfer or charge made by a debtor of, or upon, and of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not on that account alone be void as to creditors, whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not, therefore, be deemed to be void as to such subsequent creditors."

In *O'Kane v. Vinnege & Co.*, 91 Ky. Law Rep., 1551, this court said: "If a party be indebted at the time of a voluntary conveyance of his property, such conveyance is presumed to be fraudulent as to those debts, and this presumption as to prior debts does not depend upon the intentions or circumstances of the party conveying, or the amount conveyed. The law will not permit an inquiry into these matters, or give them any weight or influence. As to subsequent debts, the creditor who assails a voluntary conveyance must show, in addition, circumstances justifying the presumption that the intent of the conveyance was fraudulent before the land conveyed could be properly subjected to the payment of such debts. (*Howson v. Buckner*, 4 Dana, 251; *Enders v. Williams*, 1 Met., 346) 'It is the intent and purpose with which the grantor acts which renders the conveyance fraudulent, and this must be determined by the facts of each particular case.' (*Bank Commerce v. Payne*, 86 Ky., 446; *Beatty v. Dudley*, 80 Ky., 381; *Slyter v. Sherman*, 5 Bush, 256.)"

Applying the rule found in the authorities supra, we find in the record in this case no evidence tending to show a fraudulent intent upon the part of the appellant in making the conveyance to his wife. The land in controversy is worth about \$3,000. At the time of its conveyance to the wife there was a purchase-money lien upon it which has since been reduced to \$600. After the deed to the wife was made there was a mortgage given upon it to G. B. Rose to indemnify him as surety for appellant and wife on a note for \$650 to a Winchester bank, which has since been paid. Though the appellee, R. W. Rose, was in debt \$1,000 or more, including what he owed on the land, when the deed to his wife was made, all those debts except the \$600 owing on the land have since been paid, and in fact all debts that have been created by the appellant, R. W. Rose, since the execution of the deed to his wife, except that due the appellees, have been paid, or satisfactorily arranged, with the persons to whom they are going.

It will be borne in mind that the debt of appellees was created nearly or quite three years after the date of the conveyance from the appellant to his wife. The transaction out of which it arose, a log venture, would indicate that it could not have been in appellant's mind to create such a debt when the deed to his wife was made. In brief, we have been unable to find in his conduct subsequent to the conveyance, or in the circumstances surrounding the making of the deed, any of the indices of fraud or double dealing. Indeed, the efforts made by him to secure to appellees the payment of their debt, which were unavailing because the security offered was unacceptable to them, give assurance that he has entertained no intent to defraud his creditors.

The law has no condemnation for the man who, in good faith and in all fairness to his creditors, seeks to secure a home to his wife and children. It only interposes to prevent him from so providing for them when it would work a wrong to, or result in, a fraud upon his creditors.

Judgment reversed and cause remanded, with directions to dismiss the petition.

LOUISVILLE & NASHVILLE R. R. CO. v. ROUTT.

(Filed November 10, 1903—Not to be reported.)

Master and servant—Liability of master for act of servant—A railroad company is not liable in damages for injuries inflicted upon a person by its fireman, by intentionally striking him with a lump of coal as the train passed, such act not being within the scope of his employment.

B. D. Warfield and Marriott & Moorman for appellant.

S. M. Payton for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee sued appellant for an injury which he alleges was caused by his being struck by a flying lump of coal, which was negligently dropped or thrown from a passing train, he standing near by the track. But two witnesses testified as to the transaction. As we have come to the conclusion that the evidence showed beyond question that a peremptory instruction should have gone at the close of plaintiff's case in favor of the defendant (appellant), we will quote the statements of the witnesses bearing on the cause of the injury. Appellee testified as follows:

"Q. If the fireman from a freight train at any time injured you with a lump of coal, state how it was, where it was, and all about it?"

"A. Well, sir, I was going to Sonora, and was about a mile from Sonora when a northbound freight train came along; it was the 26th of last October, Oct. 23, 1901; I was going to Sonora, and was walking along a path right at the edge of the ties where everybody else walks down there going to town, and this train come along going north; when it got in about fifty yards of me I stepped out of the way as it come up. I was watching the cowcatcher as it come up; just as it got about even with me I looked up to see who was on it, and about that time I got a glimpse of a lump of coal coming from between the engine and the tender."

"Did you see a man throw it?"

"A. No, sir, I didn't see it leave his hands; I just got the glimpse of a man standing between the engine and the tender."

"What was the size of that lump of coal?"

"A. It looked to be bigger than my fist."

There was with him at the time of the injury one Arthur Bogue, appellee's nephew. He testified that he saw the injury, and describes it in this way:

"Q. Tell the jury now how that happened and all about it?"

"A. Well, he was standing between the engine and the tender, and he just drew back his hand and threw a lump of coal and hit him."

"Q. That was the fireman that did that?"

"A. Yes, sir; it was the fireman."

"Q. And you say you saw that?"

"A. Yes, sir; I saw it."

"Q. Was he looking at Mr. Rountt at the time he threw the coal?"

"A. Yes, sir; he was looking right at him."

Cross-examined, the witness stated:

"Q. You say this man threw the lump of coal?"

"A. Yes, sir."

"Q. Did he throw it overhanded?"

"A. Yes, sir."

"Q. How was he standing?"

"A. He was standing facing him."

"Q. Did he throw it out of the window?"

"A. No, sir; he was standing between the coal tender and the engine."

"Q. How many men were on the engine?"

"A. I didn't see but two men on there."

"Q. Did you see him reach down and get the coal, or did you just see him with it in his hand?"

"A. I saw him pick it up out of the tender—out of the side of the tender."

"Q. When he picked that up off the tender, did he have his face or his back to you?"

"A. He had his face to me. He just reached back that way and picked it up and threw it at him."

"Q. Did he look like he was throwing it at this man?"

"A. Yes, sir; he just threw it right at him."

"Q. You say he just reached down and picked up this lump of coal and threw it right at this man?"

"A. Yes, sir; he did."

The only other witness who testified for the plaintiff was the attending physician, whose testimony was confined to describing the injuries, and their extent. This was all the evidence heard at the trial.

The court is of opinion that the evidence shows conclusively that if the injury was done by a servant of appellant, such servant was not at that time acting within the scope of his employment. On the contrary, it shows that the servant purposely and maliciously threw the coal at appellee with the design to injure him, and not with any purpose of protecting the mas-

ter's property, or otherwise furthering the master's interests. It is difficult to imagine a case where the facts more clearly show that the servant was acting on his own behalf, and in no sense for the master. This same question we had under consideration recently in the case of *Sullivan v. L. & N. R. R. Co.*, 24 Ky. Law Rep., 2844, in which the reasons and some of the authorities sustaining the conclusion at which we have arrived in this case are discussed. Nor is the application of the principle at all a new one. Blackstone states the same principle in his Commentaries, volume 1, page 456, as follows: "If a servant by his negligence does any damage to a stranger, the master shall answer for his neglect; but the damage must be done while he is actually employed in his master's service, otherwise the servant shall answer for his own misbehavior."

There being no evidence whatever that appellee was injured by the negligence of any servant of appellant, or that any such servant was at the time acting within the scope of his employment, the court should have directed a verdict for the defendant.

The judgment is reversed and cause remanded for a new trial under proceedings not inconsistent herewith.

RICHART v. GOODPASTER, &c.

(Filed November 10, 1903.)

1. Appeal—Jurisdiction—Amount in controversy—Where a tenant instituted an action against his landlord to recover the sum of \$80, which the latter held as proceeds of the tenant's interest in a crop of tobacco, which had been levied on by execution in favor of a creditor of the tenant, and the creditor, who was also made a party, answered alleging that the tenant's interest in the crop of tobacco amounted to \$225 and made his answer a cross petition against the landlord, the judgment dismissing the answer and cross petition and adjudging the \$80 to the tenant involved more than \$200, and this court has jurisdiction of an appeal from it.

2. Execution—Levy on personal property—An officer who levies an attachment upon personal property held by the execution debtor and another jointly is not required by section 660 of the Civil Code to have the property inventoried and appraised in order to complete the levy; and the lien attaches from the time the execution is placed in the hands of the officer.

R. Gudgell & Son for appellant.

C. W. Goodpaster for appellees.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Nunn.

The facts in this case, as appear in this record, are in substance as follows: Appellee Knox was a tenant of appellee Goodpaster in the year 1901, and as such he raised a crop of tobacco on the shares, which was housed in Goodpaster's barn. Appellant Richart caused two executions to be issued upon judgments which he held against appellee Knox, and placed them in the hands of the constable of Bath county, and which were by him levied upon the interest of Knox in this tobacco. The constable left the tobacco in the care of appellee Goodpaster, but failed to have it appraised and inventoried

as required by section 660 of the Civil Code, but endorsed the levy of the executions, and returned them to the office from which they issued. Soon after this Goodpaster sold the entire crop of tobacco, which had not been divided and held that part of the proceeds belonging to appellee Knox, which he claimed was \$80, and refused to pay it to either Knox or appellant until the matter was settled as to which was entitled to it, both claiming the funds.

On the 30th day of July, 1902, the appellee, Knox, filed his petition in the Bath Circuit Court against Goodpaster and the appellant, Richart, in which he stated that he was entitled to two-fifths of the proceeds of this tobacco, which he claimed amounted to \$80, and also alleged that appellant Richart claimed to have some claim or lien on this tobacco, and asked that he be required to present same. Goodpaster answered, admitting the allegations of the petition to be true, and stating that he was ready to pay the \$80 to the party to whom the court might adjudge was entitled thereto. The appellant filed an answer and amended answer, alleging that his judgment claims against appellee Knox amounted to \$250 and was wholly unpaid, and denied that appellee Knox's interest amounted to only \$80, and was two-fifths, but alleged that it amounted to \$225, and was one-half interest in the crop, and also alleging that he had a lien upon Knox's interest therein by reason of the levy of these executions thereon, and he made his answer a cross action against Goodpaster, and asked for a judgment over and against him for the sum of \$225. The court sustained a demurrer to appellant's answer, and amended answer, dismissing his answer and cross petition, and adjudging that appellee Knox was entitled to the \$80 in the hands of Goodpaster, from which judgment appellant has appealed.

The appellees moved to dismiss the appeal for the reason, as they claim, that the amount in controversy is less than \$200, the judgment being for only \$80. We can not concur with appellees in this contention; by their demurrer they admitted the allegations of appellant's answers, and his claim, as stated, amounts to \$250, and the amount sought to be recovered in this action was the value of Knox's half interest in this crop of tobacco, which was alleged to be \$225, and the court adjudged against him on this claim, and it is this judgment that appellant is seeking to have revised, and which makes the amount in controversy on this appeal more than \$200.

The only other question to be determined is whether the action of the constable in making the levy and the manner in which he performed it created a lien in favor of the execution creditor. The appellees contend that because he failed to have the property appraised and inventoried no lien was created.

Under the laws of this State, from the moment an execution is placed in the hands of an officer for collection, a lien is created for its payment upon all the property of the defendant in the execution situated in the county subject to execution. By the first part of section 660 of the Civil Code it is clearly indicated that an officer may levy an execution upon personal property held by the execution debtor jointly with another person without having the property inventoried and appraised; that such is not necessary to complete the levy. The purpose of this section of the Code was to protect and preserve the rights of execution creditors, and especially joint owners of

personal property other than the execution debtors, and to prevent the officer from taking possession of the property to the possible injury and detriment of the joint owner.

The lien was created upon this tobacco when the execution was placed in the hands of the constable. The levy was made and endorsed on the executions and the lien still existed thereon notwithstanding the failure of the constable to perform his duty as to having it appraised and inventoried.

For these reasons the judgment of the lower court is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

DILS v. HATCHER.

(Filed November 10, 1903—Not to be reported.)

Debtor and creditor—Tender—Where a debtor offered to have transferred to his creditor a certain amount of bank stock and to pay the balance in money in satisfaction of an amount due under a contract for the sale of timber, the debtor himself being the owner of no bank stock and the amount of the balance not being mentioned and no money being actually offered, the transaction did not amount to a legal tender so as to defeat the right of the creditor to recover interest on the balance unpaid from the date it became due, as provided in the contract.

2. Correction of error by court—The trial court having erroneously submitted to the jury the question of a tender of the amount due under the contract instead of adjudging, as a matter of law, as it should have done, that there was no legal tender, and that interest should be allowed, that error may be corrected by the court without a new trial upon the reversal of the judgment.

Jas. Goble and Hager & Stewart for appellant.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Nunn.

On the 24th of September, 1895, appellant, by her written contract, sold to appellee and others all the merchantable poplar, cucumber, oak and ash standing and situated on a tract of about 6,000 acres of land known as the Big creek land in Pike county, Kentucky. The writing fixed the dimensions of the trees and the prices per tree within certain dimensions, and different prices were named for the different kinds and character of the timber. Appellant brought her action for over \$7,000, the amount she claimed was the balance due her on the contract. It is agreed by the parties that the whole amount due her under the contract was due and payable when the trees were measured and marked, and that this was completed the first of February, 1896; and it is also agreed that she had been paid prior to that date the sum of \$18,000, and that after that date two other payments, one of \$1,000, May 1, 1898, and one of \$2,000, May 9, 1898. Appellee admits that the purchase price of the timber according to the contract amounted to \$18,818, and agrees that he had only paid \$16,000. This issue as to the amount of the purchase price was submitted to the jury under a proper instruction, and the jury found in favor of appellee on this point, the verdict being for \$2,818. The court rendered judgment for this sum in favor of appellant, with inter-

est from the date of the judgment, and adjudged against her the cost of the action after April 29, 1901, at which date appellee offered to confess judgment for the sum of \$3,500 and cost to that date, which sum she refused to accept in satisfaction of that debt, of which action of the court, in judging the cost against her, and in refusing to allow her interest on the balance of her claim from February 1, 1898, to the date of the judgment, she complains.

The lower court in its instructions told the jury that if appellee had offered to pay the appellant the amount due, and was at the time able to pay, and appellant refused to accept it, then they should not allow appellant any interest on her claim. This was error prejudicial to appellant. This instruction was based upon an attempted plea and proof by appellee of a tender in substance as follows: That within two or three weeks after the 1st of February, 1898, and after the timber was measured and branded, he went to appellant and offered to have transferred to her \$2,500 in bank stock, and offered to pay her the remainder in money, but that she refused to receive either the bank stock or the money. It was not alleged or proven what the bank stock was worth, or that it had any value, and it was also shown that appellee did not own any bank stock; that he had an arrangement by which he expected to get it from another party, and it was not shown that he offered her any money, nor did he name any amount that he owed her as a balance due her on their contract. These facts show scarcely any of the elements necessary to constitute a tender. And under the facts admitted, alleged and proven by appellee, appellant was entitled to interest on the balance due her under the written contract from the 1st of February, 1898, until paid, to wit, \$5,818. Computing interest on this sum from that date until May 1, 1898, the date of the next succeeding payment of \$1,000, we find it to be \$785.43; deducting this \$1,000 from this principal and interest leaves \$5,608.43. Adding interest to this for eight days, or to May 9, 1898, \$7.47, and deducting the payment of \$2,000, leaves \$3,610.90, for which sum appellant should have had judgment, with interest thereon from May 9, 1898, until paid.

All the questions of fact litigated in this case were submitted to the jury, and we are not disposed to disturb their finding thereon, but under the showing of appellee as to the matter of tender the court should have adjudged, as a matter of law that it was not a legal tender, and should not have submitted the question of interest to the jury. Under this written contract appellee was bound for the payment of interest on the amount he had agreed to pay for this timber, which remained unpaid, from the date it became due.

It will not be necessary to award a new trial on reversal; this error can be corrected by the court. This procedure is recognized by this court in the case of *Cooke v. Clark's Committee*, 21 Ky. Law Rep., 316, and the cases therein cited.

Wherefore, the judgment of the lower court is reversed and the cause remanded, with directions to enter judgment for the sum of \$3,610.90, with interest thereon from May 9, 1898, until paid, and her costs in the action expended, and for proceedings consistent herewith.

CREASY v. COMMONWEALTH.

(Filed November 10, 1908—Not to be reported.)

Liquor selling—A person, who was instrumental in having others make up a sum of money with which an eight gallon keg of beer was purchased and of which he and those who contributed the money drank, was not guilty of a violation of the local option law in force in that county, which prohibited the sale of malt liquors in quantities less than five gallons, in the absence of proof that he was agent of the owner in selling the beer, his only interest in the transaction being to drink some of the beer.

James Sparks for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Nunn.

The appellant, George Creasy, was indicted by the grand jury of Laurel county and charged with the offense of violating a provision of an act of the general assembly of Kentucky, approved April 4, 1884, which prohibited the sale of intoxicating, spirituous and malt liquors in quantities of less than five gallons in the counties of Laurel, Rockcastle, Jackson, Owsley and Clay. At the February term of the Laurel Circuit Court the appellant was tried upon this indictment and under instructions of the court was found guilty and his fine fixed at \$60, and from the judgment on that verdict this appeal is prosecuted.

The evidence, without contradiction, shows this state of facts: That one Thomas Dunaway and others made up a fund of \$2, which appellant received, and with it bought from the Jung Brewing Co. a keg of beer containing eight gallons. The beer was conveyed to a convenient place, and these parties and others, including appellant, drank of it. Appellant aided in making up the fund, but did not contribute any part of it himself. Thomas Dunaway contributed 25 cents, and the appellant was fined for making the sale to Thomas Dunaway.

There was no evidence showing that appellant was the agent of, or in any way connected with, the Jung Brewing Co. at the time of this transaction, or that he had any interest whatever in the beer, and that his sole interest in the matter was that he might get some of the beer to drink. We are unable to perceive any of the elements of a sale in this transaction on the part of appellant. At most, he was only the agent of those who furnished the money to buy the beer. (*Leak v. Commonwealth*, 28 Ky. Law Rep., 932.)

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

CITY OF LOUISVILLE v. WALTERS' ADM'X.

(Filed November 10, 1908—Not to be reported.)

1. Variance—In an action to recover damages for injuries resulting in death a variance between the allegation and proof as to the exact day on which the injuries occurred was not material.

2. New trial—Newly-discovered evidence—The refusal of the trial court to

grant a new trial on the ground of newly-discovered evidence will not be disturbed where the action was tried about nine months after its institution and no reason was shown why the newly-discovered witnesses could not have been found prior to the trial.

3. Personal injuries—Damages—The fact that a person, who had died from strangulated hernia resulting from injuries received by reason of the vehicle in which he was driving striking an obstruction in the street, had previously suffered from hernia, did not relieve the city from liability for his death on account of leaving the obstruction in the street; such previous condition would only affect the amount of recovery.

H. L. Stone for appellant.

Wallace A. McKay for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Nunn.

It appears from this record, in substance, that on April 10, 1902, appellee's intestate, Frank Walters, was driving a wagon heavily loaded with lumber and posts on "F" street, in the city of Louisville. The wheels of the wagon struck and run over one of two stumps, each about six or seven inches high and eighteen inches in diameter, standing in "F" street, and partially obscured from view by debris and sand, and it is claimed that he was severely jolted and injured thereby, and as a consequence of which he had strangulated hernia and died on the third day thereafter.

The appellee instituted this action to recover damages against the city, and on a trial of the case the jury returned a verdict in her favor for \$1,500, from the judgment on which verdict the appellant has appealed.

The appellant asks for a reversal on three grounds:

1st. It claims that the court should have given a peremptory instruction to find for appellant because it was alleged in the petition that Walters received his injuries on the 11th of April, when the proof showed that it was the 10th of April; that this variance was fatal. We can not concur with the appellant in this. This variance was immaterial; the real question at issue was whether Walters received the injuries from which he died as the result of running over this stump in "F" street. This question was properly submitted to the jury.

2d. Appellant contends that the court erred in instruction No. 1 in not leaving the jury the question as to whether or not "F" street, at the place of the alleged accident, was in a reasonably safe condition for the traveling public. This instruction is not subject to this criticism; it, with the other instructions given, correctly stated the whole law of the case.

3d. And last ground relied on for a new trial was newly-discovered evidence, which could not, by the exercise of ordinary care and diligence, have been produced on the trial. Appellant filed the affidavits of four witnesses who resided, and had resided, in the city of Louisville for seven or eight years, some of whom the deceased had performed labor for, the others with whom the deceased had labored for the last seven or eight years prior to his death. It is in substance stated in all these affidavits that during all this time the deceased told each of them that he was afflicted with hernia. Upon this state of fact the lower court refused to grant a new trial. The

lower court saw the witnesses and heard their testimony on the trial, and in its discretion had the right to grant or refuse a new trial, and this court should not interfere with its action thereon unless it appear that this discretion has been palpably abused. This action was brought August 20, 1901, and was tried May 28, 1902. There is no reason shown, nor attempted to be shown, why these newly-discovered witnesses could not have been found prior to the trial of this action. Even if it were true that appellee was afflicted with hernia prior to the reception of the injury, it would not relieve the city of its liability, provided it was negligent in leaving a dangerous obstruction in its street by reason of which Walters lost his life. Admitting that Walters was afflicted, yet he was entitled to as much protection as a sound man, the only difference being in the amount of the recovery, a sound and healthy man being of more value to his estate than one afflicted. The verdict being for only \$1,500, the jury evidently took this into consideration as the evidence on the trial showed that he was defective in that portion of his body.

Perceiving no error prejudicial to the appellant the judgment of the lower court is affirmed.

ARNOLD, &c. v. EASTIN'S TRUSTEE, &c.

(Filed November 12, 1903.)

1. Vessels—Maritime jurisdiction—Barges used for the carrying of coal are vessels within the provisions of section 4192 of the Revised Statutes of the United States, which require mortgages and conveyances thereof to be recorded in the office of the collector of customs where such vessels are registered to affect others than the parties to such transfers or those having actual notice, and are subject to the admiralty courts.

2. Same—Recording of mortgage—The recording of a mortgage on a steamboat and coal barges in the county court clerk's office of the county in which they were found at the time the mortgage was executed did not create a lien in favor of the mortgagee and as against the creditors of the owner, where it was not recorded in the office of the collector of customs where such vessels were registered, as required by section 4192 of the United States Revised Statutes.

3. Same—The recording of a mortgage and bill of sale upon vessels subject to maritime jurisdiction in the office of the proper collector of customs does not affect antecedent creditors of the owner, although such instruments were executed long prior to the date of record.

4. Preference of creditors—Bill of sale—Nothing passed by a bill of sale from the insolvent owner of a boat and barges to a creditor where it appeared that the price was grossly inadequate and the purchaser, aside from having notice of his vendor's insolvency, failed to take charge and possession of the property or to list it for taxation or exercise any ownership over it, such action and circumstances indicating fraud and an intention between the parties to prefer one creditor over others.

5. Same—Bankruptcy—Although a bill of sale was executed more than four months before the filing of a petition to have an insolvent debtor declared a bankrupt, the fact that it had not been recorded in the office required by statute to constitute it notice as against creditors, and that the vendor continued in the possession of the property, rendered the sale void as to creditors; and the registering of the bill within the four months brings

the transaction within the provisions of the bankruptcy law authorizing the trustee in bankruptcy to recover the property.

6. Equity—Precedent conditions—While a court of equity might have required, as a condition to granting the petition of the trustee in bankruptcy for the recovery of property conveyed by the bankrupt in preference of creditors, that the preferred creditor be restored the money which he had paid out for the preservation of the property and sums which he had paid to satisfy liens thereon superior to the claims of general creditors, it can not, after it has adjudged the title to the trustee and after the possession of the property has been surrendered to the trustee, proceed to adjudge upon such claims.

7. Recording lien—Under the laws of the State of Indiana, no lien attaches by reason of the furnishing of materials for the construction of a dock as against creditors of the owner where the claim was not recorded in the proper office within ten days, and the claimer is not entitled to receive the amount of his claim before the trustee of the bankrupt owner can recover possession of the property.

Montgomery Merritt for appellant Arnold.

Brown & Vance for appellant Baskett.

J. E. Williamson, William W. Watts and John R. Watts for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge O'Rear.

Rankin Eastin operated a coal mine near Spottsville, Ky. His property consisted of a coal mine at the above place, with a storehouse and mining equipments, with an office, coal dock, scales, etc., at Evansville, Indiana, and a steamer, called the "Edgar," formerly the "Hussar," and thirteen coal barges, plying between the mines and Evansville and elsewhere. There were various liens upon the property, some on the mines and other property at Spottsville, and some claimed on the boat and barges. A receiver was appointed in the Henderson Circuit Court at the instance of a lien creditor, seeking the enforcement of a mortgage upon the mines and mining equipments. Thereafter certain creditors of Eastin filed petitions in involuntary bankruptcy against him, resulting in his being adjudged a bankrupt in May of 1901. On March 28, 1900, appellant, Lee Baskett, had become the surety of Eastin to the Planters State Bank of Henderson on a note for \$1,500. Eastin executed a mortgage to Baskett as indemnity for his suretyship upon the following-described property: "My steamer, Hussar and six barges, all now in Green river, at Spottsville, Ky., warranted free from all encumbrances." This mortgage was acknowledged and recorded in the clerk's office of the Henderson County Court on the day of its execution, March 28, 1900. Eastin then lived at Evansville, Ind. Spottsville is in Henderson county. The note was subsequently part paid, and the balance renewed to the amount of \$1,000, which Baskett was compelled to pay. He brought this suit on August 1, 1901, to enforce his mortgage lien upon the boat and barges. By amendments R. C. Arnold was made a party defendant, and the Farmers Bank and Trust Co., the trustee in bankruptcy for Rankin Eastin, was also made a party defendant, under the allegation that they were claiming some interest in the steamboat and barges.

Arnold answered that he had sold the barges to Eastin upon the express condition that their title should remain in him until paid for; that Eastin

had not paid for the barges on August 20, 1900, when he resold same to Arnold, and also sold him the steamer "Edgar," and executed a bill of sale of that date therefor. Arnold's bill of sale was not lodged for record nor recorded in the customs office at Evansville until the 13th day of March, 1901. It was executed and dated August 20, 1900.

Baskett's mortgage was recorded in the same office on the 1st day of April, 1901. The bankruptcy proceedings were instituted about the 6th day of April, 1901. The floating dock at Evansville, which Eastin owned, was also claimed to be in the lien to Arnold for some \$735, because Arnold claimed that he had furnished some of the lumber and means with which to build the dock.

The trustee in bankruptcy intervened, and claimed that Eastin was indebted to Arnold at the time of the alleged and attempted transfer to him of the steamboat and barges in August, 1900, and that Eastin was then otherwise largely indebted and was insolvent, and that with the design to prefer Arnold to the exclusion of his other creditors Eastin had transferred and conveyed the property in question, and that Arnold received the title to it with knowledge of Eastin's fraudulent purpose. The trustee claimed that on account of the above transactions, as well as of other acts of bankruptcy committed within four months of the filing of the petitions by the creditors, that Eastin had become a bankrupt, had been so adjudged, and that the title to all of his property was vested in the trustee for the benefit of his creditors, and that the mortgage to Baskett and the bill of sale to Arnold not having been lodged for record nor recorded within the time and the place prescribed by law, were void as to creditors. This suit, therefore, involves the title to the steamer Edgar and her barges, as well as the effect of appellant Baskett's mortgage upon the steamer and six of her barges, and of Arnold's lien upon the dock.

The circuit court adjudged Baskett's mortgage invalid. It also adjudged the sale to Arnold to be invalid, and decreed that Arnold deliver the boat and barges to the trustee, which was done. It also adjudged rents against Arnold for the use of the boat during the time that he had the possession of her after the appointment of the trustee in bankruptcy. But the court gave to Arnold a lien upon the dock at Evansville for the \$735, and permitted by judgment of the court an amended pleading to be filed by Arnold, setting up the fact he had discharged liens upon the boat to the extent of about \$1,200, for which she had been libelled in the United States District Court at Evansville by various claimants, as well as to set up certain expenses for repairs and insurance upon the boat while she was in his possession.

Baskett appeals from the judgment disallowing his lien. Arnold appeals from the judgment denying his title. The trustee in bankruptcy has prosecuted a cross appeal from so much of the judgment as allowed Arnold a lien upon the dock at Evansville as well as because it allowed him anything for the maritime liens, which it is alleged he has paid to procure the release of the boat.

By the United States Constitution exclusive cognizance is conferred upon the courts of the United States in all cases of admiralty and maritime jurisdiction. (U. S. Constitution, article 3, section 2; *The Moses Taylor v.*

Hammons, 4 Wall., 411; The Steamboat Ad. Hine v. Trevor, 4 Wall., 555; The Belfast, 7 Wall., 624; Glass v. The Sloop Betsey, 3 Dall., 6.)

This jurisdiction, though formerly questioned, has ever since the case of "The Genesee Chief" been uniformly held to include not only tide waters, but to extend to all waters connecting with other States or countries, navigable by vessels used in commerce. (12 Howard, U. S., 443.)

As an incident of the Federal control and jurisdiction congress has enacted statutes requiring the registration of United States vessels as follows (Revised Statutes of the United States, sections 4141, 4192):

"Section 4141. Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district, which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such vessel, usually resides.

"Section 4192. No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section."

Under the facts admitted in this case at the time of the various transfers affected by the decree herein the home port of the Edgar was at Evansville, Ind. Consequently any bill of sale transferring her title or any mortgage creating a lien upon her, save by way of bottomry, was of necessity recordable in the office of the collector of customs at that port before it could affect others than the parties to such transfers, and those having actual notice of it. The recording of the mortgage elsewhere was as ineffectual as if it had not been recorded at all, so far as constituting it constructive notice to creditors or purchasers was concerned. Therefore, the recording of Baskett's mortgage in Henderson County Court clerk's office of Kentucky did not create a lien upon the boat as against the creditors of her owner, Eastin, nor for obvious reasons could the recording of the mortgage in the surveyor's office on April 1, 1901, affect antecedent creditors. It is claimed for Eastin, however, that the barges were not such vessels as were within the maritime jurisdiction of the United States Courts, and as at the time they were mortgaged to appellant Baskett they were within Henderson county, the record of the mortgage in that county (the owner being a non-resident of this State) was effectual to create a lien thereon. (Section 495, Kentucky Statutes.)

It was decided in the case of *The General Cass*, Brown's Admiralty, 334, that the true criterion by which to determine whether any water craft or vessel is subject to admiralty jurisdiction is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity or means of propulsion.

Section 3 of the Revised Statutes of the United States, in defining the

word "vessel" as used in the statutes, says: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

In the following cases it has been held that a barge was such craft, and was included within the jurisdiction of the admiralty courts: *Disbrow v. The Walsh Bros.*, 36 Fed. Rep., 867; *Wood v. The Two Barges*, 46 Fed. Rep., 304; *The Dick*; *Keyes*, 1 Biss., U. S., 408; *The City of Pittsburg*, 45 Fed. Rep., 699. Statutes requiring the registration of conveyances are for the purpose of giving notice to intending purchasers and creditors. The United States statute, quoted supra, has that purpose. Of such vessels moving from place to place, and through many jurisdictions, purchasers or creditors could have no other safe means of informing themselves upon these points. It could not be known with any certainty where they may have been in the course of their voyage, and if it were competent to create a lien on them by mortgage at every point where they may have touched, inextricable confusion and opportunity for fraud would result. The Federal statute is the only efficacious and practical method of dealing with the subject. The State courts can and will enforce liens upon property, and rights thereto, created by Federal statutes, as they could if created by State statutes, unless the Federal statutes confer exclusive jurisdiction therefor upon the United States courts.

What has just been said concerning the recording of Baskett's mortgage applies with equal force to appellant Arnold's bill of sale, and to his contracts for liens upon the barges built by him for Eastin, and not paid for. But there are other questions affecting this transaction that should be decided. The record does not state the grounds upon which the circuit court based its judgment in denying appellant Arnold's title to the boat and barges, but the record does show the following facts: The debtor, Eastin, was hopelessly insolvent on August 20, 1900. For a long time prior thereto he had been indebted to Arnold for balances owing and past due upon barges built by Arnold and sold to Eastin. The steamer and the barges are shown to have been worth at the time of their transfer as much as \$9,000 or more. Arnold bought them, it is claimed, for \$3,038.22, of which \$2,500 was paid in cash when the bill of sale was executed, and the remainder by the satisfaction of an indebtedness from Arnold to Eastin of \$538.22. Upon the whole record we conclude that this sale was not made bona fide; that Eastin intended to give to his creditor, Arnold, a preference over his other creditors, knowing at the time that he was insolvent; that at the most the \$2,500 was regarded by the parties as an advancement or loan, which was to be paid to Arnold if Eastin should weather his financial storm, or otherwise Arnold was to have the boat and the barges at the inadequate price of \$3,038.22. The badges of fraud in law are, that Arnold, the creditor had constructive notice, if not actual knowledge, of Eastin's unlawful design to prefer Arnold to his other creditors, when both knew that Eastin was insolvent and failing. This is shown both by the grossly inadequate price paid for the boat and barges, and by the conduct of the parties in making the transfer, as well as by their subsequent conduct; the failure of the transferee, Arnold, to take possession of the property, but leaving it in the possession and control of his vendor, with apparent title and ownership; the leaving the boats

and bill of sale, with insurance payable to Eastin, as owner, endorsed to Arnold as his interest might appear, all in the possession and control of the vendor, show no delivery of the property; the purchase by a creditor from a falling debtor at a greatly inadequate price, which property the creditor did not need, and which he did not exercise any control over by way of using or hiring as an ordinary business man would have done with his own, and his apparent indifference to the fact that the boats were for a time taken charge of by the State court receiver in proceedings against the debtor; that the putative purchaser failed to list the property for taxation when he gave in his assessment list, all argue that the transaction was not a sale in good faith and for a fair, adequate consideration. His failure to testify fully and candidly, and his failure to remember most important facts material to his title, and of very recent occurrence, create a suspicion that justifies the solution of doubts against him. If we have been led into error in these conclusions it was easily within the power of the parties most concerned to have prevented it by candidly stating all the facts connected with the transaction, which they did not do. So we find that the circuit court was justified in adjudging that nothing passed by the bill of sale to Eastin, and that the title to the boat and barges remained in him till the adjudication in bankruptcy, whereupon the trustee was vested with title to the bankrupt's property, including that transferred by him in fraud of his creditors.

Section 70a of the bankrupt law is as follows: "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt from all. * * * (4.) Property transferred by him in fraud of his creditors."

Such conveyances may be attacked within four months under section 67e of the Bankrupt Law: "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be, and remain, a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings, or otherwise, for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor, if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Section 67e pertains to fraudulent transfers without reference to a preference of creditors.

Section 60a defines a preference, and section 60b gives to a trustee the right to recover a preference when the person receiving it, or to be benefited thereby, shall have had reasonable cause to believe the transfer was intended as a preference. Those sections read as follows:

"Section 60a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Section 57g provides that: "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Sections 67a and d are directed to liens bad for want of record, fraud, or other reasons, and are as follows:

"a. Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

"d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

Although the bill of sale was executed more than four months before the filing of the petitions in bankruptcy, the fact that it had not been recorded in the office required by statute to constitute it notice as against creditors, and that the vendor continued in the possession of the property, render the sale void as to creditors; and the registering of the bill within the four months brings the whole transaction within the purview of the legislation against acts of bankruptcy.

The facts show, as before stated, that the transfer was not only not in good faith, but that the consideration was so inadequate as to raise the presumption that the purchaser must have known of Eastin's purpose to defraud his creditors. The trustee in bankruptcy had come into the State court and invoked its equitable jurisdiction to enable it to regain the possession of the bankrupt's property from one claimed to be not entitled to the possession. In our opinion it would have been competent for the State court to have required the trustee as a condition to its granting the relief sought, that the person in possession should be restored the money which he had paid out on the property to preserve it, or impose such other equitable terms as the court might have required from any other suitor under similar circumstances. And the court might have done this, although it was

within the jurisdiction of the Federal court to have allowed such relief in finally reckoning the liens and claims of creditors in the bankruptcy proceeding, for a court of chancery ought to do complete justice, or it should require it to be done by a litigant claiming its aid before acting on his behalf. In this case it is claimed that appellant Arnold paid about \$1,900 that were liens against the boat, for which she had been libelled. These liens were superior to those of Eastin's general creditors. Their discharge by Arnold was a benefit to the bankrupt's estate to that extent. They must have been paid by the creditors, or by the assets, to wit, the boat, before general creditors would have been entitled to anything. It is but just that Arnold should be reimbursed that sum, notwithstanding that he may not have acted in good faith towards the creditors in other particulars, and as he had possession of the boat the circuit court might have required that he be repaid this sum before it would compel him to deliver the boat to the trustees for the creditors. However, Arnold, upon the announcement of the court's judgment finding that he had not title to the boat, voluntarily surrendered her to the trustee in bankruptcy. It was not competent thereafter for the State court to undertake to audit claims against the bankrupt estate or any of its assets, and to adjudge their priorities. What it might have required as a condition to granting its equitable relief upon the petition of the trustee it did not do; nor does Arnold complain on this appeal of such failure. These claims are, furthermore, maritime liens, jurisdiction to enforce which is exclusively given to the Federal courts, and while, as we have stated, the State court might have withheld its action in favor of the trustee unless he should make Arnold whole in this matter, it can not, after it has acted and adjudged the title to the trustee, and after Arnold has delivered the possession of the property to the trustee, and he has received it, proceed to adjudge independently upon matters that are beyond its jurisdiction.

As to the lien upon the dock at Evansville, whether or not it is a vessel within the contemplation of the United States Statutes (The Old Natchez, 9 Fed. Rep., 476; Cope Vallette Dry Dock, 10 Fed. Rep., 142), the alleged contract for building material and means furnished to construct the dock are not matters within the maritime jurisdiction. (People's Ferry Co. v. Beers, 20 How., U. S., 363; Edwards v. Elliott, 21 Wall., U. S., 532; Young v. The Ship Orpheus, 2 Cliff., U. S., 20.) At that time the dock was but a chattel within the State of Indiana (Stinson v. Minor, 34 Ind., 89), though it appears now to be in the Ohio river, and within the jurisdiction of the courts of this State upon a proper case. The right of Arnold under the alleged agreement for a lien upon the dock must, however, be based upon the laws of Indiana, and not of this State, as his contract was made there while the property was within that jurisdiction. Burns' Indiana Statutes provides (section 6838): "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged as provided in case of deeds of conveyance and recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof."

The Indiana Supreme Court, in considering similar contracts as affecting the rights of subsequent creditors, holds that unless a mortgage is executed

and recorded in strict accordance with the statute it is not valid as against creditors. (*Granger v. Adams*, 90 Ind., 87; *Sidener v. Bible*, 43 Ind., 230; *Ames v. Warren*, 76 Ind., 512; *Lockwood v. Slevin*, 26 Ind., 124.)

In *State v. Griffin*, 16 Ind. App. Rep., 558, the court said: "The Supreme Court of this State has many times had occasion to apply the provisions of this section, and has uniformly held that a chattel mortgage to be valid as to persons not parties thereto must be recorded in the county in which the mortgagor resides, and within ten days after its execution."

In *Seavy v. Walker*, 108 Ind., 78, it was said: "The controlling question made at the trial was upon the nature, good faith and validity of the alleged sale and transfer of the mortgaged property to Seavy and Morgan & Beach. * * * If the bill of sale in evidence in this case was in legal effect only a mortgage, as the circuit court may have concluded it was, then it was void for not having been recorded within ten days after its execution."

The trustee in bankruptcy peculiarly represents the creditors of the bankrupt, the alleged mortgagor. His claim is essentially on their behalf, and is an attack for them upon the claim of the specific creditor that he has a mortgage lien upon the property. The validity of the alleged mortgage as to such creditors does not depend alone upon its existence and due execution, and a fair consideration. By the express terms of the statute, doubtless passed out of consideration of the necessity for the protection of commercial transactions made upon the faith of the debtor's apparent state of solvency, it must be recorded in the proper office of registry, where such creditors may be apprised of all claims of liens upon the debtor's property, so that they may, before they part with their goods, protect themselves, or advisedly take the risk of the credit. While as between the debtor Eastin and the creditor Arnold the transaction regarding the dock at Evansville and the barges sold by him might be enforceable, to allow the lien as against Eastin's other creditors, especially those who gave him credit without knowledge or notice of its existence, would be at war not only with the letter, but the purpose of the statutes. The circuit court should not, under the statutes quoted, and under the decisions of the Supreme Court of Indiana, have imposed the condition of the payment of the \$735 alleged lien before adjudging the possession of the dock to the trustee.

We conclude that the judgment of the circuit court denying the lien to appellant Baskett must be affirmed, and the judgment denying the title of Arnold to the steamer and barges named in the judgment must be affirmed. But the judgment upon the cross appeal of the trustee, in so far as it allows or directs the allowance of claims to Arnold must be reversed. To the extent that it is reversed, the cause is remanded for proceedings consistent herewith.

MASON'S EX'OR v. McKNIGHT.

(Filed November 10, 1903—Not to be reported.)

Action on note—Judgment sustained by evidence—In this action to enforce the payment of a mortgage note executed by a surety on a note in bank to his cosurety in consideration of the payment of the note by the latter, in which the defense was interposed that the plaintiff had failed to account for certain collaterals which he had received as security for the payment

of the original note, the evidence is sufficient to sustain the judgment of the court holding that the collateral was worthless and the defense not good.

J. N. Hutchings and D. A. Glenn for appellant.

Orlando P. Schmidt for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Nunn.

It appears from this record that about the year 1895 or 1896 one C. G. Mason executed two four-month notes for \$500 each to a bank in Covington with appellee McKnight and D. A. Glenn as sureties. At the expiration of the four months these notes were renewed, with a partial payment on each, and they were renewed again. At the second renewal one amounted to \$380, on that one Glenn and appellee continued as sureties, the other one then amounted to \$275, and appellee and one George Mason, father of C. G. Mason, became the sureties.

On the 25th of January, 1898, by an agreement between appellee and George Mason, appellee paid the bank this debt with its interest, amounting to \$800, for which George Mason executed to appellee his note and a mortgage on real estate to secure the payment of it. George Mason died and this action was brought to enforce the mortgage lien for the payment of this debt. Mason's administrator answered, admitting the execution of the note and mortgage, and alleged that in 1896, when appellee was surety on these notes for C. G. Mason, he received as collateral security two shares of stock of the South Covington Land Co. of \$500 each; also four notes of \$58 each for balance on purchase of land executed by W. H. Dye, February 5, 1896, due in one, two, three and four years; that when appellee received these collaterals that it operated equally for the benefit of all the sureties on these notes, and that appellee had failed to account for either the stock or the notes.

Appellee replied and admitted that he had received those collaterals, but alleged that he never received anything thereon; that C. G. Mason collected these notes and entered satisfaction without his knowledge or consent, and that the stock was worthless at the time he received it and has remained so ever since, and that he is ready and willing to turn it over or reassign it at any time to any one to whom it may belong.

The lower court adjudged that the defense was insufficient, and gave appellee judgment for his mortgage debt and for the enforcement of his lien on the real estate. Without referring to the evidence in detail it is sufficient to say that it supports the findings of the chancellor.

Wherefore, the judgment is affirmed.

CAMPBELL v. SHERLEY.

SAME v. SHERLEY'S ADM'R, &c.

(Filed November 11, 1903—Not to be reported.)

1. Fraud—Enforcement of liens—Where the holder of a purchase-money lien on lands, who was also a surety on a note secured by a subsequent mortgage on the same lands, turned over his purchase-money notes to the mortgagee under an agreement between them that the latter should insti-

tute suit on the notes and buy in the land at judicial sale for the amount of both debts, the vendor having the right to take the lands upon paying the mortgage debt and upon his failure to do so that the mortgagee should retain the land and pay off the purchase-money notes; the action of the mortgagee in fraudulently having an order entered satisfying his own debt alone and in directing a deed made to him for the lands authorized a recovery by the vendor from the mortgagee of the amount of his sale bonds.

2. Judgment in bar—An action by the holder of the purchase money lien to recover the amount of the sale bonds was not barred by the judgment in the former suit, as the second suit was a direct attack upon the judgment in the first case for fraud.

James S. & Chas. H. Morris for appellant.

A. T. Ladd for appellees.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Hobson.

On March 7, 1898, a petition in equity was filed in the Oldham Circuit Court in the name of Robert Sherley as plaintiff against William B. Sherley and John R. Campbell as defendants. It was alleged in the petition that William B. Sherley had executed to Robert Sherley, on March 1, 1893, two promissory notes each for \$200, due one and two years after date, as the balance of the purchase money for fifty-two acres of land conveyed by Robert Sherley to William Sherley. The notes and deed were filed as exhibits with the petition, and it was alleged that Campbell was claiming a lien on the land, and there were no other liens on it known to the plaintiff, and that the land could be divided without materially impairing its value. Judgment was prayed for the debt and a sale of so much of the land as might be necessary to pay it. On the same day Campbell, by the same attorneys who filed the petition, filed in the clerk's office his answer and cross petition, in which he alleged that on the 15th day of May, 1894, William B. Sherley, Robert Sherley and Bettie Sherley executed their promissory note for \$267.95, due one day after date to Sarah McBride, and that to secure the note William B. Sherley executed to Sarah McBride a mortgage on the fifty-two acres of land above referred to; that she sold and assigned to him the note and mortgage, and by reason thereof he had a lien upon the land to secure the payment of his debt. It was alleged also by him that there were no other liens on the land known to him except plaintiff's lien, and that the land could be divided without materially impairing its value. Judgment was prayed against William B. Sherley and Robert Sherley for the debt and costs and for a sale of so much of the land as might be necessary to pay it. The note and mortgage were filed as exhibits with the answer and a summons was issued thereon and served on William B. Sherley and Robert Sherley. On March 24, 1898, a default judgment was entered on the action in favor of Robert Sherley against William B. Sherley for his debt of \$400, with interest and costs, and for a sale of so much of the land as might be necessary to pay the debt, no notice being taken of the mortgage debt of Campbell. The sale was made on May 23, 1898. The land was appraised at \$750, and was bought by Campbell for \$320. The sale was reported to the court at the June term, and no exceptions being filed to it was confirmed. No further steps were taken in the case until November 22, 1892, when the court entered an order

as follows: "It appearing from the pleadings in this action that J. R. Campbell had a superior lien upon the land described in the pleadings to secure the payment of his debt, interest and costs as shown by his answer filed herein; and it further appearing from the commissioner's report of sale that said land sold for \$320, and that said \$320 was an amount sufficient to pay the said debt, interest and cost of J. R. Campbell and no more, it is ordered that said proceeds of sale be applied to the satisfaction of said Campbell's debt, interest and cost. And it further appearing that said J. R. Campbell was the purchaser of said land and executed his bonds therefor, it is now ordered that said bonds be, and are hereby, cancelled and held for naught. All his costs having been paid, it is ordered that C. Sauer, M. C. of this court, make and produce to the court a deed conveying said land to the purchaser, J. R. Campbell."

The deed was accordingly made.

No further steps were taken in that action. On March 7, 1901, Robert Sherley filed a petition in equity in the same court against J. R. Campbell, in which he set out the above facts, and alleged that before the action was brought it was agreed between him and Campbell that suit should be instituted to foreclose their liens on the land, and that at the sale thereof Campbell would buy in the land for the amount of both the debts, it being agreed that the land was worth the amount of both the debts; that for this purpose he placed his notes in Campbell's hands and Campbell managed and controlled the suit, he having nothing to do with it pursuant to their agreement. He alleged that it was also agreed that his claim was superior to Campbell's, and that he was to have the privilege of paying off Campbell's debt, but if he failed to do this, then Campbell was to keep the land for both the debts; that pursuant to the agreement Campbell instituted that action and obtained the order of sale and bid in the property at the sale, but contrary to his agreement failed to bid the amount of both the debts, but only the amount of his own debt, which was fraudulent; that relying on his agreement with the defendant the entire control and management of the suit was left by him to Campbell and he did not attend the sale; and afterwards Campbell, in violation of the agreement, in fraud of his rights, and contrary to the actual facts, had the order entered declaring Campbell's claim superior to his, whereby his debt had been lost, as W. B. Sherley was insolvent. He alleged that the contract made by him with the defendant was made by the defendant for the fraudulent purpose to cheat and defraud him, and that but for it and his confidence in the defendant and the defendant's fraud he would have secured his debt. The proceedings in the preceding case were referred to as part of the petition, and judgment was prayed against Campbell for the plaintiff's debt, and for a sale of the land to satisfy it. The defendant, Campbell, demurred to the petition, his demurrer was overruled, and he then filed an answer in which he denied the agreement set out in the petition, or that any fraud was practiced by him in bidding in the land or in obtaining the order, that his debt was prior, or in obtaining the deed to himself for the land. In the second paragraph of his answer he set up the conveyance of the land by Robert Sherley to William Sherley and alleged that William Sherley afterwards executed the mortgage on it to Mrs. McBride to secure the note of \$267.48, and that Robert

Sherley signed the note as surety; that Mrs. McBride signed and transferred the note to him; that the lien of the mortgage was inferior to the purchase-money lien of Robert Sherley, but Robert Sherley was surety on his note, and it was agreed between him and Robert Sherley that his debt was to be first paid out of the proceeds of the land and should be treated as the first lien; that under this agreement the suit was instituted by Robert Sherley and he filed his answer, and at the sale bid the amount of his debt; that after the sale Robert Sherley repeatedly promised to pay his debt and redeem the land, which he failed to do, and defendant was compelled to keep the land and take a deed therefor. By an amended answer, which was also made a set-off and counterclaim, the judgments in the former case were relied on in bar of the action, and it was pleaded that there was no consideration for the agreement. It was further alleged that Robert Sherley had taken possession of the land and received certain rents from it which were pleaded as a set-off. The affirmative matter in the amended answer was controverted of record, and a reply was filed controverting the allegations of the original answer, and at the June term, 1901, the case was submitted on its merits and a judgment entered by the court adjudging to Robert Sherley the amount of the sale bonds executed by Campbell at his purchase of the land at the commissioner's sale. To this judgment Campbell excepted and prayed an appeal to this court.

Campbell did not prosecute then his appeal to this court, but on June 27, 1901, filed in the Oldham Circuit Court his petition in equity against Robert Sherley and A. T. Ladd, his attorney, who had been adjudged a lien on the recovery in the last action in which he set out the judgment rendered in that action and the proceedings leading up to it. He also set up his note and mortgage referred to charging that it was wholly unpaid, and also set out the proceedings in the first action, and alleged that he did not know, until the judgment in the last case was rendered, that no judgment had been rendered in his favor in the first case, and alleged that that action, so far as his cross petition was concerned, had not proceeded to judgment by mistake of the parties and of the court. He prayed judgment for his debt against Robert Sherley *nunc pro tunc*, and that the first action be replaced upon the docket and consolidated therewith and sought an injunction suspending the execution of the judgment in the second action until this case could be heard. The injunction was granted. The court overruled Sherley's demurrer to the petition; also his motion to dissolve the injunction on the face of the papers. Sherley then filed an answer denying the allegations of the petition as to the mistake alleged or the discovery of it, and pleaded the proceedings in the second action in bar of the third. The plaintiff filed a reply, and the defendant filed a rejoinder making up the issues, and the case being submitted on the merits at the November term, 1902, upon the record in that case and also upon the record in the two preceding cases, the court discharged the injunction and dismissed the petition, and from this judgment Campbell appeals, and has also sued out in this court an appeal from the judgment against him in the second action.

No appeal is taken from the judgment in the first case. While the evidence was very conflicting in the second case, the proof offered by the plaintiff was sufficient to sustain the chancellor's conclusion, and we see no reason

for disturbing it on the facts. It leaves no doubt that Sherley in fact turned over his two notes to Campbell for the purpose of the suit being brought by him, and that Campbell had the suit brought and Sherley took no part in it. Sherley's son Zach had married Campbell's daughter, and it seems to have been contemplated by them that Campbell would buy the land and that Zach should get it. Sherley undoubtedly had the superior lien, and all the circumstances attending the transaction indicate that it was an amicable suit as between Campbell and Robert Sherley. There is no charge that the appraisers overvalued the land, and if they did not it was about worth both the debts. Campbell has the land, and if the positive testimony on behalf of Sherley is to be believed, agreed to buy it in for both the debts. If this is true, he can not complain that the court entered judgment in favor of Sherley against him for the amount of his sale bonds. The proceedings in the first case were not a bar to the prosecution of the second suit, for the reason that it was in effect a direct attack upon the judgment rendered in the first case for alleged fraud practiced by Campbell in obtaining it. A judgment obtained by fraud may be attacked by petition in the court that rendered it at a subsequent term, and when the court has the parties before it he may proceed not only to modify the former judgment, but to enter such judgment as is proper between them. There was, therefore, no substantial error in the proceedings in the second case.

The third suit was in substance an effort to retry the matters passed on in the second case. If Campbell made the agreement, which was adjudged to have been made in the second case, he could not assert his debt against Sherley; for if he had bought in the land for both the debts his debt would have been satisfied, and he would have had no debt to recover on against Sherley. But he can not be allowed to better himself by the violation of his agreement, and so he can not keep the land on more favorable terms than he would have had if he had kept the agreement. He has the land, and has not offered to give it up or have a resale of it. It is doubtful if it would be to his interest to have a resale now after the lapse of so much time. The only thing the chancellor could have done properly, other than he did, would have been to set the sale aside and order a resale of the land, but Campbell did not ask this, and it would perhaps have been no less onerous on him to do this than simply to enforce his sale bonds in favor of Sherley, as the court did. Under all the circumstances, we conclude that this long-protracted litigation should not be reopened, and that it is the interest of all the parties that it should end here.

The judgments appealed from are, therefore, both affirmed.

WEBER, &c. v. WEBER, &c.

SAME v. SAME.

(Filed November 11, 1903—Not to be reported.)

1. Statute of frauds—While the loan of a sum of money under a parol contract to repay it at the expiration of two years is within the statute of frauds and no action can be maintained thereon, the claim is not void and it may be asserted against the estate of the deceased borrower.

2. Limitation—The statute of limitation did not begin to run against the claim until the expiration of the two years.

3. Homestead—Exemption as to purchase money—Where a loan of money was made for the purpose of purchasing a homestead, no exemption existed as against the lender.

Jas. T. A. Baker and C. B. Seymour for appellants.

W. C. Marshall for appellees.

Appeals from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Barker.

Jacob Weber died intestate in Jefferson county, Kentucky, October 19, 1897, leaving as his only heirs at law his three infant children, Lena, Joseph and Charles Weber. He left no personal property, except such as was exempt from the payment of his debts; but he owned a homestead, consisting of about eleven acres of land, upon which he was residing with his children at his death. The appellant, Frances Weber, is the mother of the decedent, and after his death was appointed, and qualified, as administratrix of his estate and as guardian of his three children.

On the 27th day of November, 1901, she instituted this action for a settlement of the estate, and for a sale of the homestead, to pay the debts of the decedent. A guardian ad litem was appointed to represent the infant defendants, and the case was referred to the commissioner, to report upon the indebtedness of the estate.

While the case was in the hands of the commissioner the administratrix, herself, proved up a claim against the estate of \$1,200, for money alleged to have been loaned by her to the decedent, for the purpose of purchasing the homestead left by him. This claim was allowed by the commissioner, but was excepted to by the guardian ad litem, and disallowed by the court.

In addition to proving up the claim before mentioned, appellant filed a formal pleading, which is called a cross petition, in which she formally set out the facts constituting her cause of action against the estate, and prayed for a judgment for the \$1,200 alleged to have been loaned by her to the decedent. To this pleading the guardian ad litem filed an answer for the infants, which was in the usual form of admitting all the allegations in favor of the infants, and denying all those which were prejudicial to their interest; and, in addition, setting up their claim to homestead in the land left by their father.

There is no opinion of the chancellor giving his reasons for the disallowance of appellant's claim; but it is stated in the brief of counsel that the reasons were, first, that the cause of action set up by appellant was barred by the statute of limitation; and, second, that it was within the statute of frauds.

The contract, as alleged by appellant, shows that it was a loan of money by her to the decedent under a parol contract to repay it at the expiration of two years. This contract is clearly within the statute of frauds, as it was not to be performed within a year, and was not in writing; but it does not follow that appellant must, therefore, lose her money. The language of the statute, so far as it is applicable to the question at bar (section 470 of the Kentucky Statutes) is as follows: "No action shall be brought to charge

any person upon any agreement which is not to be performed within one year from the making thereof, unless the contract, or some memorandum, or note thereof, be in writing, signed by the party to be charged therewith, or by his authorized agent."

It will be observed that the language of the statute is not that the contract shall be void, but that no action shall be maintained to enforce it, which, in many instances, constitutes a very wide difference. Smith, in his work on Contracts, on this subject, says, star page 60: "The consequence is, not that the unwritten contract shall be void, but that no action shall be brought to charge the contracting party by reason of it. And cases may occur in which the contract may be made available without bringing an action on it; and in which, consequently, it may, though unwritten, be of some avail. Thus, for instance, if it has been partly executed, courts of equity will enforce its complete performance; and if money have been paid in pursuance of it, that payment is a good one for all purposes."

In the case of *Roberts v. Tennell*, 8 Mon., 152, it was held: "But we can not admit, as the circuit court decided in its instructions to the jury, that the effect of the statute is to make the contract void. The statute does not declare verbal promises and contracts coming within its purview void. It only provides that no action shall be brought upon such promises and contracts, and the legal consequences of a statutory provision declaring a promise or contract void, and one which only declares that no action shall be brought upon such promise or contract, may be essentially different. In many cases coming within the purview of the statute against frauds and perjuries, the legal effect will indeed be the same as if it had declared the promise or contract void. This will be the case in all instances where the promise or contract remains executory on both sides and an action is brought to enforce the contract, and in such a case, although it is not strictly correct, that the contract is void, yet as the same legal consequences would result from it as if it were void, it would not be erroneous for the court to decide it to be so. But, on the other hand, there are many cases in which the legal consequences of considering the promise or contract void, and of considering it only such that an action will not lie on it, would be widely different. This would be the case in all instances where the promise or contract is executed in whole or in part, and an action is brought not upon the express promise or contract, but on such as may be implied by law, or where the promise or contract is used only by way of defense. * * * Thus, for example, if money be lent upon an agreement that the borrower shall repay it at the end of two years, the case, if not reduced to writing, would obviously be within the statute, because, by the terms of the agreement, it is not to be performed within a year from the making thereof, and of course no action could be maintained to enforce the express contract. It would, therefore, have no legal obligation, as the law affords no other means of enforcing its performance than by action; but there would be a legal obligation arising from the loan of the money, which is not taken away, either expressly or by implication. Nor is the express contract in such a case a mere nullity, as it would be if the statute had declared the contract void; for if the lender, in the case supposed, should bring another action to recover the money lent before the end of two years, when it became due, as

he might do were there no express contract, the borrower might avail himself of the express contract to prevent the recovery. * * * In these cases, to give to the statute the effect of rendering the contract void, and thereby utterly preventing the lender from recovering the money lent, or if he be allowed to recover the money upon the implied contract, restituting from the loan, to give to the statute the effect of not permitting the borrower to prevent the recovery of the money lent, before it is due, or of a higher rate of interest than is due by the terms of the contract, would be extending the operation of the statute beyond its letter, and instead of making the statute the means of preventing frauds, it would be converting it into an instrument of fraud and injustice; it most certainly could not be said to be demanded by the reason and spirit of the statute."

To the same effect is the case of *Montague v. Garnett*, 8 Bush, 297; *Dart v. Head*, 90 Ky., 255, and *Berry v. Graddy*, 1 Met., 553. It follows, therefore, from the principle enunciated in these cases, that, although the contract between appellant and her son was within the statute of frauds, yet her claim against his estate is not invalid, and that she can recover it, if there be no other impediments to such recovery.

These cases also settle the question of the statute of limitation, if there be such a question in this case. The rule is that, in order to be available, the statute of limitation must be expressly pleaded; and this plea was not made in this case. But passing that question, inasmuch as the verbal contract was not void, and could have been used as a defense to the collection of the money by appellant, if she had undertaken to enforce its payment prior to the expiration of the contract period, she had no cause of action until the expiration of the two years, and, therefore, the statute did not begin to run until that time.

We think the proof of appellant's claim was fully made out according to the form required by the statute. The evidence as to the merits of the claim seem conclusive. Several witnesses testified of the declaration of the decedent that he was going to borrow the money from his mother with which to purchase a home; also of his admission that he had borrowed it; and there was in the evidence the written assignment by appellant to the decedent of the note, secured by mortgage for the sum of \$1,100, and the decedent's written release of the lien showing that he collected it; also the evidence of another party, who owed appellant \$100, that he had paid this money over to the decedent for the purpose of being paid on the land purchased by the latter. This, with no uncontradicted evidence whatever, seems to us conclusive.

There is no reason shown in this record to suppose that the grandmother desires to swindle her grandchildren by the collection of a false claim based on perjured testimony; on the contrary, the evidence shows that the debt sought to be collected by appellant is genuine, and the surrounding circumstances show it to be just such a contract as would naturally take place between mother and son where the utmost confidence prevails. As appellant's debt was created for the purpose of purchasing a homestead, there is no exemption in favor of appellees as against her claim. (Section 1702, Kentucky Statutes.)

Wherefore, the judgment is reversed for proceedings consistent with this opinion.

STURGILL, &c. v. CHESAPEAKE & OHIO RY. CO., &c.

(Filed November 11, 1903.)

Married woman—Repeal—Limitation—Section 2128 of the Kentucky Statutes, which is a part of the married woman's act of 1894, and which authorizes a married woman to sue and be sued as a single woman, with certain exceptions, does not have the effect to repeal the provisions of section 2535, which extends the limitation period within which an action may be instituted for damages to her real estate for a like number of years after the removal of her disability or her death as is allowed to a person having no disability to bring such an action after the right accrues.

Jas A. Scott for appellants.

W. H. Wadsworth and E. L. Worthington for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellants, Melcina Sturgill and her husband, J. J. Sturgill, brought this suit on the 5th day of April, 1901. She alleges in her petition that in 1880 she was the owner and in possession of two houses and lots abutting on a street in Catlettsburg, and that the appellee, the Elizabethtown, Lexington & Big Sandy R. R. Co. in that year constructed a railroad in the street in front of her property so as to obstruct the access to and egress therefrom; and that the running of the trains thereon caused her house to be jarred, and smoke, soot and cinders to be thrown thereon; that these injuries were permanent in their nature, and damaged her property \$2,000; that after operating the railroad for a time, the Elizabethtown, Lexington & Big Sandy leased it to its co-appellee, the Chesapeake & Ohio Railway Co., who had continued its operation, and damages are sought to be recovered against both companies. The appellees, by separate paragraphs of their answer, plead the five, ten and fifteen years' statutes of limitation to the cause of action set up in the petition. To these pleas the appellants demurred. The court overruled the demurrer. Thereupon the appellants filed a reply, in which they plead in avoidance of the various pleas of limitation that at the time of the accrual of the cause of action set out in their petition Melcina Sturgill was then, and is now, and had been ever since the accrual of her cause of action, continuously a married woman, and by reason of which the statute of limitation did not run against her. Thereupon defendants interposed a general demurrer to the plaintiffs' reply, which was sustained, and plaintiffs declining to plead further, their petition was dismissed and they have appealed.

As the injury complained of was inflicted twenty-one years before appellants instituted their suit, it is clear that their right of action is barred, unless the fact that she was at the time of the injury and had ever since been a married woman prevents the running of the statute. Section 2535 of the Kentucky Statutes provides that: "If a person entitled to bring any of the actions mentioned in the third article of this chapter, except for a penalty or forfeiture; was at the time the cause of action accrued an infant, married woman, or of unsound mind, the action may be brought within the like number of years after the removal of such disability, or death of the

person, whichever happened first, that is allowed to a person having no such impediment to bring the same after the right accrued."

Under this statute the various pleas of limitation relied on by the appellee were ineffectual to bar her claim unless this statute has been expressly, or by necessary implication, repealed. Appellee contends, and the circuit court held, that section 2128 of the Kentucky Statutes, which is a part of the act of March 15, 1894, defining the property rights of the husband and wife, had this effect. The statute is as follows: "A married woman may take, acquire and hold property, real and personal, by gift, devise or descent, or by purchase, and she may, in her own name, as if she were unmarried, sell and dispose of her personal property. She may make contracts and sue and be sued as a single woman, except that she may not make any executory contract to sell or convey or mortgage her real estate unless her husband join in such contract, but she shall have the power and right to rent out her real estate, and collect, receive and recover in her own name the rents thereof, and make contracts for the improvement thereof. A gift, transfer or assignment of personal property between husband and wife shall not be valid as to third persons, unless the same be in writing, and acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded; but the recording of any such writing shall not make valid any such gift, transfer or assignment which is fraudulent or voidable as to creditors or purchasers."

Whilst this statute is materially different from all former statutes relating to the property rights of husband and wife, it does not remove all of the disabilities of coverture. For instance, she can not make a contract for the sale, conveyance or mortgage of her real estate unless her husband join in such contract. Nor can a married woman's estate be subjected to any liability upon a contract made after marriage to answer for the debt, default or misdoing of another, including her husband unless such estate shall have been set apart for that purpose by deed, conveyance or other conveyance. In *Martha Higgins v. Clint Stokes*, 24 Ky. Law Rep., 2427, Mrs. Higgins sued on the 4th of January, 1902, to recover possession of a lot of ground, which she alleged belonged to her, but which her husband had sold and conveyed without her consent by general warranty deed, in which she did not unite; that she continued to live with her husband as his wife until his death in January, 1900. In that case the defendant, as in this, plead that the plaintiff's cause of action accrued more than fifteen years prior to the 15th of March, 1834; and that her disability as a married woman was removed by that act, and that her right to recover the land was barred. The trial court sustained this contention, but it was held upon appeal that section 2128 did not, by necessary implication, repeal so much of section 2506 as applied to married women. In *Onions v. C. & C. Elevated R. R. Transfer Bridge Co.*, 21 Ky. Law Rep., 820, it was contended by the defendant that section 34 of the Civil Code, which provides "that in an action between the husband and wife, and in an action concerning her separate property, and in actions concerning her general property, and in actions for personal suffering or injury to her personal character, in which he refused to unite, she might sue alone," authorized women to sue for damages to her real estate, and by necessary implication, repealed section 2525 of the Kentucky Statutes. It

was held not to have this effect. Indeed before the enactment of section 84 of the Civil Code married women had all the power conferred by that section. If the husband refused to unite, such suit could have been instituted through a next friend. It can not be presumed that the general assembly intended by implication to repeal a provision of the statute relating to limitation by an act amending and changing the statute which regulated the property rights of the husband and wife.

We, therefore, conclude in this case that section 2525 of the Kentucky Statutes is unaffected by the act of March 15, 1894, and that the trial court erred in sustaining a demurrer to appellants' reply, and the cause is, therefore, reversed and remanded for proceedings consistent with this opinion.

McCORMICK v. APPELEGATE.

(Filed November 11, 1903—Not to be reported.)

1. Location of land boundary—Although corner trees called for in a deed have been cut down, upon proof of their existence and exact location, the rule that courses and distances must give way to known objects will control in locating the boundary as if the corner trees were still standing.

2. Agreement in bar—A written agreement between adjoining land owners that the county surveyor should establish the dividing line between them by survey, and that each would abide by the location thus made is not a bar to an action instituted by one of them to settle the controversy where there is not satisfactory proof to show that the surveyor established the line called for.

W. C. Halbert for appellant.

R. D. Wilson and U. C. Thoroughman for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Hobson.

Appellant and appellee owned adjoining tracts of land in Lewis county. This controversy has arisen between them as to the dividing line between their tracts, and involves about one-fourth of an acre of ground, consisting of a triangular strip fifty nine feet wide at the base and running out to nothing at the other end. The land in controversy is of small value, except that appellant's road runs over it, and from the conformation of the ground it would be difficult for her to get a road elsewhere. Appellee's deed calls for appellant's line, and so the only question in the case is the proper location of her line under her deed. She got the land from her father, David Tonery, who lived on it and held it for a great many years. The difficulty in determining where her line runs arises from the fact that if it is run upon the courses of the deed it does not strike the point at which she claims the corners stood, and the trees called for in the deed as the corners are no longer in existence. In the absence of evidence establishing the actual location of the corners the courses and distances of the deed must control in the location of the survey. But when the corners, as actually located, are established, the calls of the deed must give way to the marked objects found on the ground, and the lines must be run to the established corners. Although the corner trees have been cut down, still if their existence is proven, and

the spot where they stood is clearly identified, the rule is the same as when the corner trees are still standing. These principles have been long settled by this court.

The evidence in the case leaves no doubt that the corner claimed by appellant at B on the surveyor's plot is the original corner claimed by her father and recognized by the persons under whom appellee claims while the trees were still standing. The evidence shows when and by whom the corner tree was cut down, and that after this a large rock was planted in its roots to mark the corner. There is practically little controversy in the testimony on this subject, and the testimony for appellant is confirmed by the use of the land with the road on it by her father and those claiming under him as far back as the memory of any of the witnesses run, although some of them are old men. It is also confirmed by the fact that to locate the line as claimed by appellee would be to place it where there is no testimony that the corner ever stood, and where, from the nature of the ground, it would seem that this could not have been the corner. We, therefore, locate the corner in controversy at the stone claimed by appellant at the point B on the plot, and locate the dividing line between the parties as located by the lines on the plot indicated by the letters 9-C B-12. In other words, the dividing line is to be run with the red lines on the plot from 9 to B, and from B a straight line will be run to the corner at 12. The confusion in the case has arisen from the evident mistake in the courses of the deed as to two of the lines, but the mistake in the course is not material when the corner is actually located.

In January, 1896, the parties entered into the following written contract:

"This agreement, made and entered into by Maggie P. McCormick of the first part, and Alvin Applegate of the second part:

"Party of the first and second part agrees to have it surveyed by the Toncray deed of the Cordingly farm, by the county surveyor, and each party to pay one-half of the expenses of surveying, and both parties agree to let the county surveyor establish the line, and each party agrees to stand to the lines, and party of the first agrees to pay the party of the second part \$50 if she fails to stand to this article of agreement and the party of the second part agrees to pay the party of the first \$50 if he fails to stand this article of agreement

"MAGGIE P. McCORMICK,

"ALVIN APPLGATE."

The county surveyor testifies that he made a survey of the land, and was told that there was an agreement that he should run the line from Mrs. McCormick's deed and locate the line between the two parties by it; and that a line located by him should settle the dispute between the parties. He so states that he ran the lines by her deed, and found that the course and stance given in her deed did not include the land in dispute. The written contract and the survey made pursuant to it are relied on in bar of the present action subsequently instituted by appellant.

The submission was in writing. It was a controversy in regard to land, and it would seem reasonable that the parties contemplated a written award. No written award was made. There is nothing to show what line the surveyor ran, except the verbal testimony of witnesses as to where he ran. He no stone for any of the corners, and made no marks on the ground to

show the lines. His testimony as to what he did is as follows: "In surveying Mrs. McCormick's land I did not establish any corners. I may have blazed some of the lines. Where the disputed land is there is no timber standing, and both corners called for below the gum and sugar-tree corner are gone; this is my recollection. * * * After I made my survey and reported to the plaintiff, and before I finished it, she was very much dissatisfied, and let me know it in a very emphatic way."

This testimony is insufficient to show that the witness established any lines. On the contrary, it would rather seem to show that he simply ran by the courses and distances of the deed, and when the plaintiff was dissatisfied with the survey did not establish the corners, but quit. The plaintiff continued to hold and claim to her original lines. There is authority that a parol agreement fixing a dividing line which has been carried into effect, and has been acted upon by the parties holding up to the agreed line, will be enforced especially after the lapse of many years; but there was no agreement on any line here, and the surveyor did not establish any line or corner within the meaning of the contract.

Judgment reversed and cause remanded for a judgment as herein indicated.

TANSEY v. STRINGER.

(Filed November 11, 1903—Not to be reported.)

Oil inspector—Term of office—The date of the appointment of the first inspector of oils under a legislative act making the term of office four years fixes the date from which each successive term begins to run, and the failure of the court to appoint until a later date than that so fixed does not operate to change the term so as to permit an appointee to hold over to a later date.

Byrne & Read for appellant.

D. A. Glenn and C. M. F. Striger for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

This case involves the right to the office of oil inspector for Kenton county, from July 24, 1902, to September 12, 1902. Appellant, who had held the office prior to July 24, claims that his term did not expire until September 12; appellee, who was appointed July 24, contends that appellant's term expired on the day before he (appellee) was appointed. The undisputed facts are as follows: Appellant was appointed oil inspector for a term of four years, on the 24th day of July, 1886; on the 22d day of August, 1890, he was again appointed; on the 7th day of September, 1894, he was appointed for the third time; on the 16th day of August, 1895, he was removed from office for cause, and appellee was appointed. On the 16th day of September, 1895, appellee was removed from office, and appellant was re-appointed thereto: this last order was to take effect as of September 7, 1898. On the 24th day of July, 1902, appellee was appointed to the office; whereupon appellant claiming, as before said, that his term did not expire until the 12th day of September, 1902, instituted this action to recover the office from appellee.

Upon trial of the case the petition was dismissed; from which judgment this appeal has been prosecuted.

The facts, as said before, are undisputed, and the sole question presented on the merits of the controversy is as to the time the four-year term of office commenced and ended. The precise question involved in this action arose in the case of *Hoke v. Richie*, 18 Ky. Law Rep., 546. In the opinion the court said: "Prior to 1888 the statute which fixed the duties and emoluments of the office provided for no term of office. The inspector appointed by the county judge was authorized 'to remain in office until removed by the court for misconduct, negligence or incompetency.' * * * The act of May 15, 1886 (section 2204, Kentucky Statutes,) provides that 'the inspector shall remain in office four years, unless removed by the court for misconduct.' In July, 1884, J. Fry Lawrence was appointed. In July, 1888, after the passage of the amendatory act, he was re-appointed. In July, 1892, he was again appointed. In none of the orders of appointment was any mention made of any term for which he was to hold the office. In November, 1893, he died, and the county judge of Jefferson county thereupon appointed the appellant for four years, and the question for decision is whether this appointment was to fill the unexpired term of J. Fry Lawrence, or whether it was a new term of four years."

After discussing the statute, the court said: "We have concluded, though with some hesitation, that the apparent purport of the peculiar language of the statute must yield to the general legislative purpose prevalent in this State. We are of opinion, therefore, that in July, 1892, J. Fry Lawrence was appointed for a term of four years, and that the appointment of appellant was for the unexpired part of that term."

In response to a petition for a rehearing the court said: "After carefully reconsidering the argument of counsel and the authorities cited, we have concluded that the intent of the statute was to designate consecutive periods of four years, following each other in regular order, the one beginning where the other ends. * * * By section 161 of our Constitution it is provided: 'The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment or during his term of office; nor shall the term of any such officer be extended beyond the period for which he may have been elected or appointed.' If the contention of appellant were to prevail, it would permit the appointing power to extend the terms of his appointees by causing them to resign on the last day of his own term of office and thereupon re-appointing them for new terms of four years. We can not believe that the legislature so intended."

It, therefore, follows, from the principle settled in the case above cited, that the first term of office of appellant, who was the first appointee under the amendment fixing the term at four years, commenced on the 24th day of July, 1886, and ended on the 23d day of July, 1890, four years thereafter; that, although the court, in re-appointing him from term to term, allowed the time to lap over by failing to make the appointment on the day the term expired, his holding over did not have the effect of creating a new beginning for the term of office, but had the effect of making the appointment one for the unexpired term. The time during which appellant was allowed to hold over, by the failure to re-appoint him on the day his term expired, was not

an extension of the old term, but a diminution of the new. His term, which is involved in this litigation, expired on the 28d day of July, 1902, and, consequently, the appointment of the appellee was proper.

Wherefore, the judgment dismissing the petition is affirmed.

STITES v. SHORT, SHERIFF.

(Filed November 11, 1902—Not to be reported.)

1. Tax sale—Pleading—The purchaser of real estate is not entitled to any relief against the sheriff on account of the sale of the property for taxes assessed against the vendor in the absence of an allegation in the petition that he had had his deed recorded, as it is to be presumed otherwise that the record showed that it was still the property of his vendor.

2. Taxes—Application of personalty—While the failure of the sheriff to subject the taxpayer's personalty to the payment of the taxes assessed against him before selling the real estate might afford a cause of action against him in favor of the taxpayer, one to whom he sold the real estate which the sheriff afterwards sold for taxes has not that right.

R. C. Hill for appellant.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barker.

Appellant instituted this action in the Daviess Circuit Court against appellee, W. I. Short, sheriff, and W. A. Bartlett, alleging in his petition substantially that on the 5th day of February, 1902, he purchased a certain tract of land in Daviess county, which is described by metes and bounds, and that thereafter he owned and possessed it; that on the 17th day of November, 1902, W. I. Short, as sheriff of Daviess county, sold the land as the property of Thomas S. Pettit, for a tax bill amounting to \$99.95, and that it was purchased by W. A. Bartlett for the amount of the tax claimed to be due; that afterwards appellee, as sheriff, conveyed the land to the purchaser by a deed, under which he is claiming to own it, and to be entitled to its possession; that at the time of the levy and sale in question Thomas S. Pettit had a sufficiency of personal property situated in Daviess county out of which the tax, for which the land was sold, could have been made; that by reason of the levy and sale appellant had been damaged in the sum of \$100, wherefore he prayed that the levy and sale be set aside and held for naught, and for a judgment for the sum of \$100. To this petition both of the defendants filed general demurrers; that of W. A. Bartlett was overruled by the court; that of appellee Short was sustained; whereupon appellant declining to plead further as to Short, his petition was dismissed, of which he now complains. There is no allegation in the petition that appellant ever had the deed, which he alleges was delivered to him on the 15th of February, 1902, for the land in question recorded; nor does his petition state from whom it was purchased; presumably, then, the record showed that it was owned by Thomas S. Pettit, and that it was properly assessed for the year 1902 in the name of Pettit, and the tax remaining unpaid, it was the duty of the sheriff to collect it. We are unable to see how appellant was damaged by the sheriff's selling the land as Thomas S. Pettit's, although the latter

might have owned personalty at the time which could have been distrained. This transaction might have afforded Pettit a cause of action against the sheriff, but not appellant.

The judgment is affirmed.

HIGGINS v. STOKES, &c.

(Filed November 11, 1903.)

Married woman--Limitation--Repeal--Section 2506 of the Kentucky Statutes, which gives to a married woman the right to bring an action for the recovery of her real property within three years after the removal of her disability, although the fifteen years period of limitation has expired, is not repealed by section 2128, which is a part of the married woman's act of 1894, and which authorizes a married woman to sue and be sued as a single woman.

Robertson & Thomas for appellant.

D. G. Park and W. W. Hester for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action at law was instituted on the 4th day of January, 1902, by the appellant, Martha Higgins, against the appellees, S. J. Matthews and Clint Stokes, to recover possession of the north half of lot No. 18, in the city of Mayfield, which she alleges was conveyed to her by the executors of her deceased father, John M. Gardner, in the division of his real estate among his heirs at law on the 14th day of April, 1863. She further alleges that at the date of this conveyance she was a married woman with several children; and that she and her husband immediately took possession of the property and lived upon it until December, 1876, when he, without her consent and against her will, conveyed the lot to T. J. Reynolds by a general warranty deed, in which she did not unite; and that shortly after the conveyance to Reynolds her husband moved her and her children from the property and surrendered the possession thereof to Reynolds; and that she continued to live with her husband as his wife until his death on the 16th of January, 1900; that the title to the property is still in her, and asked that she be adjudged the possession thereof. The defendants in the first paragraph of their answer deny that plaintiff is the owner of the lot sued for. In the second paragraph they plead and rely upon the thirty years' statute of limitation. In the third paragraph they allege that they, and those under whom they claim, have had and held the actual, adverse possession of the property described in the petition continually for more than fifteen years prior to the 15th day of March, 1894, and for more than three years thereafter; that plaintiff's cause of action accrued more than fifteen years prior to the 15th of March, 1894; and that her disability as a married woman was removed by the act of the 15th of March, 1894; and that, under section 2506 of the Kentucky Statutes, her right to recover the land in controversy has been lost. The plaintiff filed a general demurrer to the third paragraph of the defendants' answer, which was overruled. Thereupon she filed a reply, in which she denied that her cause of action accrued more than thirty years before

the filing of her suit. The defendants thereupon filed a general demurrer to the reply, which was sustained, and the plaintiff declining to amend, it was ordered that her petition be dismissed, and plaintiff has appealed. Section 2128, relied on to defeat recovery in this action, is as follows: "A married woman may take, acquire and hold property, real and personal, by gift, devise, or descent or by purchase; and she may in her own name, as if she were unmarried, sell and disposed of her personal property. She may make contracts, sue and be sued as a single woman, except that she may not make any executory contract to sell or convey or mortgage her real estate unless her husband join in such contract; but she shall have the power and right to rent out her real estate, and collect, receive and recover in her own name the rents thereof, and make contracts for the improvement thereof."

It is very earnestly insisted for appellees that as this statute clothes married women with the right to make contracts, sue and be sued as a single woman, that by necessary implication it repealed the statute of limitation exempting women from its operation in three years after the removal of such disability. To support this contention we are referred to pages 239 and 240 of 19 A. & E. Ency. of Law, 2d edition. The text referred to is as follows: "While there seems to be some conflict of opinion on the subject, the decided weight of authority is in favor of the view that the married woman's acts removing all the disabilities of married women and enabling them to sue and be sued, and to contract as if they were not repealed, by implication the clauses in the statutes of limitation exempting such women from its operation, and causes the statutes to run against them as if they were single."

Numerous decisions from various courts are cited to support the text, but the following significant note by the annotator follows the citation of these cases: "The foregoing cases all deal with the proposition that the mere fact that a married woman could have brought her suit during coverture does not deprive her of the benefit of the exception in her favor in the statute of limitation. And this is the correct rule. There are few, if any, jurisdictions in which a married woman is not able to sue during coverture by her next friend, yet this power has never been held to affect the general exception. If the text, however, relates to a general and complete removal of disabilities, not only as to suit by her in other respects, in such a case there is room for the application of the maxim *cessante ratione lege, cessat ipsa lex*."

The statute relied on in this case does not remove all the disabilities of married women in the disposal of their real property. On the contrary, it expressly provides that "she may not make an executory contract to sell, convey, or mortgage her real estate unless her husband join in such contract."

Section 25 6 of the Kentucky Statutes provides: "If at the time the right of any person to bring an action for the recovery of real property accrued such person was an infant, married woman or of unsound mind, then such person or persons claiming through them may, though the period of fifteen years has expired, bring an action within three years after such disability is removed."

As this suit was instituted by the appellee within three years after the time of the removal of the disability of coverture, it is apparent that the plea of limitation is not available to defeat recovery unless section 2128,

quoted *supra*, repeals, by implication, so much of section 2506 as applies to married women. In *Onions v. Covington and Cincinnati Elevated Railroad Transfer Bridge Co.*, 21 Ky. Law Rep., 820, it was contended for appellee that section 34 of the Civil Code, which provides "that in actions between the husband and wife, and in actions concerning her separate property, and in actions concerning her general property, and in actions for personal suffering or of injury to her personal character, in which he refused to unite, she may sue alone," authorized women to sue for damages to her real estate, and by necessary implication repealed section 2525 of the Kentucky Statutes.

In response to this contention this court said: "Although married women after 1876 might sue alone as to her general estate, she was by no means relieved of the disability of coverture; she was not only under the domination of her husband, but he owned absolutely her personal property; he might reduce to possession her choses in action, and had the right to use all of her real estate, with power to rent it out for not more than three years at a time and receive the rent. * * * It would be contrary to the entire spirit of our laws to allow limitation to run against her during her husband's lifetime; that the legislature did not intend to do so is apparent from the particular language of the exception, and the fact that it was brought over into both the Revised and General Statutes after the adoption of the Code, which empowered the wife to sue in her own name in certain actions."

It was held that the legislature did not have in mind the statute of limitation in the adoption of section 34 of the Civil Code; and that the statute did not run against the married woman until the death of her husband. The act of March 15, 1894, regulating the property rights of husband and wife, does not refer to the statute of limitation, and we can not presume an intention on their part to change the statutes of limitation in so far as married women are concerned, which had been a part of this State since 1846. We, therefore, conclude that section 2506 of the Kentucky Statutes is still in full force and effect in so far as married women are concerned, unaffected by the enactment of the act of March 15, 1894, regulating the property rights of the husband and wife.

For reasons indicated the judgment is reversed, with directions to sustain the demurrer to the third paragraph of defendant's answer, and for further proceedings not inconsistent with this opinion.

RHODES v. STONE, &c.

STONE v. COLUMBIA FINANCE AND TRUST CO., &c.

(Filed November 11, 1903—Not to be reported.)

Rescission of contract—A., being the owner of two houses and lots, mortgaged them to a building and loan association, and afterwards purchased a third lot, which was between and adjoined the other two, and erected a house partly on lot No. 3 and partly on one of the other lots, all three of the houses being thereafter insured for the benefit of the loan association; subsequently the assignee of the association foreclosed its mortgages and purchased at judicial sale all three of the houses and lots, and later sold them to B. for a valuable consideration; A., having instituted proceedings to recover lot No. 3, which was not included in the mortgage, the assignee of the association plead an estoppel by reason of the fact that all of the houses were insured for the benefit of the association, and that the assignee was allowed to take possession under its purchase without being notified of A.'s

claim. Held—That the proof does not warrant the application of an estoppel, and in view of the fact that each party labored under a mistake as to the actual facts of the case, there should be a rescission of the sale to B., and an accounting by him of the rents received, subject to credit for repairs, taxes, etc., and a return of his purchase money, with interest; as between A. and the assignee, the house in question being partly on the lot of each, there should be a sale and a division of the proceeds, with a due accounting of rents and disbursements for repairs, taxes, etc., between them.

Thos. E. Ward for appellant Rhodes.

John F. Lockett for appellant Stone.

R. H. Cunningham for appellee Trust Co.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hobson.

In January, 1895, Moses Rhodes and his wife, the appellant, Rosalie Rhodes, to secure a debt of \$1,300, executed to the United States Building and Loan Association a mortgage upon two lots on Alvasia street in Henderson, Ky., the property of the husband, and indicated on the plot by the letters S and T. In June, 1895, Rhodes bought the lot R on the plot, and after this built a house, two-sevenths of which is on lot S and the remainder on lot R. He conveyed all his property to his wife. There was a house on lot T and also on lot S before the erection of the one referred to on lots R and S. All three of these houses were insured in the name of Mrs. Rhodes for the benefit of the mortgagee, and the policies were delivered to it. The building and loan association became insolvent and made an assignment to the Columbia Finance and Trust Co. for the benefit of its creditors, which brought a suit to foreclose its mortgage. A judgment was obtained for the sale of the property mortgaged to pay the debt. The sale was had and the property was bought in by the trust company for less than the amount of its debt. The trust company then took possession of all three of the houses and collected the rents from the tenants. Mrs. Rhodes offered it something over \$1,200 for the property. It declined to accept this offer, and some months later sold the property to J. W. Stone for \$1,300. On August 8, 1900, Mrs. Rhodes began this suit against Stone and the trust company to recover lot R and the rents, the deed to the trust company having been made in October, 1899, and the deed from it to Stone having been made in April, 1900.

The situation of the three lots is shown on the following plot:

	Alley.	S	R.	Alley, 17½ ft.	T
		45 ft.	45 ft.		45 ft.

Alvasia street.

It is clear from the proof that Moses Rhodes did not own lot R at the time the mortgage was executed to the building and loan association. It is also clear that the mortgage only included lots T and S, the lot T being properly described and lot S being described in such a way that the representatives of the trust company understood it included the ground embraced by lots R and S. But this is admitted now to have been a mistake on their part, and it is conceded that the title to lot R was and is in Mrs. Rhodes. It is insisted, however, for the trust company that she is estopped to claim the house put on that lot for the reason that she insured it for the benefit of the mortgagee, and led it to understand it was included in the mortgage; also that she allowed it to take possession of the property after the foreclosure and to sell it to Stone without notice of her claim. While there is force in this position, we do not think the proof sufficient to warrant the application of an estoppel. Part of the house was on lot S., and the making of the insurance on all the houses for the benefit of the mortgagee simply increased its security. After the sale under the mortgage the trust company took possession as a matter of right, and Mrs. Rhodes did not mislead it in any way. On the contrary, she attempted to notify it of her present claim, although it would seem from the evidence that there was a misunderstanding between the parties as to what she claimed. It seems to be simply a case of mutual mistake, the trust company acting upon what it thought to be its rights, while Mrs. Rhodes denied its right and yet referred to its assertion of right, neither party understanding the facts accurately as they now appear or their legal rights under them.

When the difficulty came up the trust company offered to rescind the contract with Stone. This he declined to do, insisting upon his bargain and for an abatement of the price to the extent of the property lost. Under all the facts we conclude that there was a mutual mistake here innocently made, and that the contract between Stone and the trust company should be rescinded. The jurisdiction of the chancellor to grant a rescission in a case of mutual mistake is undoubted, and under the facts of this case we are clear that this is the most equitable solution of the difficulty. Stone must account for the rents collected from the property while in his hands, less proper disbursements on account of repairs, taxes, insurance and the like, as in other cases of rescission between vendor and vendee. He will be entitled to a return of his purchase money, with interest to the extent that it has been paid to the trust company on his purchase. He must also account for any rents not collected which might have been collected by ordinary care.

As between Mrs. Rhodes and the trust company, Mrs. Rhodes is the owner of lot R and so much of the house as stands on it, and the trust company is the owner of lot S and so much of the house as stands on it. As since the trust company took possession, it, or Stone claiming under it, has received all the rents of the property, it must account to Mrs. Rhodes for five-sevenths of these rents, and as in other cases between joint tenants, where one has collected the entire rent, will be entitled to credit out of the rent collected for necessary repairs, taxes, insurance and the like paid by it or by Stone; and it will be chargeable with any rents uncollected which might have been collected by ordinary care. The court can not fix a value on the property of either of the parties and require the other to take it at the valuation so fixed.

The house being indivisible, if the parties can not agree upon a basis of settlement, the court, upon the petition of either, can lay off a lot about the house in such manner as may be equitable and necessary for its proper enjoyment, and may decree a sale of the house and lot and divide the proceeds between them according to their interest in the property.

The judgment appealed from is reversed on both the appeals and on the cross appeal. Each of the parties will pay his own cost in this court, and the cost of making the transcript will be taxed one-third to each of them. In the circuit court Mrs. Rhodes will recover her costs of the trust company, and as between the trust company and Stone, each will pay his own costs.

KELLY v. GARDNER.

(Filed November 11, 1903—Not to be reported.)

1. Pleading—Construction against pleader—Under the rule that a pleading must be construed most strongly against the pleader, the allegation of a pleading of the committee of a person adjudged of unsound mind, setting out the statements of two physicians made for the purpose of dispensing with the presence of such person, must be presumed to contain all of their statements favorable to the pleader.

2. Persons of unsound mind—Absence from inquest—Physician's affidavit—Under section 2157 of the Kentucky Statutes, the affidavits of physicians made for the purpose of dispensing with the presence of one charged with being of unsound mind and incapable of managing her estate at the trial of that question, which failed to state that they had personally examined her, and that they verily believed her to be incompetent to manage her estate, and which merely stated that it would be unsafe to bring her before a jury for trial, were insufficient for the purpose, and a judgment finding her incompetent to manage her estate in her absence was void.

3. Same—Notice—Where an officer, instead of arresting a person charged with being incompetent to manage her estate, as directed by the summons issued by the court, delivered to her a copy of the summons, there was not sufficient notice of a trial as to her competency to sustain a judgment finding her incompetent.

J. P. Thompson, Ben Spaulding and S. A. Russell for appellant.

H. P. Cooper for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted in the court below by appellee, against appellant, for the purpose of recovering from him certain property held as her committee, and for a settlement of his accounts as such committee.

On the 15th day of April, 1901, an information was filed in the Marion Circuit Court by the county attorney against appellee, Susan Gardner, charging that she was a person of unsound mind, and not capable of managing her estate, and requesting that a jury be impanelled to try that issue.

Upon the filing of this information the following warrant was issued by the judge of the county court:

"To the Sheriff of Marion County:

"From information furnished by Ben Spaulding, county attorney, there

are reasonable grounds to believe that Miss Susan Gardner is a person of unsound mind, and not capable of managing her estate. You are, therefore, commanded to arrest said Gardner, and bring her before me, to be dealt with as by law required.

"This 15th day of April, 1901.

(Signed) "O. G. KELLY, P. J. M. C. C."

Upon which the following return was made:

"Executed the within warrant by delivering a true copy to Miss Susan Gardner this April 16, 1901.

(Signed) "J. M. COOPER, S. M. C.,

"By J. C. FISH, D. S. M. C."

Appellee was not present upon the trial of the case, her presence having been dispensed with upon the filing of the affidavit of two physicians that it would be unsafe to have her present in court. An attorney was appointed by the court to defend for her, and upon the trial she was found to be of feeble mind; whereupon a judgment was entered by the court in conformity to the verdict, and appellant was appointed her committee, executed bond, and took charge of her estate.

On the 23d day of May, 1901, upon the personal application of appellee, the judge of the county court entered this order: "The judgment entered in this case on the 15th day of April, 1901, is ordered set aside and held for naught, and a new trial is ordered to be held on the 23d day of May, 1901."

Afterwards, a trial was again had on the subject of appellee's competency of mind, which resulted in the jury's finding in her favor on this issue.

From this second judgment an appeal was taken to the Marion Circuit Court, which reversed the judgment of the county court ascertaining appellee to be of sound mind. Appellant, in his answer, pleads the first judgment in the county court, establishing the imbecility of mind of appellee, and that the fact that he had been duly and legally appointed her committee, and rightfully held possession of her estate. Appellee replied, setting up the second judgment of the county court, which vacated the first judgment, and which established her soundness of mind. Appellant then replied, pleading the judgment of the Marion Circuit Court, vacating the second judgment of the county court, and holding it to be void for want of jurisdiction. Appellee rejoined, claiming the judgment of the circuit court to be void for want of jurisdiction. The question involved is one of law growing out of official records about which there can be no dispute. The chancellor rendered a judgment in favor of appellee, from which appellant prosecutes this appeal.

The first question arising is whether or not the original judgment, finding appellee to be of unsound mind and the appointment of appellant as committee, is void; if it be, there is no necessity of examining any other question. Appellee was not personally before the court when the judgment establishing her infirmity of mind was rendered. Section 2157 of the Kentucky Statutes provides: "No inquest shall be held, unless the person charged to be of unsound mind, or an imbecile, or incompetent to manage his estate, is in court and personally in the presence of the jury. The personal presence of persons charged shall not be dispensed with unless it shall appear by the oath, or affidavit, of two regular, practicing physicians, that

they have personally examined the individual charged to be of unsound mind, or an imbecile, or incompetent to manage his estate, and they verily believe him to be an idiot, or lunatic, or incompetent to manage his estate, as the case may be, and that his condition is such that it would be unsafe to bring him into court."

In the amended answer of appellant, in which he sets out the judgment upon which he relies, it is stated on the subject of the absence of appellee when the judgment was rendered: "It being made to appear to the court from the statements under oath made by Doctors H. B. Paterson and L. D. Knott, two regular, practicing physicians, that it would be unsafe to bring and produce said Sue Gardner before the jury for trial, her personal presence before the jury, as by law provided, was dispensed with."

It is a familiar rule of pleading that they must be construed most strongly against the pleader, and as appellant undertakes to set out the statements of the two physicians, it must be presumed that he states all of their testimony which was favorable to him. It is not alleged that the two physicians had personally examined appellee, or that they verily believed her to be incompetent to manage her estate. The sum total of their statements is that, in their opinion, it would be unsafe to bring her into court; as to why it would be unsafe is not made to appear. It might have been that her health was in such condition as would endanger her life to be brought into court, and yet it would not follow that she was of unsound mind, or incompetent to manage her estate. The statements of the physicians may have been made, based upon evidence in which they had confidence, and still they may not have made any personal examination of appellee. So tender is the law of depriving one of his liberty, or his property, by a judgment rendered in his absence, that it is made absolutely necessary, before his presence can be dispensed with that there shall be the testimony of two regular, practicing physicians, who have personally examined him, and who, under oath, are willing to say that, in their opinion, he is of unsound mind. This statutory requirement is mandatory, and in the absence of the testimony in question the court had no jurisdiction to try appellee without her personal appearance before the jury at the time of the trial.

The officer into whose hands the warrant of arrest came did not execute it according to its tenor, but delivered a copy of it to appellee. This warrant did not purport to be a notice to appellee of the pendency of a proceeding against her in any court; it merely states that information had been furnished by the county attorney that there are reasonable grounds to believe that she is a person of unsound mind, and required the officer to arrest, and bring her before the judge; it in nowise fills the requirements of a summons; it does not purport to notify appellee of the time, or place, of the trial to be had. The fact that the officer did not arrest appellee, but instead left a copy of the warrant with her, was rather an intimation, than otherwise, that the proceedings against her had been abandoned. In the absence of any notice to appellee of the time and place of trial of the question of her mental capacity the judgment is void. In the case of *Stewart v. Taylor*, 23 Ky. Law Rep., 577, it is said: "The mere fact that one may be believed to be a lunatic will not waive the necessity of notice, because that is the very question to be tried. He is entitled to the presumption of sanity until he

has been adjudged otherwise on the inquest. To say that one is insane, and, therefore, need not be notified of the proceeding, is to decide the very question to be, and before it is, tried. Although the statute is silent upon the subject of notice, we can not believe that the legislature ever intended that one should be declared a lunatic and have his property and person put in charge of another without either being present in court, with an opportunity to defend the proceeding, or without having due notice thereof, and thus have an opportunity to appear and defend. Even if the legislature had so intended, a judgment rendered in the proceeding would not be valid unless the defendant in the writ had been notified by process of the court of its pendency, or was present at the trial with an opportunity to defend. To adjudge him to be of unsound mind without notice, or his personal presence at the trial, would be to deprive him of important and valuable rights without being heard. This seems to have been the opinion of this court in *McAfee v. Commonwealth*, 3 B. Mon., 805."

For the reasons indicated the judgment is affirmed.

YORK v. EAST JELICO COAL CO.

(Filed November 11, 1903—Not to be reported.)

1. Estoppel—Title—Where an execution-debtor executed a writing to a sheriff authorizing him to sell a certain tract of land in satisfaction of an execution in his hands in preference to personal property, excepting from such tract a certain number of acres which he had sold to a third party, and such writing was returned by the officer with the execution and made a part of the record, the debtor is estopped to claim any part of the tract embraced by the exception in the writing as against a purchaser who relied upon the record.

2. Land title—The effect of the writing was to except from the tract only such part as had previously been conveyed and the debtor had no right to any part of the tract on account of an alleged mistake made by him in writing in the writing to the sheriff the number of acres which had actually been conveyed.

B. B. Golden, J. Smith Hays and J. H. Tuggle for appellant.

Jas. D. Black and Pitzer D. Black for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Barker.

This action was instituted by appellant against appellee to recover a sum of \$7,000, the alleged value of four million bushels of coal mined, and wrongfully converted, by appellee from thirteen acres of land in Knox county, claimed to be owned by him.

The answer placed in issue the title of appellant to the land in question and set up title to it in the company by conveyance from the heirs at law of Jackson Campbell, who, it was alleged, died owning it; and pleaded certain matters of estoppel against appellant's claiming that Jackson Campbell did not own the land at his death. Upon trial of the case the circuit judge, after appellant's evidence was in, peremptorily instructed the jury to

find a verdict in favor of appellee, who was defendant below. Complaining of this, appellant is here on appeal.

In 1867 appellant obtained a patent from the State of Kentucky for a boundary of land containing 100 acres lying on the waters of Brush creek in Knox county, Ky. It was admitted that the land involved in this litigation was contained within the boundary of this patent. On the 20th day of August, 1878, Michael Girdner, having theretofore obtained in the Knox Circuit Court a judgment against appellant and John Hoskins for the sum of \$100, with interest at the rate of 6 per cent. per annum from the 15th day of August, 1876, until paid, and \$9.20 cost thereon, an execution was caused to be issued in the case, which came into the hands of the sheriff of Knox county, who was proceeding to levy the writ upon the personal property of appellant, whereupon he executed and delivered to the sheriff the following writing:

"John Lay, S. K. C., has in his hands an execution in favor of M. Girdner and against H. H. York and John Hoskins, issued from the Knox Circuit Court. I have this day given up and directed to be sold to satisfy said *fi. fa.* in preference to selling personal property a tract of land patented to me, lying on the waters of Black branch and Hoppers or Hoskins branch of Brush creek, containing 100 acres, more or less, except twenty acres sold to Jackson Campbell, and bounded on the south by Abijah Hoskins, on the east by Wm. Smith, on the north by James Owens, on the west by Jackson Campbell.

(Signed.) "H. H. YORK."

It was admitted that the land referred to in this writing was the same patented to appellant in 1867. The sheriff having had the tract of land surrendered to him for sale appraised, sold it at public outcry, on the 2nd day of September, 1878, and it was purchased by S. M. Perkins, for \$6.50. The land not having been redeemed by the execution debtor within the time allowed by law, the sheriff, on the 25th day of July, 1887, conveyed it to the purchaser, who took possession of it.

On the 25th day of May, 1895, appellee purchased the twenty acres deeded to Jackson Campbell from his heirs at law (he having died in the meantime), who conveyed it by quit-claim deed.

After surrendering the land covered by his patent to the sheriff, for sale, to satisfy the execution, appellant left the State of Kentucky, and was absent for twenty years, with the exception of one or two short visits. He paid no attention whatever to the land, never listing it for taxes, or in any way, so far as this record shows, exercising any dominion over it, until after it was purchased by appellee, who owned land adjoining it, and who built a railroad to it, and opened up a coal mine, thereby bringing it into market, and giving it a value.

Appellant, while admitting the recitation in the paper executed by him, surrendering the property to the sheriff for sale, that he had sold twenty acres of the patent to Jackson Campbell, contended in this action that he was mistaken on this point, and that he only sold Campbell eight acres, and the balance of the reservation belonged to him. The sheriff had returned the paper containing the recitation of the sale of the twenty acres to Jackson Campbell with the execution, and it was a part of the record.

Upon faith in the truth of the recitation, appellee purchased the land from the heirs of Jackson Campbell, and made improvements upon it worth many times its original value.

Appellant is clearly estopped from setting up, as against appellee, any claim to the twenty acres of land recited to have been conveyed to Jackson Campbell, as appellee had a right to rely on the truth of the record he had made, and had relied on it. Even if it were true that appellant was mistaken as to his having deeded Jackson Campbell twenty acres, while in fact he only conveyed him eight acres, it would not avail him in this action, without regard to the question of estoppel. The paper, which he delivered to the sheriff surrenders up for sale under the execution all of the patent except what he had conveyed to Jackson Campbell; the sheriff so sold it, and Perkins so purchased it. It resulted, therefore, that Perkins obtained by his purchase all of the patent except that owned by Campbell; afterwards Perkins and Campbell agreed on a line dividing the property between themselves, and it follows, if Campbell got more land than he was entitled to in the division, he got what belonged to Perkins, and not what belonged to appellant. Perkins and appellee, between them, owned the whole patent, and this excludes appellant from any ownership therein.

Appellant was bound to show title in himself in order to recover; his own evidence showed that all of the land contained in the patent, his only muniment of title, had been conveyed to Perkins and Campbell by the sheriff's sale and his own deed, and, therefore, the trial judge correctly instructed the jury to find for appellee.

The judgment is affirmed.

BLANTON, &c. v. HOWARD.

(Filed November 11, 1903—Not to be reported.)

1. Practice—Reference to commissioner—After an action for the settlement of a partnership pending on the ordinary docket has been referred to a commissioner to hear proof without objection of either party and exceptions to the commissioner's report are filed and heard by the court, it is too late to raise the question that the case should not have been referred to a commissioner. -

2. Same—Where the commissioner heard proof and reported the testimony to the court and the court heard exceptions to the report, it is to be presumed that the court considered the testimony on the hearing, and the objection that there was an erroneous delegation to the commissioner of the trial of the issues can not be sustained.

W. F. Hall and J. S. Forrester for appellants.

H. C. Clay for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted by the appellants against the appellee to recover the balance of a deposit which they had made with him. In his answer he claimed that he was not indebted to them because of claims which he had against them for services rendered as attorney, for commission in selling a

tract of land and for an amount which was due him growing out of a partnership transaction. Without objection the court made an order which reads as follows: "This cause coming on for trial, and it appearing to the court that the issues raised by the pleadings involve a settlement of accounts and partnership dealings between the parties, this cause is referred to the master commissioner of this court for an accounting and settlement of the issues of fact herein, and to report to this court his findings of fact on said issue. The master commissioner will hear all proof offered by the parties hereto, or either of them, and reduce same to writing and file same with his report."

Pursuant to that order the commissioner heard all the testimony offered by either party, reduced it to writing and returned it with his report to the court. The case was pending on the ordinary side of the docket, and we fail to find any order transferring the case to equity.

It is insisted for a reversal, first, that the issues of fact should have been tried by a jury; second, that the court delegated to the commissioner the trial of the issues, which, if the case was properly referred to the commissioner, should have been tried by the court.

From our view of the case it was not necessary to discuss the question as to whether the appellants had the right to have the issues of fact tried by a jury. The case was referred to the commissioner without objection by the appellants; they appeared before the commissioner, introduced their testimony, and when the commissioner made his report they appeared and filed exceptions to the report, which were tried by the court. This was all done without any objection upon their part. In our opinion it is too late now to make the question that the case should not have been referred to the commissioner, and as to the proceedings had in the case.

Of course it is not the province of the commissioner to dictate the ultimate decision of the court. It was his business to report facts for the inspection and approval of the court. And while the phraseology of the order appears to have given the commissioner a little more authority than is common to be conferred on him, still he did proceed in the usual way, and did hear and report all the testimony offered by the parties to the litigation. He reported his conclusion as to the facts. Both parties excepted to the report, and as the testimony was reported we must conclude that the court considered it on the trial of the exceptions.

The judgment is affirmed.

ALLEN, &c. v. FARLEY.

(Filed November 11, 1903—Not to be reported.)

1. Execution sale—The fact that the sheriff failed to subject the personal property of the execution debtor before proceeding to sell his real estate does not invalidate the sale, the debtor having recourse against the officer for any damage sustained thereby.

2. Same—Appeal—Practice—While two lots of ground on which an execution was levied should have been sold separately on account of the fact that a lien existed against one of them and none against the other, the Court of Appeals will not disturb the sale of them together where the question was first raised on appeal.

Greer & Marble for appellants.

W. F. Bradshaw and E. H. Puryear for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Paynter.

Omitting many details and unnecessary facts to be recited in this opinion, it appears that there was a lien on lot No. 6, in Mechanicsburg (which is in the corporate limits of Paducah) for the balance of a sale bond. The appellant, T. W. Allen, had the legal title to this lot as well as to lot No. 7, in the same place. There was no lien on lot No. 7. An execution was issued against T. W. Allen and H. S. Allen in favor of one Robertson, which was levied on the lots. At the sale the appellee, Farley, became the purchaser of the lots. He paid off the lien debt against lot No. 6. He instituted this action and by the petition, as amended, claimed that he acquired title to lot No. 7, and a lien upon lot No. 6, it being encumbered by a lien at the time of the levy and sale under the execution.

The grounds for reversal urged in this court to which we deem it necessary to make reference are, first, that the defendants in the action had personal property subject to execution sufficient to pay the debt for which the lots were sold; second, that the sheriff sold the lots together, not separately as he should have done.

The record does not very satisfactorily show that the defendants in the action had personal property out of which the execution could have been made. Assuming, however, that they did have personal property to satisfy the execution at the time the lots were levied upon and sold, that fact would not invalidate the sale. If the debtor sustained any damage because the sheriff levied upon the lots and sold them instead of personal property the sheriff is responsible. (Hayden, &c. v. Dunlap, 3 Bibb, 216; Farris, &c. v. Benton, 6 J. J. M., 255; Holcomb v. Hays, 23 Ky. Law Rep., 352.)

For the first time the question is made in this court that the sale under the execution should have been disregarded, because the sheriff sold the lots together. No proceeding was instituted to quash the return on the execution, or to set aside the sale under it. While, in our opinion, the lots should have been sold separately, because the sale of lot No. 7 could be absolute and title acquired thereto by virtue of it, yet only a lien was created on lot No. 6 because it was encumbered by a lien. Unless it was so sold, it was difficult to decide what part of the execution was satisfied by sale of lot No. 7, and for what part of it a lien existed on lot No. 6. The reasons were particular and strong why the lots should have been sold separately under the execution, but as the question was not raised until it reached this court, we do not feel that we should adjudge the sale of the lots was invalid because they were not sold separately.

The judgment is affirmed.

BATES MACHINE CO. v. NORTON IRON WORKS.

(Filed May 20, 1902.)

1. Foreign corporation—Attachment against property of—An attachment may issue against a foreign corporation or a nonresident defendant for any reason that would justify one against a resident defendant, in an action for

the recovery of money regardless of the basis of the claim and independently of the citizenship of the defendant; but where the ground of the attachment against such nonresident is based solely on the nonresidency, the action must be on a contract, judgment or award.

2. Same—Removal of property—Where the property of a foreign corporation located in this State consists of a debt due to it by a resident debtor, such a credit has a situs in this State and an attachment may be issued against it based upon the affidavit of a creditor that the corporation is about to remove it from the State, under subsection 6 of section 194 of the Civil Code.

3. Breach of contract—Inability to fulfill—The inability of one who contracted to supply a machine for the manufacture of wire nails to comply with his contract on account of the incapability of the machine to do the work for which it was designed was not a good defense to a suit for damages for the breach of the contract, where that inability did not amount to an impossibility, there being machines that would manufacture that kind of nails.

4. Measure of damages—The measure of damages for the failure to furnish to a manufacturer a machine for the making of wire nails is the reasonable profits which the manufacturer would have made out of the wire-nail business had the machine been furnished.

Wm. Cromwell for appellant.

Hager & Stewart for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge White.

This is an action for damages arising from a breach of contract by appellant, Bates Machine Co., to furnish to appellee, Norton Iron Works, machines to manufacture wire nails. Appellant is a foreign corporation, and when the action was filed an attachment was sued out, and the Ashland Steel Co. was summoned as garnishee. That company answered, admitting an indebtedness of \$2,500, which was ordered to be paid into court. The appellant filed its answer, admitting the contract, and failure to deliver the machines contracted for, but pleads that such nonperformance was because of impossibility, that is, that the machines contracted for were to be used in the manufacture of wire nails, and that, after the contract was entered into, appellant discovered that the machine would not make nails with such speed as to be profitable, and that for that reason appellant declined to make the machines, not being able to remedy the defect. This is practically the only defense offered. Appellant moved to discharge the attachment on the ground that there could be no attachment on a claim of unliquidated damages. This motion was overruled, and a trial was had resulting in a verdict and judgment for \$2,000. After reasons and motion for new trial had been overruled this appeal is prosecuted.

Counsel urges as a reason for reversal the action of the court in refusing to instruct the jury to find for defendant if they should believe that the machine was so defective, either in plan or construction, that it was impossible for defendant, by the exercise of all the mechanical skill it possessed, or could obtain, to remedy so as to manufacture wire nails in such quantities and with such speed and of such quality as would sell readily on the market. As a further ground of reversal complaint is made of the

criterion of damage by which the jury were authorized to fix its verdict. The instruction reads: "If the jury believe from the evidence, on and prior to the 20th day of May, 1896, the plaintiff was engaged in the business of manufacturing and selling nails, had a plant with needful power and appliances to operate wire nail machines in its said business, and a demand in its business for wire nails, such as the plaintiff in the use of wire-nail machines could manufacture and sell, and that the defendant knew these facts; and shall further believe from the evidence that the plaintiff, on being advised that defendant could not, or would not, make or deliver the said wire-nail machines, and the plaintiff, by the use of diligence, was unable to purchase machines of like character and description in the market with which to manufacture wire nails, and the defendant knew at the time of the purchase by the plaintiff that it purchased the machines with the view to their use in the manufacture of wire nails, and for sale of such nails at a profit, and such was in the contemplation of the parties at the time; and shall further believe from the evidence that from the use of the said machines the plaintiff could and would have realized a profit in the manufacture and sale of wire nails made by said machines, then such profit, if any, in an amount not exceeding \$2,000, is the damage, if any, they shall find for the plaintiff under instruction No. 1." Further complaint is made of the refusal to discharge the attachment on the face of the pleadings. The grounds of attachment set out in the affidavit therefor are: Nonresidency, and that "defendant Bates Machine Co. is about to remove its property, to wit, money and credits due it in this State, out of this State, not leaving enough therein to satisfy plaintiff's claim in suit herein." Section 194 of the Civil Code of Practice provides: "The plaintiff may * * * have an attachment against the property of the defendant, including garnishees as provided in section 227. * * * In an action for the recovery of money against (1) a defendant, who is a foreign corporation or nonresident of the State; or * * * (6) is about to remove, or has removed, his property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim, or the claims of said defendant's creditors; or * * * (8) * * *. But an attachment shall not be granted on the ground that the defendant is a foreign corporation or a nonresident of the State for any claim other than a debt or demand arising upon a contract, express or implied, or a judgment or award." There are two grounds set up for the attachment, the one of nonresidency, and the other under subsection 6. The affidavit states all facts requisite to obtain an attachment unless it is prohibited by the clause quoted in subsection 8.

By a careful study of section 194 we conclude that an attachment may issue against a foreign corporation or a nonresident defendant for any reason that would justify an attachment against a resident defendant. That is, an attachment may be had against a foreign corporation or a nonresident defendant if he is about to remove, or has removed, his property out of the State, not leaving enough to satisfy plaintiff's claim, as provided in subsection 6; or if he has sold, conveyed, or otherwise disposed of his property, with fraudulent intent to cheat, hinder or delay his creditors, as provided by subsection 7; or is about to so sell, convey or dispose of his property, as provided by subsection 8. In these cases an attachment may issue in an

action for the recovery of money, regardless of whether it be claimed, for one reason or another, and also independent of the fact of citizenship of the defendant. But as against a foreign corporation or a nonresident the fact of nonresidency alone authorizes an attachment, if the action be on a contract, or on a judgment or award. If the action against a nonresident or foreign corporation be not upon a contract, judgment or award, there must be some ground stated that would justify an attachment against a resident defendant, or else it will not issue. In this case there is a ground stated that would justify an attachment against a resident defendant, if it be that money and credits due a foreign corporation by a debtor resident in this State has a situs here that can be removed out of this State. The property that is stated to be in this State, and which the defendant is about to remove, is money and credits due it in this State. In the case of *Railroad Co. v. Sturn*, 174 U. S., 10, 19 Sup. Ct., 797, 43 L. Ed., 1144, the Supreme Court held, after a careful review of the authorities, that a debt is property at the residence of the debtor, and was subject to attachment there. The court said: "The primary proposition (of counsel) is that the situs of a debt is at the domicile of a creditor, or, to state it negatively, it is not at the domicile of the debtor. The proposition is supported by some cases; it is opposed by others. Its error proceeds, as we conceive, from confounding debt and credit, rights and remedies. The right of a creditor and the obligation of a debtor are correlative, but different things, and the law, in adopting its remedies for or against either must regard that difference. Of this there are many illustrations, and a proper and accurate attention to it avoids misunderstanding. This court said, by Justice Gray, in *Wyman v. Halstead*, 109 U. S., 654, 656, 3 Supt. Ct., 417, 418, 27 L. Ed., 1068: 'The general rule of law is well settled that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor.' And this is not because of defective title in the creditor or in his administrator, but because the policy of the state of the debtor requires it to protect home creditors. (*Wilkins v. Ellett*, 9 Wall., 740, 19 L. Ed., 586; *Id.*, 108 U. S., 256, 2 Sup. Ct., 641, 27 L. Ed., 718.) Debts can not be assets at the domicile of the debtor if their locality is fixed at the domicile of the creditor, and if the policy of the state of the debtor can protect home creditors through administration proceedings, the same policy can protect home creditors through attachment proceedings." This case was approved and applied in the cases of *King v. Cross*, 175 U. S., 896, 20 Sup. Ct., 181, 44 L. Ed., 811, and in the very recent case of *Rothschild v. Knight* (decided March 8, 1902), 22 Sup. Ct., 391, 46 L. Ed., ——. A full discussion of the question is found in section 125, *Minor, Conf. Laws*. We conclude, therefore, that the grounds stated in the affidavit for attachment are sufficient to warrant its issue, that is, that the defendant was about to remove its property which was then in this State without the State, not leaving sufficient to satisfy plaintiff's claim. There was, therefore, no error in refusing to discharge the attachment.

The instructions asked by appellant, and which the court refused, and of which action complaint is made, in effect told the jury that appellant would not be liable for a breach of contract it was unable to fulfill. These instructions did not say that there was no liability if the contract was impossible of performance. This was not the contention of appellant. It is well known

that machines are made that will manufacture wire nails. This is not denied. But appellant says: "My machine will not make nails, or is not a practical machine for making wire nails, and I can not remedy the defect; therefore, I will disregard my contract to furnish wire-nail machines." The answer to this by the law is that you must pay the damages resulting from your breach of contract. If the contract was impossible of performance by any person the case might be different. Inability to perform is never a defense to an action for a breach of contract unless that inability amounts to an impossibility. There was no error in refusing the instructions offered.

The remaining question is the measure of damages. This state of facts is presented: Appellee was in business, and, among other things, engaged in making cut nails, which were sold on the market, and to jobbers and wholesale dealers. The customers of appellee were asking about wire nails, and were offering to buy wire nails. Appellee could not furnish such nails, because it did not have the machines to make wire nails. Under these circumstances the contract was made with appellant to furnish machines to make wire nails. After the contract was made and appellee had purchased wire and prepared to make wire nails, appellant refused to furnish the machines, and appellee's customers purchased wire nails of other dealers. There is no claim for damage for loss in materials bought by appellee, but the claim is for profits necessarily lost by a failure to have the wire-nail machines to make the wire nails. It is shown that when appellant refused to comply with its contract the appellee was then unable to purchase wire-nail machines from any other person, caused, possibly, by a combination of the nail makers. It is thus evident that appellee's position is not so advantageous in its business relation as it would have been if the wire-nail machines had been furnished according to contract. Appellee has been injured because of appellant's failure to comply with the contract. What is the criterion of recovery? Appellee insists that it is the reasonable profits it would have made out of the wire-nail business. This theory the trial court held to be the law. Appellant insists that this measure of recovery is too uncertain and indefinite. In the case of *Cordage Co. v. Luthy*, 98 Ky. 586, this court approved an instruction which authorized the jury to fix the damages by the profits that Luthy & Co. would have made in the resale of twine. The instruction told the jury that if by the use of reasonable diligence appellees (Luthy) were unable to purchase twine of the same character and description in the market, and if the defendants (Cordage Co.) knew at the time of purchase by plaintiffs that they purchased same with a view to a resale, and that the profits anticipated thereon were, in the contemplation of both parties, the motive which induced plaintiffs to make the purchase, then the measure of damages is the difference between the contract price of the twine, plus the freight thereon, and the price at which it could have been sold for by plaintiffs at their place of business. In short, the recovery was authorized for the profits that could have been made on a resale. This same rule was laid down in *New Market Co. v. Embry*, 20 Ky. Law Rep., 1130 where the contract broken was a failure to furnish slop to feed cattle. The measure of damage was the profits that would have been made in fattening the cattle. In the case of *Telephone Co. v. Wisdom*, 23 Ky. Law Rep., 97, the court said, where there was a breach of contract to furnish telephone service

as agreed: "As a matter of law there is, I think, no doubt that the plaintiff may recover prospective profits for the whole contract period. In other words, he is entitled to the full benefit of his contract. But the difficulty is, and ever must be in cases of this kind, to reach this value with reasonable approximate certainty. This damage, in the very nature of the case, must be more or less speculative and uncertain, and this must be known to the parties to such contracts. And, while such damages are recoverable, any verdict or judgment for such damage must be based on existing facts." Other cases might be cited, but these recent cases are sufficient to show that where profits from a resale, or from the use of an article contracted for, are in contemplation of the parties, and induce the contract to be made, such profits are to be considered as the measure of damage for a breach of that contract. In the case at bar it is clearly shown that appellee wanted the machines to manufacture wire nails to sell to the trade, and that when appellant failed or refused to supply the machines the appellee was unable to buy such machines elsewhere. It is also shown that if appellee had obtained the nail machines it would have sold nails to its customers in such quantities as to realize the amount of profit allowed by the jury here. In our opinion the criterion of recovery as given by the court in the instruction quoted above was proper.

Finding no error the judgment is affirmed, with damages.

CONRAD TANNING CO. v. MUNSEY.

(Filed November 11, 1903—Not to be reported.)

1. Variance—Where the proof showed that the injuries complained of were occasioned by the defective passageway which led from a railroad car to the covered place where the defendant's tan bark was stacked, the mere fact that the plaintiff called the covered space a yard instead of a shed was not material.

2. Master and servant—Defective appliances—It was the duty of the master to furnish a reasonably safe passageway over which the servant should wheel tan bark from a car to the bark shed, and the question of whether that duty had been performed and as to the opportunity of the servant to ascertain its defective condition, if so, was one for the consideration of the jury.

William Krieger for appellant.

Chatterson & Blitz for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Paynter.

The plaintiff stated his cause of action as follows: "That on or about the 6th day of July, 1901, he was in the employ of the defendant company engaged in the work of wheeling tan bark in a wheelbarrow from loaded cars to the yard of the company; that the defendant company provided a passageway from the said cars to the said yard, which was wholly unsafe and insecure, as was known to the defendant company, its agents and officers superior in authority to the plaintiff, and which was unknown to the plain-

tiff; that while he was engaged in passing over the same the planks so provided by the defendant gave way, and this plaintiff was precipitated to the ground, falling upon his wheelbarrow and bruising and injuring his body, limbs and person, from which injuries he has suffered great mental and bodily pain and anguish and loss of time, and been compelled to lie in bed for four months, and is still in bed."

It will be observed that the plaintiff averred that he was injured by reason of an unsafe and insecure "passageway from the said cars to the said yard." The proof tended to show that the defendant had a switch in its tan bark yard shed; that the passageway was constructed of boards from the car to the back part of the shed; that there was an opening below the passageway about eight feet deep; that one of the boards broke while the plaintiff was crossing it with a wheelbarrow load of tan bark, throwing the wheelbarrow and himself to the bottom of the open space. He fell on the wheelbarrow and sustained the injuries complained of.

It is insisted that the plaintiff did not prove his cause of action as alleged, because the passageway did not lead from the car into the defendant's yard. If there had been no covering over the place where the bark was being stacked, that space would properly be designated as a yard. The injury was not averred to be from a defective condition of the yard, but of the passageway. The mere fact that the pleader called the space covered by a roof a yard was not material, for he testified he was injured by the defective condition of the passageway which led to the place where the tan bark was stacked.

It is insisted that a peremptory instruction should have been given for the defendant. The law is well settled that where a servant is injured by a defective appliance, if the master had knowledge of such defect or ought to have had, and that the servant did not know of it and did not have equal means of knowing with the master, damages may be recovered against the master for such injury. In this case the plaintiff testified that the foreman had placed the planks for his use; that over the hole where he fell a thin plank was placed on a thick one as part of the passageway; that the lower plank was rotten and gave way and threw him in the hole; that he did not know of its defective condition. It was the duty of the master to furnish a passageway in a reasonably safe condition. If the passageway was constructed when the plaintiff began to wheel tan bark over it, he did not have the same means of knowing the defect in it as did the master. However, this was a question for the jury, and it decided for appellee. We are of the opinion that a peremptory instruction should not have been given.

In the grounds for a new trial no error is complained of as to instructions, except as to the failure of the court to give a peremptory one, therefore, there is no question here for review as to the correctness of the instructions, except as to the peremptory instruction. We will, however, add that we think the court properly instructed the jury. If the testimony had been weighed from the number of witnesses, it preponderated in favor of the defendant. However, the jury was the judge of the weight and credibility of the testimony, and we are unwilling to hold that the verdict is so against the weight of the evidence that a new trial should be given.

The judgment is affirmed.

CITY OF COVINGTON v. HERZOG.

(Filed November 12, 1903.)

1. License tax—Constitutionality—An ordinance of a city of the second class passed pursuant to section 3058 of the Kentucky Statutes, which is a part of the charter of cities of that class, providing for the payment of a license tax on the business of real estate agent, is not in violation of the Constitution.

2. Same—Sufficiency of pleading—The mere averment in a petition to prevent the prosecution of the plaintiff for failure to pay the license imposed; that the amount of the tax as fixed was oppressive, unequal, unjust and disproportionate to those borne by tradesmen and professional men within the city, was not a sufficient averment of facts to sustain a cause of action.

3. Same—The fact that the ordinance in question grouped the several occupations of real estate agents and brokers, financial agents and brokers, house rental agents, and lien and brokerage companies into the single class of real estate agents and levied a single tax thereon, does not afford a ground for complaint by one engaged in either or all of them.

F. J. Hanlon for appellant.

Myers & Howard for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, the city of Covington, appeals from a judgment of the Kenton Circuit Court, overruling their general demurrer to the petition of appellee, and the entry of a judgment prohibiting the city from prosecuting appellee for conducting a real estate business without license as required by ordinance. The petition of appellee alleges "that he has for many years been employed as the agent of other persons in buying, selling and renting real estate, and in buying and selling mortgage and other real estate lien notes;" that the city of Covington, on the 25th of April, 1901, passed an ordinance relating to the licensing of various lines of business; that section 4 of the ordinance provides: "Real estate—each and every person or firm engaged in the capacity of or following the business of real estate agents shall pay a license annually of \$25. By real estate agent, for the purpose of this section, is meant each and every person or firm who buys or sells real estate, either at auction or private sale, for a commission; or who loans money on real estate, rents houses and collects rents therefrom, or sells mortgage or lien notes for commission, shall be considered as engaged in the real estate business, and as such must pay the license as herein prescribed."

That this ordinance and section 3058 of the Kentucky Statutes, which is a provision of charters of cities of the second class, were both unconstitutional and void in so far as they authorize the levy of a license tax on real estate agents, because they subdivide the business into six distinct occupations, namely: "Real estate agents and brokers," "financial agents and brokers," "house rental agents," "lien and brokerage companies;" that under the statute and ordinance the city had the right to levy a license tax on persons pursuing any one of these various occupations, which were in reality the same business; and that the license tax of \$25 was oppressive, unequal, unjust, and disproportionate to those borne by tradesmen and professional men

nerally within the city of Covington, and disproportionate and unequal the license or occupation taxes levied generally by the ordinance. Section 1 of the Constitution provides that "all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by the Constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, license, or franchises."

Section 181 of the Constitution provides that "the general assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, or franchises, trades, occupations and professions."

In pursuance to these provisions of the Constitution the general assembly in the charter of cities of the second class provides that the general council of such city shall have power by ordinance to tax and regulate every known kind of occupation and pursuit, including auctioneers, real estate agents and brokers, financial agents and brokers, rental agents, etc., and the ordinance in this case conforms substantially to the provisions of section 3058 of the statute. While appellee alleges that the license tax of \$25 is unequal, unjust and disproportionate to that levied upon other similar occupations, no facts are recited to support the averment, and the allegation as it stands is nothing more than a conclusion of law.

While there is a general similarity in each of the various occupations grouped in the ordinance under the head of dealers in real estate, and the same person might well engage in all of them at the same time, yet they are by no means identical, and either of them might furnish sufficient employment to occupy the entire time of a person, firm or corporation. We see no ground for complaint on the part of appellee because the ordinance has grouped all of these separate occupations under a single head and levied a single tax, as though they only constitute one occupation. If the city had seen fit to separate each of these occupations into separate heads, and required the payment of a license tax for the prosecution of each one of them, appellant would have had better grounds for complaint.

We have had similar contentions before us as to the constitutionality of this provision of appellant's charter, which also appears in the charters of cities of the first, third and fourth classes, in the cases of *Commonwealth v. Laundry Companies*, 105 Ky. 257; *City of Covington v. Woods*, 98 Ky. 344, and *Crossdale v. City of Cynthiana*, 21 Ky. Law Rep., 32. In all of these cases the constitutionality of the statute and the ordinances pursuant thereto were upheld. The mere averment of the petition that the tax is oppressive and unequal is not sufficient averment of facts to support a cause of action.

For reasons indicated the judgment is reversed and cause remanded, with instructions to sustain the demurrer filed by the city and for other proceedings consistent herewith.

COMMONWEALTH, BY, &c. v. YOUNG MEN'S CHRISTIAN ASSOCIATION.

CITY OF LOUISVILLE v. SAME.

(Filed November 12, 1903.)

Exemption from taxation—The property, not exceeding one-half acre, belonging to a Young Men's Christian Association and used by it in the conduct of its work, and also that rented out for the purpose of raising revenue for aid in the maintenance of the institution, as well as that taken in payment of donations to the institution and held pending a sale, is exempt from taxation under the provisions of section 170 of the Constitution, both on the ground that it is a place actually used for religious worship and that the institution is one of purely public charity.

Jas. B. Clark and H. L. Stone for appellants.

Hayes & Wells, Helm, Bruce & Helm and Strother & Gordon for appellees.

Appeals from Daviess Circuit Court and Jefferson Circuit Court, Chancery Branch, Second Division, respectively.

Opinion of the court by Judge O'Rear.

These two appeals involve a common question, namely, the liability of the property of appellees to taxation. In each case the appellee owns a large and valuable building, used in part for other purposes than directly by the association. Rooms in the buildings are rented to raise revenue to help to maintain the institutions. A considerable part of the buildings are constantly used by the associations for their meetings and other work. In each case also the appellee owns a vacant lot, and other property, pending its sale. The lots were taken in payment of donations to the institutions. Appellees' claim of nonliability to taxation depends upon the character of the institutions.

All property must share in bearing the burden of government, except such as by the Constitution is expressly exempt. Section 170 of that instrument is as follows: "There shall be exempt from taxation public property used for public purposes, places actually used for religious worship with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto."

Appellees claim to come within the classes of exempted objects above named on three grounds: First, that their buildings are places actually used for religious worship, and do not exceed one-half acre of ground; second, that they are institutions of purely public charity; and, third, that they are institutions of education not used or employed for gain by any person or

poration, and the income of which is devoted solely to the cause of education. The circuit courts of Davless and Jefferson counties each sustained the claims of exemption.

The act of legislature granting the charter to appellee, the Louisville association, approved April 3, 1878 (2 Acts, 1878, page 280), states the purposes of the association thus: "Whereas, certain persons have associated themselves together as a Young Men's Christian Association, for the promotion of religion, morality, and intellectual and social improvement, and for the better promotion of these ends desire a charter of incorporation, therefore, be it enacted, etc."

The Constitution adopted by the association, in which is set forth its purposes, declares:

"Section 1. It shall be the object of the association to seek out young men and endeavor to bring them under moral and religious influences; to secure their attendance at some place of worship; to introduce them to the members and privileges of this association; to aid them in selecting suitable boarding places and employment, and by every possible means to surround them with Christian influences.

"Section 2. Members shall exert themselves to interest the churches to which they may belong in the object and welfare of the association, and use all proper means to increase its usefulness."

The objects and purposes of the Owensboro Association are substantially the same.

So much for the apparent nature of the association. Actually, on every Sunday afternoon there is held in their buildings a religious service for the worship of God. As a witness describes these, they are "much like preaching service, though not so formal;" there is singing of hymns, reading of Scriptures and expounding of the same, prayer, and generally an invitation and exhortation to men to begin the Christian life. In addition to these religious Sunday services, which may be said to correspond with the preaching services of the churches, there are regularly taught Bible classes in the association buildings, which classes correspond very nearly to the Sunday-school work done by the churches. Other religious studies are also conducted. All of these services are strictly religious services, and are actually held in the association buildings. In addition to these, other work of a religious nature is done by the association outside of the building. Its religious work is its main work. Its secretary receives a salary. He is the only one of the association who receives any money compensation from it. His duties are quite similar to those of a pastor of a church.

There was nothing, perhaps, in all that moved the settlement of this country and the establishment of its forms of government more dominant than the religious idea. From the earliest settlement, through every form of social compact, and by universal consent, engrafted now either upon the Constitutions of the States, or upon their statutes, is the idea that the public well-being justifies the most liberal encouragement of religious teachings and practices; and to that end, always, buildings used for religious worship have been exempted from taxation. Religious societies are deemed to be public benefactors. Their teachings and moral discipline among their members are probably of as much value to society in keeping the peace, and pre-

serving the rights of property, as the most elaborate and expensive police system without such influence. Hence they are regarded with favor.

No one church, or sect, is regarded by the law above any other. Nor does the manner of worship, or the method of teaching, or the creed, affect this public policy. It is, therefore, not material that the institution claiming the benefit of the constitutional exemption is without an ordained preacher; or that its methods involve a departure from the customary modes of worship. If the worship is religious, commending itself to the consciences of its votaries, it is within the pale of the law's favor. We have no hesitancy in declaring that appellees, in the use of their buildings as places actually used for religious worship, are exempted from taxation thereon as being clearly within the letter and intent of section 170 of our Constitution.

But if the society owns other property, not actually used as a place for religious worship, or if it owns property so used, but in excess of the quantity exempted by that clause of the Constitution which has been quoted, or if some part of its buildings is used distinctly for other purposes, such excess would be liable to taxation as other property, without regard to its ownership, unless by some other provision of the Constitution it was exempt. Which brings us to consider appellee's claim that they are institutions of purely public charity.

Charity, in its broad sense, should abound in every institution, tempering even the rigor of the law, and meliorating the harsh conditions of life. It is announced by Divine authority, and regarded by the common consent of all enlightened people as being the chief of human virtues. When property is employed in its unselfish exercise on behalf of the public, where it eases the burden of society, and in a measure thereby discharges a duty which the public on its conscience owes to unfortunate humanity, and is unrestricted save by the limitation of ability, the charity may be said to be a purely public one. "Public charities are public blessings, and the Commonwealth is interested in giving force and effect to them," this court declared in *Chambers v. Baptist Educational Society*, 1 B. Mon., 215.

Aside from that part of the religious work done by appellees, which may be denominated devotional, they undertake to bring within the religious, moral and intellectual influences of the institution all young men, and for that matter, old men, too, for their betterment, improvement and protection from evil influences and consequences. It is not so much the giving of alms, or in aid of the mendicant. The endeavor is to reach the boys and young men before they need alms, and before they are reduced to beggary; and by training the minds, and teaching them how to use and preserve their bodies, and how to live useful and honest lives, to save them from the lower grades of misfortune so familiar in the utter helplessness of abject poverty, and disease, and want. This is accomplished by the institutions keeping open attractive quarters, where libraries of useful books, current magazines and newspapers, innocent games of amusement, a gymnasium for the exercise and development of the body, and night schools affording additional opportunities to such as have not had sufficient advantages in education, are all accessible to whomsoever will avail himself of them, without regard to creed or nationality. Lists of decent boarding houses are kept, to which strangers are directed. Proper acquaintances and associations are formed

useful and moral instruction imparted. In other words, they help the pless, would keep the innocent innocent, endeavor by placing clean ideals experiences before the youth to have them adopt them in their lives; y aid the uneducated to a limited but practical education; this is all done r the love of God and for the love of our neighbor, in the catholic and versal sense, free from the stain of anything that is personal, private or lish," and it is, therefore, as said by this court in *Ford v. Ford's Ex'or*, Ky., 576, a charity.

But it is argued that however benevolent the purposes and work of these titutions, they are limited to their own members, and consequently come der the head of private instead of public charities. The institutions have iverships, for which a nominal fee is exacted. Many, if not most, of air privileges are restricted to their own members. But the members have property right, or at most but a qualified and temporary one in the build- gs or funds of the associations. They receive no profits or dividends. Cer- leates of membership are not transferable and have no money value. The lation of the members is similar to that of members of churches—a mem- rship entailing a pecuniary obligation and probably an insignia of worthi- ss and good standing for the time being. The fund by which the lots ere acquired and the buildings erected and furnished was in the main con- tributed by charitably disposed persons who have absolutely no pecuniary interest in or control of the institutions. They are donated for the perpetual njoyment of all who shall avail themselves of the privileges. The part con- tributed by membership fees is by far the smaller part of the means neces- ary to maintain the association's work. Any man or youth of acceptable moral standing is eligible for membership. Many of the privileges of the institutions are, however, absolutely free to all the public. But the fact hat some part of the expense in maintaining the institution is required to be paid by those who enjoy all its privileges does not change its character as a public charity. It was held by this court in *Trustees of Kentucky Female Orphan School v. City of Louisville*, 100 Ky., 470, that the fact that a small stipend was exacted from some of those who were benefited by the school did not detract from its character as an institution of purely public charity. That regulation merely made the charity partly self-sustaining. It was also held in that case, and the cases decided at the same time, that the fact that only a limited number of the public, and of their selection by sec- tarian trustees, did not deprive it of its characteristics as a purely public charity. It is plain that the framers of the Constitution could not have meant that only those institutions should be included in their exemption which were freely open to all the public—for there are none such. Discip- line, order, regulation and selection are necessary in dispensing such char- ities, and requirements not unreasonable in these particulars, although they limit, as of necessity they must, the number to be benefited to the accom- modation of the means at hand, are not at all incompatible with the general character of such institutions.

As the institutions are ones of purely public charity, which includes its educational features, not separately considered for that reason, all their property is exempt from taxation. For, as said by the court in the course of the opinion in *Trustees Ky. Female Orphan School v. City of Louisville*, supra, at page 486: "Upon the whole it would seem that when the statute

exempts the 'institution' from taxation, and no qualifying words are used showing or tending to show that only the property 'used' by the institution, or 'connected' with the institution, is to be exempt, then the associated entity—the corporate being—with its estate as an entirety is embraced by the word institution."

The cases of *Newport v. Masonic Temple Association*, 108 Ky. 333, 21 Ky. Law Rep., 1785; *Widows and Orphans' Home of the Odd Fellows of Ky. v. Bosworth, Sheriff*, 24 Ky. Law Rep., 1505, and *Commonwealth v. Lexington Cemetery Co.*, 24 Ky. Law Rep., 924, are cited by appellants as indicating a different construction from that here given in section 170 of the Constitution.

In addition to the fact that those cases do not purport to overrule the comparatively recent, and thoroughly considered, case of *Trustees of Ky. Female Orphan School v. City of Louisville*, supra, and were, therefore, not considered by the court as being in conflict therewith, there is this distinction between them on the one side and the Orphan School case and these cases on the other. The Masonic Temple case and the Odd Fellows Widows and Orphans' Home case were each private charities, pure and simple, and so held by the court, because they were exclusively for the benefit of certain designated beneficiaries, those dependent upon the creators of the charities, or for the benefit of the persons claiming the exemption, as in the case of the Masons. They were held to have certain secret rites, ceremonies and distinctions which might be deemed to have a peculiar value; at least they were intended to, and did, exclude all the public but themselves from their enjoyment; they owned their property, and used it exclusively for their own personal enjoyment and entertainment, as a social club or other similar association might. Their charitable contributions were more in the nature of a mutual insurance or protective arrangement by which they insured themselves, or the dependent members of their families, against want in certain contingencies. Their charitable work, if any outside of that bestowed on themselves and their own families, was incidental only, and not the objective purpose of the institutions.

The cemetery company case was decided upon the express language of the Constitution, which exempted only the places of burial, or graveyards, and not investments devoted to the maintenance of burial places. Two cases from other courts denying the exemption to Young Men's Christian Associations have been cited by counsel for appellants, viz.: *Auburn v. Y. M. C. A.* (a Maine case), 29 Atl. Rep., 992; and the other a New Jersey case, *State v. Patterson*, 39 Atl. Rep., 655.

The first of these cases was made to turn upon the peculiar phraseology of the Maine statute, to wit: "Except that so much of the real estate of such corporations is not occupied by them for their own purposes, shall be taxed in the municipality in which it is situated."

All that part of the association's buildings actually occupied by them was held to be exempt. The New Jersey case discusses only the "charitable feature" of the question. It held that the word charity in their statute was not used in its broad sense, but, on the contrary, was used solely in the sense of "aid to the needy." This construction of the word is not in harmony with that uniformly placed upon it by this court.

The judgment of the circuit courts are each affirmed.

The whole court sitting.

Chief Justice Burnam dissenting.

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[Reported by Walter G. Chapman, Esq., of the Frankfort, Ky., Bar.]

KENTUCKY COURT OF APPEALS.

HENSLEY, &c. v. FRANKLIN, &c.

(Filed November 12, 1903—Not to be reported.)

Land sales—Recovery of purchase money—In this action to recover the deferred payments of purchase money for real estate the evidence is sufficient to sustain the judgment of the court that the plaintiff is not entitled to recover on account of the superior title of third parties to a part of the land, which deprives the vendee of a portion of the tract conveyed, exceeding in value the amount of the deferred payments.

John W. Howard for appellees.

Appeal from Magoffin Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 31st day of March, 1896, the appellants, John W. and Lurinda Hensley, sold and conveyed by general warranty deed to Paulina Franklin a tract of about 600 acres of land lying in Magoffin county, in consideration of \$900, all of which was paid in cash, except \$231.66. On the 4th of January, 1897, the appellants brought this suit against the appellees, in which they asked a judgment against them, and for an enforcement of their vendor's lien, and the sale of enough of the land to pay the balance of the purchase money. The defendants answered that since their acceptance of plaintiffs' deed they had discovered that Stephen and Jasper Wheeler were claiming a large portion of the boundary of land under older grants, and allege that plaintiffs were insolvent, and made their answer a cross petition against the Wheelers, and called upon them to set up their claims to any part of the land covered by their deed. Stephen Wheeler filed an answer in response to the cross petition, in which he claimed to be the owner of about fifty acres of the land covered by defendants' deed, and Jasper Wheeler answered that he owned, under senior grants, about 150 acres of the tract. The plaintiffs controverted the claims of both the Wheelers, and in their reply to the answer of the defendants allege that prior to the conveyance they had notified the defendants of the claim of the Wheelers to a part of the land covered by the deed;

and that they would not warrant the title as against them, but that by mistake and inadvertance the deed contained a clause of general warranty as to the entire tract. The affirmative averments of the reply were controverted by rejoinder. A great deal of testimony was taken pro and con, and upon final submission the circuit judge decided that Stephen Wheeler owned under senior grants about twenty-five acres of the boundary covered by appellants' deed; and that Jasper Wheeler was the owner of about seventy-seven and two-fifths acres of the land embraced in the deed; that the value of these two tracts of land was in excess of the balance of the purchase money sued for, and dismissed plaintiffs' petition, and they have appealed. No brief has been filed in the case by the appellant, but we have reached the conclusion, from a careful reading of the record, that the judgment appealed from is sustained by the evidence.

Judgment affirmed.

PETER & MELCHER STEAM STONE WORKS v. GREEN.

(Filed November 12, 1903—Not to be reported.)

Damages—Master and servant—Pleading—The failure of the servant's petition to allege that he could not have known of the dangerous condition of a pile of stone near which he was working at the time of the injury by the exercise of ordinary care did not render his petition defective, the allegation that he was wholly unaware of and had no knowledge or information of the danger he was subjected to by the act of his master's superintendent in placing the stone being sufficient.

Forcht & Field and O'Neal & O'Neal for appellant.

Augustus E. Willson for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Nunn.

Appellee in his petition, in substance, alleged that in August, 1901, he was engaged as stone cutter in the yards of appellant's stone works; that on the day previous to his injury the appellant had caused to be piled three stones, fifteen inches thick, fifteen inches wide and eight feet long, one upon the top of the other, at a point in its yard very near where the appellee was engaged in cutting stone; that on the day he received his injury he was engaged at his labor near to this pile of stone, with his back to it, when appellant's superintendent, Melcher, who was in charge of its plant, and seeing the proximity of this appellee thereto, negligently and carelessly directed one of its employes to place another stone on this pile, of the same dimensions of the others. Each of these stones had under it a stick two inches thick and about eighteen inches long, and the whole resting on soft earth. In a very few minutes after the last stone was placed the whole toppled over and fell upon the legs of appellee, severely injuring him, by reason of which he was confined to his bed and room for several weeks, and that he incurred expense in effecting a cure, and his actual loss sustained by reason of these injuries amounted to \$198. He sued for \$2,500. The appellant answered in three paragraphs: First, a general denial; second, an

tributary negligence on the part of appellee; third, that appellee's injuries were the result of the negligent acts of a fellow servant of equal grade with appellee. The issues were completed, and a trial was had, which resulted in a verdict in favor of appellee for \$200, and appellant asks for a reversal.

The appellant contends that appellee's petition was defective in failing to state that he could not have known of the danger by the exercise of ordinary care, and refers to *Bogenschutz v. Smith*, 84 Ky., 840. The appellee, in his petition, alleged that he was wholly unaware of and had no knowledge or information of the danger he was subjected to by the negligent act of Melcher, the superintendent. It was unnecessary for him to allege that he could not know of such danger by the exercise of ordinary care. The case referred to sustains this position. In the *Bogenschutz* case the court said: "The petition in this case is somewhat indefinite. It does not clearly appear whether the pleader intended to allege that the injury resulted from the act of a fellow laborer, caused by the neglect of the master in not providing safe and proper premises, or simply that the injury was caused by the alleged improper obstruction of the gangway. Construing it, as we must, most strongly against the pleader, the latter construction must be adopted; and it was essential to the sufficient statement of the alleged cause of action that it should have been stated that the alleged defective condition of the gangway was unknown to the appellee."

The general rule is that the master must provide his employe with reasonably safe implements and safe places to perform his labor. Under the allegations and proof we have a case where the master by his own acts made the place dangerous, and caused an injury to his servant. The lower court properly instructed the jury upon all the issues in the case. It first submitted the question to the jury as to whether or not appellee received his injuries as the result of the negligent acts of Melcher, the superintendent, and, if so, permitted the jury to find for appellee; and, second, that if he received his injuries as the result of the negligent acts of his fellow servant, they must find for appellant; also, if the jury believed he received his injuries as the result of contributory negligence on his part, or the failure to exercise ordinary care, then, in such event, they should find for appellant. The evidence was conflicting, the verdict small, and we do not feel authorized to disturb the finding of the jury thereon.

Perceiving no error prejudicial to the rights of appellant the judgment of the lower court is affirmed.

ROSE, &c. v. WARE.

(Filed November 18, 1903.)

Limitation—Under section 2508 of the Kentucky Statutes the period within which an action for the recovery of real property may be brought shall not in any case be extended beyond thirty years from the time the cause of action accrued by reason of any death or the existence or continuance of any disability. (*Branson v. Thompson*, 81 Ky., 387, overruled.)

W. L. Reeves, W. P. Sandidge and Hazelrigg & Chenault for appellants,
Rose, &c.

Petrie & Standard for appellants, Winston, & Co.

Perkins & Trimble and W. S. Pryor for appellee.

Appeal from Todd Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

Under section 2508, Kentucky Statutes, the period within which an action for the recovery of real property may be brought shall not in any case be extended beyond thirty years from the time the cause of action accrued by reason of any death or the existence or continuance of any disability. The statute in this case having begun to run, and more than thirty years having elapsed after the cause of action accrued, the bar of the statute was complete. Upon reconsideration of the case of *Branson v. Thompson*, 81 Ky., 387, we conclude that it is in conflict with *Johnson v. Sweat*, 81 Ky., 392; *Bankston v. Crabtree Coal Co.*, 95 Ky., 455; *Stillwell v. Leavy*, 84 Ky., 379; *L. & N. R. R. Co. v. Thompson*, 105 Ky., 190. That case is now, therefore, overruled.

Petition for rehearing overruled.

LEWIS V. MAYSVILLE & BIG SANDY R. R. CO.

(Filed November 13, 1908—Not to be reported.)

Removal of causes—Where a nonresident corporation and its lessor, a resident corporation, were joined as defendants in an action for damages for personal injuries sustained by the plaintiff by reason of the alleged negligence of the lessee company, the right of the nonresident to remove the action to the Federal court can not be defeated on the ground that the corporation should not be treated as a legal entity, but that the court should consider the individuals holding its stock and presume them to be residents of this State.

A. D. Cole for appellant.

E. L. Worthington for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, G. J. Lewis, an employe of the Chesapeake & Ohio Ry. Co., brought this suit against the Maysville & Big Sandy R. R. Co., a Kentucky corporation, and the Chesapeake & Ohio Ry. Co., a Virginia corporation, to recover damages for the loss of his right leg, which he alleges was occasioned by the negligence of the Chesapeake & Ohio Ry. Co.'s employes whilst operating the railroad as lessees of the Maysville & Big Sandy R. R. Co. The Chesapeake & Ohio Ry. Co. filed its petition to remove the case to the United States Circuit Court for the Eastern District of Kentucky. The Mason Circuit Court ordered the removal, over the objections of the plaintiff, and he has appealed. Counsel for appellant argues that the word "corporation," as used in section 211 of the Constitution of Kentucky, and the words "company, association or corporation," as used in section 841 of the Kentucky Statutes, do not refer to the corporation as a legal entity, but to the various individuals who own its stock; and that the court should

presume such stockholders to be citizens of Kentucky; and that consequently there exists no diversity of citizenship which would entitle the Chesapeake & Ohio R. R. Co. to a removal of this case to the Federal court.

We are of the opinion that this contention can not be successfully maintained. The words, both in the Constitution and in the statute, manifestly refer to the corporation itself, and not to the individual stockholders, who may be either individuals or corporations. Besides, it was held in *Muller v. Downs*, 94 U. S. N. C., 444, that for the purpose of jurisdiction it would be conclusively presumed that all stockholders of a nonresident corporation were citizens of the State in which it was incorporated. The same contention was made in the case of *Davis' Adm'r v. C. & O. Ry. Co.*, 25 Ky. Law Rep., 812, and it was decided against appellant's contention. And in *Swice's Adm'r v. Maysville & Big Sandy R. R. Co.*, 25 Ky. Law Rep., 436, it was held that a servant in the employ of a lessee company, whose injury was caused by the negligence of his employer alone, had no cause of action against the lessor company. It seems to us that the opinion in these recent cases are conclusive of the question, and that the trial court properly refused to retain jurisdiction of the case after the filing of the petition for removal.

For reason indicated the judgment is affirmed.

HOWSE, &c. v. REEVES & CO.

(Filed November 13, 1903—Not to be reported.)

Void judgment—Party not before court—A court can not properly enter a personal judgment against one who is not before the court by summons, nor order the sale of his property to satisfy liens against it; and the consent of an attorney, who represented other defendants who were before the court, to the entry of the judgment does not validate it in the absence of authority to act for him.

Hazlerigg & Chenault and W. P. Thorne for appellants.

John D. Carroll and G. Allison Holland for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Hobson.

James Howse, Jr., bought of Reeves & Co. an engine, separator, sawmill, grist mill and attachments, and executed in part payment therefor, with his father as his surety, two notes, each for \$588; also two notes, each for \$125. He executed a mortgage on the property purchased to secure the notes, and his father and mother executed a mortgage on certain real estate to secure a part of the purchase money. Reeves & Co. brought this suit to recover on their notes and to enforce their mortgages. The father, James Howse, Sr., the mother, Rhettta Howse, and the son, James Howse, Jr., were all made defendants to the petition. A summons was issued upon the petition, which was executed on the father; James Howse, Sr., and returned not found as to the wife and son. An alias summons was issued, which went into the hands of another officer, and he executed it again on the father; also on the wife.

In this condition of the record, and without any service of process on James Howse, Jr., the court entered judgment against the father and son

on the notes, and foreclosing the mortgages. The personal property was sold under the judgment and was bought by the plaintiff for \$625. Thereupon exceptions were filed to the sale on the ground that James Howse, Jr., was not before the court. The court overruled the exceptions and confirmed the sale, and the defendants appeal.

James Howse, Jr., has not had his day in court. The court could not properly order the sale of his property, or enter any judgment against him until he was before the court, and when on exceptions to the sale it was shown that he was not before the court, and that the property had not sold for its value, the court should have set the sale aside. The affidavits filed on the hearing of the exceptions do not show that Thorne, the attorney, who consented to the entry of the judgment, had any authority to act for James Howse, Jr. In fact the contrary appears.

Judgment reversed and cause remanded, with directions to sustain the exceptions and set aside the sale.

JOHNSON v. DePAUW UNIVERSITY, &c.

(Filed November 12, 1903.)

1. *Res adjudicata*—Construction of will—Where some of the heirs at law of a testator instituted an action to have the will declared void, and alleged that the descendants and heirs of the testator were numerous and that it was impracticable to bring them before the court within a reasonable time and asked that they be allowed to sue for the benefit of all, and the court entered judgment dismissing the petition, no appeal being taken therefrom, the question of the validity of the will must be considered as *res adjudicata* after the lapse of nearly thirteen years without any of the parties in whose behalf the action was brought showing disapproval, although the will was subject to the criticism that it created a perpetuity for the selfish and private purpose of educating the descendants of certain persons, and although no order was made by the court allowing the plaintiffs to sue for the benefit of all the descendants.

2. *Same*—Title—Others of the descendants having been made defendants to an action by the devisee for a sale of certain of the property devised, and having obtained an order of court permitting them to defend for themselves and all the other descendants, and having consented to the sale and asked that the proceeds be devoted to the purpose of the will, the purchaser at judicial sale took a good title to the property sold by order of the court.

C. C. Hieatt for appellant.

Harris & Marshall for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

In the year 1867 one William Holman died a citizen and resident of Jefferson county, Kentucky, and left a will which was admitted to probate and was recorded in the Jefferson County Court on the 12th of August, 1867. By his will he made some special devises and then willed all of his estate to his wife during her life, and then used this language: "And after the death of my wife everything given into the hands of the trustees of the GreenCastle

University in the State of Indiana in trust, the proceeds of which may be used only for the purposes of education of the descendants of George Holman and Jacob Meek." It is proper to remark here that the appellee, DePauw University, is the legal successor to all the rights and privileges of the Greencastle University named in this will.

The testator, William Holman, never had any children. George Holman, the person referred to in his will, was his father, and his mother was the daughter and only child of Jacob Meek. Testator's wife died in the year 1887, and in the year 1890 Nicholas Holman, George W. Holman and William V. Holman, who claimed to be descendants of George Holman and Jacob Meek, brought an action in the Jefferson Circuit Court against this appellee, in which they sought to have that part of William Holman's will above quoted declared void, in which action it was alleged that George Holman and his wife, a daughter of Jacob Meek, left eleven children, all of whom were then dead, and that each of them had left children, and that there were more than 120 of them who were the descendants and heirs of George Holman and Jacob Meek; that they resided in many States and Territories of the Union and the places of residence of most of them were unknown, and that the question sought to be litigated in their action involved a common or general interest of many persons; that it was impracticable to bring all of them before the court within a reasonable time, and, therefore, the plaintiffs, the three persons named, sued for the benefit of all the descendants of George Holman and Jacob Meek. In this action they described the property of William Holman left after the death of his widow and asked that they be allowed to prosecute the action for the benefit of all the heirs of Holman and Meek, and that the court declare the provision in the will named void and that the property be distributed between the descendants of Holman and Meek. A general demurrer was filed to this petition, and the court construing the provision of the will, copied herein, was of the opinion that the devise was for a charitable use or purpose and sustained the demurrer. The plaintiffs therein objected and excepted and prayed an appeal to the Court of Appeals, which was granted, but no appeal was ever taken from that judgment, which was rendered in the early part of the year 1891.

On the 6th of September, 1902, the appellee, DePauw University, filed its action in the Jefferson Circuit Court, in which it set forth the will of William Holman, the judgment of the court in the above-described case and the description of two pieces of real estate which was devised under the will of William Holman, setting forth that this property was out of repair and producing but little income, and asked the court to sell it for the purpose of reinvesting it in other property more remunerative. In this action appellee made Otway C. Sterling and Sidney T. Sterling, who were descendants of George Holman and Jacob Meek, defendants, and alleged that the other descendants of Holman and Meek were numerous, and that it was impracticable to bring them all before the court within a reasonable time; that the questions involved were of a common and general interest to all of them, and prayed that the defendants named be allowed to defend for all of the descendants of Holman and Meek. In this case the court made an order in conformity with such request, and the defendants answered, ad-

mitting the allegation that the descendants of Holman and Meek were numerous and that their places of residence were to them unknown, and that they had no objections to the sale of the property sought to be sold in this action, and prayed that in the event of a sale that the court would sufficiently protect the proceeds to the end that they be devoted to the purposes named in the will of William Holman and that their answer be taken as the answer of all the descendants of Holman and Meek. Upon proof being heard as to the necessity of a sale of the property, the court made an order directing a sale of it, the commissioner sold it and appellant, Henry M. Johnson, became the purchaser. Appellant filed exceptions to the report of sale because the title to the lots sold did not pass to the purchaser under the judgment and sale herein because the devise in the will of William Holman, deceased, of the remainder interest in his estate to the trustees of Greencastle University, in the State of Indiana (now DePauw University, appellee herein), was void, the effect of the devise being to create a perpetuity, the object not being a charity. The court overruled the exceptions and confirmed the report of sale, from which action of the court appellant has appealed.

The appellee by counsel contends that the devise under consideration is valid, it being for a charitable use and refers to the cases of *Gass v. Wilhite*, 2 Dana, 170, and *Ford v. Ford*, 91 Ky., 572. In the opinion of this court these opinions do not sustain the position of counsel. The case in 2 Dana was where the society of Shakers was sued by one of its members who had withdrawn therefrom, claiming that he had given the society property, and demanded the value of it. His counsel argued that the gift was not a valid one; that it was prohibited by law, not being for a charitable use. The court in that case decided that the gift was a valid one, and in the opinion used this language: "So long as piety is recognized by common assent, and by the legislature, as a valuable constituent in the character of our citizens, the general law must foster and encourage what tends to promote it. In legal estimation it must be viewed as what is not only estimable in itself, but as an appurtenance to the characters of individual citizens, of great value to society, for its tendency to promote the general weal of the whole community. * * * In a country like ours, where it is one of the fundamental canons of the political law that there shall be no established religion, and that government shall not actively participate in the support or dissemination of religion of any sort, all such societies—pious institutions of all sorts—must depend upon the eleemosynary contributions of individuals. This would seem to require that the law should esteem such contributions as in a peculiar degree charitable. Whenever the end is truly pious, donations to promote it, the law must esteem as really charitable." The court in this case upheld the gift upon the principle that the society of Shakers was a religious body, a church, and under our statutes such a gift is expressly made valid. (Section 817, Kentucky Statutes.) The case of *Ford v. Ford*, supra, was where a testator in his will directed that a monument be erected over his and his wife's graves. The court upheld this provision of the will upon the grounds that it did not create a perpetuity; that the statute expressly authorizes it and also that it was for a humane purpose. In this case the court used this language: "Charity,

in its most general legal sense, has been said to be a general public use, but the definition given by the eminent counsel in the Girard will case has received judicial approval. It is: 'Whatever is given for the love of God or for the love of our neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain of everything that is personal, private or selfish, is a gift for charitable uses.' "

In the will under consideration the testator, William Holman, gave without any limitations, and in perpetuity, to appellee all his estate remaining after his wife's death for the purpose of the education of the descendants of George Holman and Jacob Meek. This devise was in no sense for a general public use, nor was it given with motives free from the stain of everything that is personal, private or selfish. It is confined solely to the education of the descendants of two individuals only. If it had been given to the appellee for the general purposes of education, or if it had been given into the hands of trustees for the education of poor children or the children of a State, county or a designated community, it would have been valid and upheld as a devise for a charitable use. (5 Ky. Law Rep., 419; 82 Ky., 5; 86 Ky., 610; 3 Bush, 365.)

But we are of the opinion that this question in this case is res adjudicata for the reason that three of the heirs of William Holman, the deviser of the first estate, brought suit against DePauw University for the benefit of themselves and all the heirs and descendants of Holman and Meek, making the allegations required by section 25 of the Code, and seeking to recover the property embraced in the trust on the ground that the will was void for perpetuity, and the court in that case adjudged that the will was valid and dismissed the petition. The only objection made to the conclusiveness of this judgment is that there was no order of court in that case authorizing the plaintiffs to sue on behalf of all the heirs. The provision of the Code with reference thereto is as follows:

"Section 25. If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all."

Even if an order of court allowing the Holmans to prosecute the action for the benefit of all was necessary, which we do not decide, it is not shown that any of the parties in whose behalf the action was brought disapproved of it, and after the lapse of time—nearly thirteen years—the presumption is that all the descendants of Holman and Meek concurred in its object. (Flint v. Furr, 17 B. M., 513.) And in addition to this it does appear in this case that two of the descendants of Holman and Meek, who represented themselves and all the other descendants, acting under order of court, appeared, consented and requested that the proceeds of this real estate sold be by the court protected to the end that the same be devoted to the purpose named in the will of William Holman. We are of the opinion that the lower court was right in overruling the exceptions filed to the commissioner's report as the appellant by his purchase will obtain a good title to this property.

Wherefore, the judgment is affirmed.

HALL v. ELY.

(Filed November 12, 1903—Not to be reported.)

Land sales—Deficiency—Where it was represented to the purchaser that a tract of land contained 185 acres and he agreed to pay \$3,500 for same, a deficiency in the boundary of twenty-six acres is unreasonable and excessive and entitles the purchaser to an abatement of the deferred purchase money for such deficiency at the ratable price per acre.

Reed, Greer & Oliver for appellant.

White & Ray and J. M. Fisher for appellee.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Settle.

Negotiations for the purchase of a tract of land in Marshall county, this State, began in September, 1897, between the appellant, D. E. Hall, then a resident of Illinois, and the appellee, J. F. Ely, which, on November 17, 1897, resulted in the purchase by the former of the land, and its conveyance to him by deed, from the appellee as of that date. In the beginning, and in a large measure throughout the transaction, the appellee was represented by an agent in the person of W. M. Olliver, who was an officer of, and connected with, the Marshall County Immigration Co.

The consideration stated in the deed was \$3,500, \$750 of which appellant paid in cash to appellee. And as there were two mortgages on the land, one to secure a debt of \$1,014.40, going to C. S. Gibson, and the other to secure a debt of \$480 in favor of Dycus & Wood, the payment of these two debts was assumed by appellant, and for the remainder of the consideration for the land, viz., \$1,255.60, he executed to appellee his note, due twelve months after date, secured by lien on the land.

Suit was brought against the appellant by Gibson in the circuit court to recover his debt, and enforce the mortgage for its payment. Wood & Dycus, holders of the junior mortgage, were made parties, and filed answer, which was made a cross petition against the appellant, and also against the appellee, the latter of whom was called on to assert the vendor's lien retained in his favor by the deed to secure the payment of the \$1,255.60 note executed to him by the appellant.

Appellee filed answer and cross petition, in which judgment was asked for the amount of the note held by him against the appellant, and also for the enforcement of the lien retained to secure its payment. Appellant paid the debt to Gibson of \$1,014.40, but filed an answer to the cross petition of the appellee, in which he resisted the recovery sought by the latter on the note of \$1,255.60, upon the ground of fraud and misrepresentation on his part in the sale of the land, and as to the quantity thereof. It is averred in substance in appellant's answer to the cross petition of appellee that he and his agent, the Marshall County Immigration Co., falsely represented to him that the tract of land sold him contained 185 acres, when as a matter of fact it contained only 158 acres and 74 poles, making a deficit of over, twenty-six acres; that in his purchase of the land it was estimated to him at between \$19 and \$20 per acre, and that the consideration should be abated according to the estimated price to the extent of the deficit.

The appellee, by reply, traversed the affirmative matter of the answer, and the parties having taken proof upon the issues thus formed, the circuit court upon the submission of the cause gave appellee and Dycus & Wood judgment for their respective debts, but allowed appellant credit upon the amount recovered by appellee of \$168.66, for a shortage of eight acres and four poles found in the land conveyed him, that quantity being in the adverse possession of the Nashville, Chattanooga & St. Louis R. R. Co., J. M. Hendrickson and Cleo Peel at the time of appellant's purchase.

The judgment also allows the appellant further credits on the debt of appellee for payments made and demands held by him against appellee, about which there was no controversy, but refused him credit for any further deficit in the land than the eight acres and four poles mentioned. Of so much of the judgment as refused to allow him credit on appellant's debt for the further alleged deficiency in the land appellant complains, hence this appeal.

It appears that repeated conversations occurred between the appellant and appellee, and between the former and appellee's agent, W. M. Olliver, in regard to the quantity and quality of the land before the sale was consummated. Appellant and Olliver both testified that appellee and Olliver represented that the tract of land contained 185 acres; in fact, that appellee informed appellant that it would, if surveyed, be found to contain not less than 204 acres. In addition, the writing given Olliver by appellee conferring upon him authority to sell the land, which was introduced in evidence, describes it as containing 185 acres, and it was so described in the advertisements offering it for sale that were posted by Olliver as appellee's agent.

It is true that appellee denies that he represented the tract to contain 185 acres, but his evidence is outweighed and overcome by the opposing statements of appellant and Olliver, and the facts manifested by the writing and advertisements mentioned. Appellant also testified that at the time of his purchase of the land he was a stranger in Marshall county, and was unacquainted with the land, and that he relied wholly upon the representations of appellee and his agent as to the quantity of land, and was thereby led to believe, and did believe, that he was buying from 185 to 204 acres, and that before the sale was consummated, and while at the depot, in Benton, waiting for a train, Olliver, in the presence of Ely, made for appellant's information a calculation on his shoe showing the several parcels of land composing the entire tract, and that when added the whole contained 184½ acres; and further, that appellee and Olliver then gave him a plat of the land on which they wrote in words and figures "185 acres."

It appears that the quantity is mentioned in the deed to appellant from appellee as 177 acres, "more or less." Appellant testified—in which he was corroborated by Olliver and contradicted by appellee alone—that this was done at the instance of appellee, and for the reason, as then given by him, to make the description of the land in the deed conform to the description in the title papers held by him, but that he explained that the words "more or less" would include the excess over the quantity named in the deed, and again assured appellant that there were 185 acres in the land conveyed by the deed. The foregoing facts so conclusively established, make it clear that appellee sold the land as containing 185 acres, and the appellant purchased in the full belief that it contained that quantity. It is further ap-

parent that though the consideration for the land is stated in gross in the deed as \$3,500, the sale was understood by the parties as one by the acre; but whether this was true or not, in order to effect a sale of the land to the appellant, it is evident that it was necessary for appellant and his agent to convince him that the land contained as much as 185 acres, in which they seem to have succeeded.

The survey made by order of court shows that the boundary given in the deed from appellee to appellant includes only 166 acres and 78 poles, and that 8 acres and 4 poles thereof were in the actual, adverse possession of the railroad company and others at the time of appellant's purchase, which left a balance of 158 acres and 36 poles to the appellant, the difference between which and the quantity of land sold appellant, and which he believed he was buying, viz., 185 acres, constitutes a shortage of more than 26 acres, which is a deficit equal to one-sixth of the real quantity of land the appellant was put in possession of under his deed, or $14\frac{2}{3}$ per cent. of 185 acres.

In determining the equities of a case like the one at bar we can not always find a precise rule by which to be governed. In *Harrison v. Talbott*, 2 Dana, 258, this court, quoting with approval *Young v. Craig*, 2 Bibb., 270, said: "The equity of each case must depend upon its own peculiar circumstances. The relative extent of the surplus or deficit can not per se furnish an infallible criterion, but the conduct of the parties, the date of the contract, the value, extent and locality of the land, the price, and other nameless circumstances, are always important and generally decisive."

We think it evident that it was never intended or contemplated by the parties that such a loss in quantity would occur as is shown to have resulted in this case, and, moreover, this sale in gross was in reality understood by the parties thereto to be a sale by the acre as shown by their conduct and the circumstances surrounding the entire transaction. We are of opinion, therefore, that this is one of the cases in which equitable relief should be allowed because the deficit is unreasonable and exclusive. In *Harrison v. Talbott*, supra, there was a sale, as supposed by the parties, of 400 acres of land for \$5,000. Later it was discovered that the tract contained 490 acres. Upon the refusal of the vendor to convey, this court held that the vendee must either accept 400 acres only, or pay for the excess at the ratable price per acre.

In *Smith v. Smith*, 4 Bibb, 81, relief was granted the injured party where the surplus was only 10 per cent., and in *Shelly v. Smith's Heirs*, 2 Marshall, 513, similar relief was allowed the vendee where the deficit was 15 per cent.

In the case of *Hazelp v. Austel*, 4 Ky. Law Rep., 908, this court held that "a deficiency of more than ten acres in a conveyance by metes and bounds of 100 acres more or less, considering the quantity and character of the land, is greater than the parties must be presumed to have contemplated, and must be accounted for."

In our view of the case the lower court erred in limiting the appellant in the abatement of the contract price to the 8 acres and 4 poles which were in the adverse possession of the railroad and others at the time of his purchase of the land.

The contract price should have been abated at the ratable price per acre for the difference between 158 acres and 74 poles, the net amount of land ap-

pellant received the title to and was put in possession of, and the 185 acres which appellee represented to appellant he was selling him, and to the end that this may yet be done the judgment is reversed and cause remanded.

HOLCOMB v. COMBS.

(Filed November 12, 1908—Not to be reported.)

1. Res adjudicata—A judgment in an action in ejectment or for trespass adverse to the plaintiff's contention is a bar to a subsequent action by him against the same defendant for trespass on the same land.

2. Title—Adverse possession—Where the defendant in an action for trespass had actual, adverse possession of the land in controversy for more than fifteen years before the plaintiff set up claim to it, and none of the latter's vendor's had claimed it, there was no merit in the plaintiff's claim.

D. D. Fields & Son for appellant.

R. O. Brashears for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Settle.

This action was instituted by the appellant in the lower court to recover of appellee's damages for trespass to land claimed to be owned by appellant.

The acts of trespass are alleged to have been committed by the cutting of timber thereon, and an injunction was issued by the appellant's procurement to prevent further cutting of the timber by appellee.

The answer admits the cutting of the timber complained of, but denies appellant's title, and avers that the title to the land in controversy is in the appellee, Edward Combs, and in addition, that he and those under whom he claims it, have had, and held, the actual, adverse possession of the land, claiming it to a well-defined marked boundary for more than fifteen years continuously before the institution of the appellant's action.

The answer is made a counterclaim, and it is therein further averred that two other actions had been previously brought in the same court by the appellant against the appellee, Edward Combs, for alleged trespasses committed upon the same land, each of which actions had been decided adversely to the appellant, which adjudications were pleaded in bar of this action, and the court asked to quiet appellee's title to the land in controversy. After the filing of further necessary pleadings, by consent of parties, the cause was transferred to the equity docket, and the proof taken by depositions. Upon the trial of the cause the court below, by its judgment, dismissed the appellant's petition, dismissed the injunction, declared the appellee, Edward Combs, to be the owner of the land, and quieted his title thereto, and of that judgment the appellant now complains. The appellant claims title to the land in controversy under a patent of ancient date for fifty acres issued by the Commonwealth to one Edward Polly, who conveyed the same land by deed to his son, David Polly, and he in turn conveyed it to his brother, Randolph Polly, from whom it passed by deed through several parties to the appellant, who became the owner of it in 1884.

It appears, however, from the evidence that while the land was owned by

the Pollys, and, indeed, until it came to the appellant it was inclosed by a fence where the line is now in dispute. It further appears that the appellee, Edward Combs, as the remote vendee of one Benjamin Webb, is the owner of a small tract of land which adjoins the Polly survey, and was patented to Benjamin Webb at a date subsequent to that of the Polly patent, and this land, or nineteen acres of it adjoining the Polly patent, is the land over which the controversy between these parties arose. We find from the survey made of the land in controversy, and from other evidence in the case, that it does not lie within the boundary of the Polly patent, and the evidence further shows that not one of the appellant's vendors, several of whom testified in the case, ever claimed that it did. In fact no owner of the Polly survey, except the appellant himself, ever set up any claim to the land in controversy.

Upon the other hand, the appellee, Edward Combs, and his vendors, without exception, have claimed ever since the date of the Webb patent to own the land in controversy, which claim extended to a well-defined marked boundary, the line on that side of the land in controversy being that of the Polly patent. Leaving out of the question the claim of his vendors, we find from the evidence that the appellee, Edward Combs, has continuously had, and held, the actual possession of the land in controversy adversely to the appellant and all others, claiming to a well defined marked boundary, viz., the Polly patent line, from the year 1868 down to the institution of this action by the appellant. During the whole of that time the only interruption of the appellee's rights was caused by a suit brought against him in 1886 by the appellant, who became the owner of the Polly survey shortly theretofore. It is not clear to us from the record in this case whether that action was one in ejectment or for trespass, as in this case. At any rate, the trial of that case resulted in a verdict and judgment in favor of the appellee. Thereafter the appellant sought a new trial by petition in the circuit court, which was refused and the petition dismissed. An appeal from the judgment dismissing his petition for a new trial was taken by the appellant to the Superior Court, and that court affirmed the judgment of the circuit court.

Undoubtedly the judgment in the former suit was, and is, a bar to this one. So upon that ground alone the lower court could not have erred in dismissing the appellant's action. But in the absence of the plea of *res judicata* the evidence found in the record convinces us that the appellant's claim of title to the land in controversy is wholly without merit.

Wherefore, the judgment is affirmed.

SMITH v. DOYLE, &c.

(Filed November 13, 1903—Not to be reported.)

Vacancy in office—Validity of election to fill vacancy—The provision of section 148 of the Constitution which forbids the election of a municipal officer at an election at which members of congress are elected has application only to regular elections for full terms and does not apply to an election to fill a vacancy in the office of city assessor; neither do the provisions of section 167 of the Constitution that municipal officers shall be elected at the

general elections in November, but in odd years only, apply to an election to fill a vacancy in the office of city assessor, which, under section 152, must be filled by an election at the next succeeding election at which city, town, county, district or State officers are to be elected, provided the unexpired term does not end at that election and three months intervene between the vacancy and the election.

R. C. Stoll, Breekinridge & Shelby and Butler Southgate for appellants.

W. P. Kimball and Hazelrigg & Chenault for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hobson.

At the regular election in November, 1899, H. C. Foushee was elected city assessor of Lexington for four years, the term beginning on the first Monday in January, 1900. He qualified, but died in December, 1901, and on January 8, 1902, appellant Smith was appointed to the vacancy. At the regular election in November, 1902, appellee Doyle was elected to fill out the unexpired term, and on November 10 appellant filed his petition, seeking an injunction restraining the election commissioners from issuing to Doyle a certificate on the ground that under the Constitution an election to fill the vacancy could not be held at that time. At that election a member of congress was elected; also members of the general council of the city of Lexington, but no other State, city, county or district officers. The case turns upon the proper construction of sections 148, 152 and 167 of the Constitution. These, so far as are material, are as follows:

"All elections of State, county, city, town or district officers shall be held on the first Tuesday after the first Monday in November; but no officer of any city, town, or county, or of any subdivision thereof, except members of the municipal legislative boards, shall be elected in the same year in which members of the house of representatives of the United States are elected." (Section 148.)

"Except as otherwise provided in this Constitution, vacancies in all elective offices shall be filled by election or appointment as follows: If the unexpired term will end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, and if three months intervene before said succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the remainder of the term." (Section 152.)

"All city and town officers in this State shall be elected or appointed as provided in the charter of each respective town and city until the general election in November, 1893, and until their successors shall be elected and qualified, at which time the terms of all such officers shall expire; and at that election, and thereafter as their terms of office may expire, all officers required to be elected in cities and towns by this Constitution, or by general laws enacted in conformity to its provisions, shall be elected at the general elections in November, but only in the odd years, except members of muni-

cipal legislative boards, who may be elected either in the even or odd years, or part in the even and part in the odd years." (Section 167.)

It will be observed that by section 148 no officer of any city, except members of municipal legislative boards, shall be elected in the same year in which members of the house of representatives of the United States are elected, and by section 167 all officers required to be elected in cities shall be elected in the general elections in November, but only in the odd years, except members of municipal legislative boards, who may be elected either in the even or odd years, or part in the even and part in the odd years. It is earnestly maintained that these provisions apply not only to full terms, but to the filling of vacancies under section 153.

This precise question was presented in *Shelley v. McCullough*, 97 Ky., 164, where the tax receiver of the city of Louisville, who was elected at the November election, 1893, for a term of four years, died within a month after his election, and at the next November election in the year 1894 McCullough was elected to fill the vacancy. The filling of the vacancy at that election was held proper under the constitutional provisions quoted. The court said: "As there is no inhibition against the holding of district and State elections at the same time congressmen are elected, and as under section 152 vacancies in city and county offices may be filled at such district and State elections, we conclude that section 148 applies only to the ordinary elections for full terms. And so with respect to section 167, it is provided that in 1893, and thereafter as their terms of office may expire, city and town officers are to be elected as provided by law, but only in odd years, the section manifestly applying to elections held upon the expiration of the regular terms of office."

The same conclusion was intimated in the previous case of *Berry v. McCullough*, 94 Ky., 247. There is nothing in *Neeley v. McCullum*, 10 Ky., 143, or *Eversole v. Brown*, 21 Ky. Law Rep., 935, in conflict with these cases; on the contrary, they are therein cited and approved. The construction of the Constitution which has thus been declared has been acted on, and should not now be departed from.

Appellant can not raise the question of Doyle's eligibility in this proceeding. The county commissioners are merely ministerial officers without power to sit in the judgment on the eligibility of a candidate or to refuse him a certificate of election for that reason. The former opinion has been withdrawn. (25 Ky. Law Rep., 278.)

Judgment affirmed.

AMERICAN BOOK CO. v. McELROY, &c.

(Filed November 13, 1903—Not to be reported.)

Schools—Adoption of books—Where the county school superintendent and the board of examiners meet and adopt the books for use in the schools of the county for the succeeding five years they have no authority at a subsequent meeting to make any changes in the list.

Chandler & Norman and P. K. McElroy for appellant.

H. S. McElroy and H. P. Cooper for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

By this action the appellant sought a writ of mandamus against S. G. McElroy, superintendent of common schools of Marion county, to compel him to record in his office the adoption of "Baldwin's Readers," Books 1, 2, 3, 4 and 5, published by it. H. S. McElroy, son of the superintendent, and J. G. Wood, composed the board of examiners. On November 23, 1901, the superintendent and the members of the board of examiners met to consider the adoption of text-books for the five ensuing years. Representatives of certain book companies appeared and gave reasons why their respective publications should be adopted. No books were adopted at that meeting. On January 2, 1902, the superintendent and his board met for the purpose of making the adoption. They proceeded to agree upon certain books, and among others: "Baldwin's Readers." The books upon which they agreed were placed upon the adoption list. This list was signed by McElroy and Wood as examiners, and S. G. McElroy as superintendent, endorsed his approval of it. The list was left with H. S. McElroy, Secretary of the board. Afterwards under the direction of the superintendent it was destroyed. The reason it was destroyed was the superintendent, on the 9th of January, called another meeting of the board and attempted to substitute for "Baldwin's Readers" "Lights to Literature," Books 3, 4 and 5, published by Rand, McNally Co., and "Graded Literature," Books 1 and 2, published by Maynard, Merrill & Co.

It is contended for appellees that the adoption did not take place on January 2d, but that what they did was merely tentative or conditional, and the right was reserved by agreement to have a subsequent meeting to make any change in the list which they saw proper. If the adoption took place on the 2d of January, the superintendent and his board were without power to change it, because the books thus adopted were, under the statute, to be used in the common schools of the county for the five ensuing years. If the superintendent refused to make a record of the books adopted, he may be compelled to do so by mandamus. (*Johnson v. Ginn & Co.*, 20 Ky. Law Rep., 1475.) We have examined the evidence in this record with great care, and considering all the facts and circumstances developed by it, we have reached the conclusion that an adoption of text-books was made on January 2, which includes "Baldwin's Readers." While the superintendent and his son might have thought they had the right to meet and make the change, it is our opinion that such right did not exist. It results that the mandamus should have been awarded.

The judgment is reversed for proceedings consistent with this opinion.

McDONALD, &c. v. STEMBRIDGE'S ADM'R.

(Filed November 13, 1903.)

Limitation—Suspension of statute by execution—Where an execution was issued on a judgment within fifteen years after the last execution at the instance of the nonresident personal representative of the deceased judgment debtor the running of the statute of limitation was suspended, notwithstanding the clerk failed to require the representative to execute a bond

that he would dispose of any property which he might receive upon the execution according to law, as required by section 404 of the Civil Code.

Montgomery Merritt for appellants.

M. C. & G. D. Givens for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Paynter.

The only question involved here is whether appellee's rights have been barred by the statute of limitation. Margaret A. Stemberidge, on October 25, 1880, recovered a judgment against appellant, J. B. McDonald. On November 4 of the same year an execution was issued on the judgment. Margaret A. Stemberidge died March 2, 1891, while domiciled in the State of Indiana. The letters of administration were duly granted in Indiana. On November 2, 1895, the proper affidavit was filed with the clerk of the Henderson Circuit Court, and also a transcript of the record showing the appointment of the personal representative in Indiana. The clerk made the proper endorsement on the execution and issued same on the date last named. He did not require the nonresident personal representative to execute the bond required by section 404, Civil Code of Practice. No other execution was issued on the judgment until August 2, 1902, so if the execution which issued November 2, 1895, did not stop the running of the statute of limitation this action is barred, because section 2514, Kentucky Statutes, provides that an action upon a judgment or decree of any court of this State, or of the United States, or of any State or Territory, shall be commenced within fifteen years from the date of the last execution. If the judgment was not alive when the execution was issued in 1902, the issuance of it could not give vitality to it. At common law on the death of the plaintiff in the judgment the judgment abated, but it could be revived by a writ of *de facias*. (*Morgan, &c. v. Winn's Adm'r.* 17 B. M., 244; *Venable v. Smith's Ex'or*, 1 Duvall, 198.) The death of the plaintiff suspends proceedings on a judgment until some one qualifies as personal representative and until an execution is issued in his name. The Civil Code of Practice points out particularly as to the affidavit and the record that shall be filed with the clerk and as to the endorsements which he shall make upon the execution. In the case at bar every requirement of the Code was fully complied with, except the execution of the bond required by section 404. Under this section, as the appointment of the personal representative was made in Indiana, it was the duty of the clerk to require of him a covenant with good security that he would dispose according to law of any property which he might receive upon the execution. The purpose of this bond is to protect the creditors of the decedent in this State and not for the benefit of the defendant in the execution. From our view it is not necessary to determine whether this provision of the Code is directory or mandatory. The execution was issued in good faith, and placed in the hands of the sheriff. It evidenced a purpose on the part of the personal representative of the decedent to enforce the collection of the judgment. The execution which was issued on the judgment was as much an execution in the contemplation of law as if the clerk had fully complied with the Code by requiring the execution of the bond. The mere fact that an execution may for some reason be

quashed does not change its legal designation or name. In *Louisville & Nashville R. R. Co. v. Smith's Ex'or*, 87 Ky., 501, this court held that a summons issued which was illegal and was subsequently quashed suspended the statute of limitation. In that case the court recognized that the summons was illegal and did not require the defendant to answer the petition, still it suspended the running of the statute of limitation. By the statute under consideration, in the computation of time for the purpose of determining whether it is a bar, the calculation is made from the date of the last execution. We are of the opinion that the execution in question was such as would suspend the running of the statute of limitation.

The judgment is affirmed.

COVINGTON STONE AND SAND CO. v. ROSEDALE ELECTRIC
LIGHT JOCKEY CLUB, &c.

(Filed November 13, 1903—Not to be reported.)

1. Corporation—Double liability of stockholders—Where a creditor of an insolvent corporation enforced the statutory double liability of the stockholders the claims of other creditors which the stockholders had compromised and had assigned to them were properly allowed to share ratably with the debt of the first creditor.

2. Same—While the stockholders were entitled to come in ratably with the creditor of the corporation as to bona fide claims of other creditors which they had purchased, they were not entitled to bring in claims which the corporation owed them so as to cut down their liability to creditors where the management of the affairs of the corporation was fraudulent as to creditors.

S. D. Rouse and R. C. Simmons for appellant.

Chas. H. Fisk for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hobson.

The Rosedale Electric Light Jockey Club was incorporated on April 28, 1896. The purpose of the corporation was to carry on races by electric light. The capital stock of the corporation was fixed at \$10,000, divided into one hundred shares of \$100 each. Anton Ruh subscribed for ten shares, J. H. Kruse for twenty, Fred W. Schmitz for five, C. B. Reed for five, and L. S. Hatch for ten. A. R. Mullins was one of the originators of the enterprise, but was away on the day the articles were signed, and ten of the shares signed for by Kruse were for him. Ruh, Kruse and Mullins each paid in \$500, being one-half of the amount of their subscription. Reed and Schmitz paid in nothing. Hatch paid in \$500 (including what Menninger paid in for him). Schmitz and Reed were to pay for their stock in services. Mullins was president and Hatch superintendent, Kruse secretary and treasurer, each at a salary of \$300 a month, Schmidt was assistant to Kruse, and Reed assistant to Hatch, each at \$3 a day. The corporation rented ground, erected buildings, bought dynamos and other electrical apparatus, and by the 10th day of June, 1896, was in debt something like \$20,000. The Covington Stone and Sand Co. then brought this suit, with attachment. Other

creditors came in. All the visible property of the company was sold and the proceeds paid only a small per cent. of the debts. The stone and sand company, on December 3, 1893, amended its petition, and sought judgment against the stockholders, both for their unpaid subscriptions and their double liability under the statute. One of the creditors, having a debt of about \$2,000, filed a suit against the solvent stockholders, charging that they had assumed his debt; also that the incorporation was a fraud, and had not been legally made; and he obtained judgment against them personally, which was affirmed by this court. They then went out and compromised with all of the creditors except the sand company at about 30 cents on the dollar. The sand company did not attack the incorporation, but proceeded with its action to enforce the statutory double liability of the stockholders, and, on final hearing, the court enforced the double liability of the stockholders, but allowed the claims which the stockholders had compromised at 30 cents on the dollar, and had had assigned to them, to come in ratably with the debt of the sand company, and of this it complains, insisting that these claims should not have been allowed to come in at all, and that at most they should have only been allowed to come at the amounts which the defendants paid out to the creditors.

The liability of the stockholders to appellant is based wholly upon the statute. The double liability of the stockholder under the statute is to the creditors and not to the corporation, and each creditor is entitled to look to this fund for the payment of his debt. Nothing that the defendants could do after the corporation failed could lessen their liability to appellant, and nothing that they did could give the appellant any greater rights against them than it already had. Their compromising with the other creditors and taking the assignment of their claims did not make them liable to appellant under the double liability statute for anything more than they were liable to before these compromises were made. They had a right to buy their peace with the other creditors, and when they had done this and taken an assignment of these debts against the corporation they had the right to bring them in in order that the true amount of their liability to appellant might be ascertained. The argument for appellant proceeds on the misconception that it acquired greater rights by reason of these stockholders compromising with the other creditors, when in fact the rights of the parties were fixed long before that, and their liability to appellant could neither be diminished nor increased by any action the other creditors might take or omit. The question is not presented here whether appellant might not have held the appellees personally liable if it had attacked the incorporation and sued them as partners. It has sued them as stockholders, basing its claim under the statute and assuming the validity of the corporation. It can not hold the defendants liable in this action on the ground that they were partners, for it has elected to treat them as stockholders in the corporation. The judgment of the circuit court was, therefore, proper.

On the cross appeal of the appellees we do not see that they have any substantial ground for complaint. The amended petition seeking to hold them liable as stockholders was filed within less than a year after any transfers of stock were made, and by the terms of the statute the transferror remains liable if the action is brought within two years after the transfer. The court

properly excluded the liabilities of the corporation to appellees existing before the suits were brought from the computation for the reason that as to these claims the stockholders did not come with clean hands, and should not have been put on an equal footing with the other creditors of the corporation. The way the affairs of the corporation were managed was itself a fraud on the creditors, and it would have been inequitable to have allowed the stockholders to bring in these claims of their own against the corporation to cut down their liability to its innocent creditors. But when their liability to these creditors was fixed they had a right to buy their peace from the creditors, and so the bona fide claims which they bought were properly allowed to come in.

The judgment complained of is, therefore, affirmed on the original and on the cross appeal.

WHALLEN v. HALLAM, &c.

(Filed November 13, 1903—Not to be reported.)

Attorney and client—Fees—The sum of \$1,000 paid by a client to one of his three attorneys, who represented him in an examining trial before a justice of the peace on the charge of bribery, in having an indictment for the offense quashed, no second indictment being returned, in the prosecution of the prosecuting witness in the bribery case upon the charge of obtaining money under false pretenses, and in an action to recover from the bailee the alleged bribe money, was ample remuneration for the services, and a verdict for an additional \$1,000 was palpably against the weight of evidence.

Wallace & Miller for appellant.

D. W. Sanders and W. B. Thomas for appellees.

Appeal from Jefferson Circuit Court, Common Pleas Branch, Second Division.

Opinion of the court by Judge Barker.

Early in January, 1900, State Senator S. F. Harrell, in a speech delivered in a caucus of the Democratic members of the general assembly of the Commonwealth of Kentucky, charged that appellant, John H. Whallen, had attempted to bribe him, for the purpose of influencing his vote on certain political matters, which were to come before the general assembly; that he (Harrell), in order to entrap Whallen, had simulated acquiescence in the proffered bribe, which consisted of the sum of \$5,000 to be paid Harrel when he had performed his part of the bargain; that \$4,500 of this money, together with a paper containing the conditions of the transaction, were locked in a box of the Louisville Trust Co. in the city of Louisville, Ky.

This statement, naturally, caused considerable excitement, and was extensively published by the press of the State, and especially in the newspapers of the city of Louisville.

As a result of this charge a warrant was sworn out against appellant before G. B. Thompson, a justice of the peace for Franklin county, Kentucky, charging him with the offense of bribery. Upon being informed of this proceeding appellant employed J. T. O'Neal, of the Louisville bar, as his leading counsel, but as O'Neal was unable, owing to business engagements

to go to Frankfort, it was agreed between them that appellee Hallam should also be employed. Appellant went to Frankfort, accompanied by his bondsmen, prepared in advance to give any bond which might be required of him. Upon their arrival in Frankfort Gen. P. Watt Hardin was associated with appellee as appellant's counsel. In company with his counsel appellant appeared before the justice at the time fixed for the examination; whereupon it was indicated by the magistrate that it was his custom in cases pending before him when the grand jury was in session to at once hold the party charged over for their action; and as the grand jury of Franklin county was then in session, he proposed to follow his usual rule. This was opposed by counsel for appellant, who insisted on a trial of their client, the evidence showing that a speech of about five minutes was made upon the question, at the conclusion of which the justice held appellant over in a bond of \$10,000 for his appearance before the grand jury.

Afterwards the grand jury indicted appellant upon a charge of bribery. To meet this charge appellant again returned to Frankfort, at which place he received information from a friend of certain matters showing irregularity in the formation of the grand jury which returned the indictment against him. This information he conveyed to his attorneys, who thereupon moved the court to quash the indictment. As soon as this motion was made Commonwealth's attorney, Robert B. Franklin, moved the court to dismiss the indictment against appellant, and again refer the matter to the grand jury, which was done. No further indictment was ever had against appellant, and the proceedings against him, so far as the Franklin Circuit Court was concerned, ended.

Pending these proceedings in the courts the general assembly passed a joint resolution for the appointment of a committee to examine into the transaction which had taken place between appellant and Senator Harrell. No committee, however, was ever appointed under this resolution, and no further action was ever had in the premises. As a counterstroke against Harrell there was caused to be issued from the police court of the city of Louisville a warrant against Senator Harrell, charging him with obtaining money from appellant under false pretenses. Appellee then went to Louisville, and there, in conjunction with J. T. O'Neal, argued before the court the motion of Harrell to dismiss the warrant against him. This motion was overruled by the court, and Harrell was held over to the grand jury of Jefferson county, which afterwards, upon an examination of the facts, refused to indict him. A motion was then made before the judge of the Jefferson Circuit Court, Criminal Branch, to resubmit the question to another grand jury, which, after elaborate argument, was overruled. This ended the proceedings against Harrell.

The appellant then desired to recover from the trust company the \$4,500 deposited by him, and which was locked in one of its boxes; the trust company declined to turn the money over without a judgment of a court to protect it in so doing; whereupon appellant, through his counsel, filed a formal suit against the trust company, which filed an answer; and after certain formal proceedings had been taken a judgment was rendered in favor of appellant, and the money paid over to him.

Afterwards J. T. O'Neal, appellee and Gen. P. Watt Hardin agreed

among themselves on a fee of \$1,000 each for their services. The fee of Gen. Hardin, for reasons not necessary to be set forth, was, by his consent, reduced to \$750, which was paid him. O'Neal received a check for \$1,000, in full for his services. Afterwards appellant enclosed in a letter to appellee his check for \$863.71. The letter is as follows:

"Mr. Theo F. Hallam,

"Covington, Ky. :

"Friend Theo—I enclose you a check for \$862.71, which is for fees stipulated, \$1,000, less the following cash items, amounting to \$137.29:

January 8, cash.....	\$50 00
January 29, cash.	50 00
February, hotel expenses at Frankfort.....	17 29
February 14, cash	20 00

"I assure you, old pard, that it gives me pleasure to send you this check, and I trust we may outlive the Goebel business, and that you may be able to earn more fees, and they could not be too large to suit me.

"I want you to feel that there is no time, night or day, that I will not be pleased to be called upon by you, and that it will always be a great pleasure for me to serve you in any capacity.

"I would very much like to see you before starting on our trip to Europe, incidentally to learn a little English; for, as you remarked, when you were last here, we have Irish, Dutch and French in our party, and only need one who can speak a little English.

"Kindly return receipt for \$1,000, and always believe me to be your friend.

(Signed) "J. H. WHALLEN."

After appellant returned from the trip to Europe, which is alluded to in the letter, appellee demanded of him the sum of \$9,200, as an additional fee for his services rendered appellant in the criminal proceedings herein recited. Payment of this demand being refused, this action was instituted in the Jefferson Circuit Court to recover it by law. The petition is in four paragraphs. The first sets up a claim for \$1,000 for appellee's services in the matter of the warrant against appellant before Squire G. B. Thompson; the second, a claim for \$5,000 for services rendered in the matter of the indictment pending in the Franklin Circuit Court; the third, a claim for \$3,000 for services in watching appellant's interest in the matter pending in the general assembly, under the resolution passed to investigate him; the fourth, a claim for \$200, being appellant's expense account incidental to the services rendered by him.

Appellant's answer denied his indebtedness to appellee in any sum whatever, and placed in issue the reasonableness of the charges against him, and also pleaded payment in full for all services which had been rendered. A trial of the case resulted in a verdict against appellant for the sum of \$1,000, of which he is now complaining. Appellee's contention is that the \$1,000 he received was for his services in Louisville only; appellant's, that the payment was in full for all services whatever.

The conclusion we have reached as to the reasonableness of appellee's charge against appellant, and the merits of the plea of payment, renders it unnecessary for us to discuss the many technical questions raised by appel-

lant, further than to say that, other than as herein indicated, we perceive no substantial error in the record. Appellee states, at great length, in his evidence that he stayed in Frankfort the whole month of January, watching the interest of appellant, at his instance and request; and he describes in detail his many labors by day and night in the library, examining many books, in order to prepare himself to fully represent his client's interest. But the fact remains that, at most, appellant was charged with a misdemeanor, the punishment of which is fine and imprisonment, and we are unable to perceive why it was necessary for appellee to examine many books, or to remain in Frankfort, to watch the proceedings of the grand jury, or those of the general assembly. Of necessity he could do nothing, as attorney, before the grand jury indicted his client. As well said by the Commonwealth's attorney in his evidence, appellee could not practice law before the grand jury, and, as that body did not return a second indictment against appellant, we are at a loss to find a foundation for any charge on this score, except the service of preparing and entering the motion to quash the indictment. We are equally at a loss to perceive any foundation for the charge for the service alleged to have been rendered in watching the legislature; for, other than the passing of a resolution for the appointment of a committee to investigate the conduct of appellant, nothing was ever done in the matter. It does not appear that anything was done to prevent action on the part of the legislature.

The action to recover the sum of \$4,500 was merely formal, and was required as a matter of caution by the trust company for its protection. Harrell made no claim to this money; on the contrary, his position was that it constituted a proffered bribe, which he had refused; the trust company did not claim it; its holding was that of bailee. Indeed, from the very necessity of the case, no one but appellant could have asserted any claim to it. The formal action by which the money was regained from the trust company, and the proceedings in Frankfort before mentioned, and the argument made in the proceedings against Harrell, constituted the whole service rendered by appellant's counsel in the matter against him. For this, it is admitted, he had paid his counsel, in the aggregate, \$2,750; Gen. Hardin for his services accepted the sum of \$750; J. T. O'Neal received \$1,000, stating in his deposition that, although he had performed the larger share of the work, he felt that he had been most "liberally paid, and was happy;" and appellee has been paid \$1,000.

Appellee introduced no evidence except his own as to the value of his services; on the other hand, appellant introduced seven or eight attorneys, all of whom stand high at the bar, one being an ex-chief justice of this court, none of whom placed a higher value upon all of appellee's services than from \$1,000 to \$1,200, most of them naming a far lower sum.

We do not believe there was any necessity for appellee to remain in Frankfort, either to watch the proceedings of the grand jury or of the legislature; a preponderance of the evidence, as well as the dictates of ordinary judgment, show the inutility of this; besides, there is record evidence in the case showing his admission that he stayed in Frankfort during the month of January on a different matter.

After a careful examination of this record we are constrained to the opin-

ion that the verdict against appellant is palpably against the weight of the evidence, and that the amount received by appellee was ample remuneration for his whole service. For this reason the judgment is reversed for proceedings consistent herewith.

Whole court sitting.

HENDERSON BREWING CO. v. FOLDEN.

(Filed November 13, 1903—Not to be reported.)

1. Variance—Action for damages—Where the allegation of the petition in an action for damages for personal injuries alleged that the injuries were caused by the "negligent construction of said machine, or appliance, and by the negligent arrangement made by defendant for operating same," and the proof tended to show that the machine or appliance had become defective from long use, there was not a material variance between pleading and proof.

2. Practice on appeal—No attempt having been made in the lower court to have the alleged variance corrected and no intimation being made that the defendant was misled thereby, this court will not consider it as a ground for reversal.

3. Motion for new trial—Where the motion for new trial does not contain the ground that the verdict was contrary to the evidence this court can not consider the question as to the evidence.

W. J. Peter and O'Neal & O'Neal for appellant.

James M. Yeaman and Yeaman & Yeaman for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Barker.

The appellant is a corporation engaged in brewing beer in Henderson, Ky., and also operates, in connection with its brewery, an ice plant. The appellee was employed, as he himself describes, as a general roustabout, his business being, generally, to wheel out ashes and cinders, and other like work. On the occasion involved in this litigation he had been ordered by the appellant's superintendent to operate the crane, which lifted the frozen cans containing the ice from the receptacle in which the water was congealed, and by means of this machine to carry the cans to a point called the dump, where the ice was taken from the cans. Each of these cans, when filled with water, weighed about 300 pounds. The means by which the cans were attached to the windlass, or crane, was a hook fastened in holes driven on each side of the can for that purpose.

Appellee had assisted in this work before on several occasions, but had never operated the windlass, or crane, alone prior to the night on which he was hurt. When he came to lift the can, by the falling of which he was hurt, he adjusted the hook, and by means of the windlass lifted the can partly out of the receptacle in which it had been frozen; before it was entirely out the hook slipped, and the can fell back to its place. Appellee readjusted the hook, and then successfully lifted the can from its place, and was propelling it on the road to the dump when the hook again slipped, and the can fell upon his foot, seriously and permanently injuring him.

To recover damages for the injury sustained this action was instituted by

appellee, and upon trial before jury he recovered the sum of \$1,000, of which appellant is now complaining. It is seriously urged that there is a fatal variance between the allegation of the petition and the proof; this variance consists in this: The allegation in the petition sets forth the negligence of the appellant as follows: "The said injury was caused by the negligence of the defendant, and by its negligent construction of said machine, or appliance, and by the negligent arrangement made by defendant for operating same."

The evidence tended to establish the fact that the hooks had been worn smooth by use, and thereby made unsafe for the purpose of lifting the cans.

Appellant insists that there is a variance between the allegation that the construction or arrangement of the machine or appliance was defective and the evidence that it had become defective by long use, it being insisted that the language of the petition means the original construction or arrangement of the machine was defective. It seems to us that this is an overstrained construction of the language used in the petition. We think it fairly means that the construction or arrangement of the machine or appliance for lifting the ice cans was defective at the time appellee was ordered to operate it; but even if this were not true, the variance is not a failure to establish the cause of action in its general scope and meaning, which is contemplated by section 181 of the Code, and held to be a failure of proof, and fatal; and if it be a variance at all, it is such a one as comes within the purview of sections 129 and 180 of the Code, and which are held to be immaterial, and which the court is authorized to amend according to the justice of the case.

The very question urged here arose in the case of *Woodcock v. Farrel*, 1 Met., 437. The sections of the old Code which were discussed in the case cited are identical with sections 129, 130 and 181 of the Civil Code of Practice. The court, after discussing the different kinds of variances, said: "It is by no means clear, as already intimated, that there is any real variance between the fact alleged in the answer and the proof; but conceding that such variance does exist, will it be pretended that it was such as was calculated to mislead the plaintiff in maintaining their action, or in anywise affect or prejudice their substantial rights? Can it be doubted that if the variance now complained of had been suggested at any time during the trial the court below would have corrected the immaterial error by so amending the pleading as to make it conform to the state of facts made out by the evidence? It is the obvious policy and spirit of the Code referred to, and of numerous other similar provisions, that errors of this class should not constitute a ground of reversal here unless an unavailing effort had been made for their correction in the court below. The wisdom of this policy none will question."

There was no suggestion in the court below that appellant had been misled by the variance between the allegation of the petition and the evidence; nor was there any attempt on its part to have the wrong now complained of remedied. If appellant had made it appear to the court that it had been misled by the variance between the allegation of the petition and the evidence, the court would no doubt have ordered the pleading amended so as to conform to the evidence, and if it was necessary to the proper presentation of appellant's defense, have continued the cause for that purpose. In the absence of any complaint below we conclude that appellant was not misled to his prejudice by the variance complained of, if variance it be.

It was the duty of appellant to furnish appellee with reasonably safe appliances with which to do the work at which he had been placed. (Shearman & Redfield on Negligence, section 194.) It was also its duty to, from time to time, inspect these appliances and instrumentalities of service, and by the use of ordinary care and diligence keep them in safe condition. (Idem, section 194a.)

The evidence tends to establish that the particular appliance with which appellee was ordered to do the work had become defective by long use, and was dangerous. There was evidence that this condition of things had been brought to the attention of appellant's foreman, who was the proper person to receive such information and to remedy the defect; that of this defect appellee was at the time ignorant. It is true that all of the witnesses who testified in the case, whether for or against appellee, except himself, deposed that it was unnecessary, in the operation of the crane in question, for appellee to get under the can in such way that, if it fell, it would crush him, and that no reasonably prudent man would so place himself in doing the work in hand as to receive the injury complained of upon the falling of the can; but, as the motion for a new trial does not contain the ground that the verdict was contrary to the evidence, we can not consider that question here.

The instructions of the court fairly and clearly set forth the principles of law which we think govern this case, and perceiving no error in the record, the judgment is affirmed.

McCONATHY, &c. v. LANHAM, &c.

(Filed November 13, 1903.)

Statute of frauds—Extension of written contract by verbal agreement—An option in writing for the sale of an interest in real estate for a period longer than one year, conditioned upon the payment of the stipulated price at a stated date, can not be revived and extended as to the date of payment by an alleged verbal agreement entered into between the parties after the expiration of the time mentioned in the option, after which by its terms it became null and void.

L. H. James and Ollie James for appellees.

Bingham & Davies for appellants.

Appeal from Crittenden Circuit Court.

Opinion of the court by Chief Justice Burnam.

In November, 1899, the appellees, J. T. Lanham, E. L. Lanham and H. C. Truitt, executed and delivered to the appellants, W. J. McConathy and W. E. Burke, the following:

"This contract witnesseth that: Whereas, J. T. Lanham holds a lease of mineral rights in the lands owned by the Page & Krausee Mining and Manufacturing Co., of St. Louis, Mo., lying in Crittenden county, Kentucky; and whereas, he has sold one-fourth undivided interest in said mineral lease to T. J. Carter, and one-fourth interest to E. L. Lanham, and one-fourth interest to H. C. Truitt, now we, the said J. T. Lanham, E. L. Lanham and H. C. Truitt, each bargains and sells to W. J. McConathy and W. E. Burke, both of Louisville, Ky., our undivided rights in said lease for and in consid-

eration of the sum of \$200 each, to be paid on or before the 3d day of December, 1899. It is further agreed that if the consideration herein named is not paid on or before the 31st of December, 1899, this contract of sale shall be null and void.

"This — day of November, 1899, in Marion, Crittenden county, Kentucky.

"J. T. LANHAM,

"E. L. LANHAM,

"H. C. BURKE."

On the 9th of July appellees sued the appellants on this contract, and alleged that while they had a right to cancel the contract because the \$600 was not paid as stipulated on the 31st day of December, 1899, that they had not done so because at the defendants' request that their option should be extended until the following April, they had agreed thereto; and that subsequent to the 31st day of December the defendants, in recognition of their liability under the agreement, had promised to pay the \$600. A general demurrer was sustained to the petition. Appellees then filed an amended petition, in which they allege, in substance, that before the 31st day of December, 1899, at the special instance and request of the defendant, the contract of lease was extended, and they were given sixty days longer to pay the consideration therefor; that the defendants thereafter took possession of the leased property and operated a mine thereon. The defendants demurred to the petition as amended, which was overruled. They then filed an answer, in which they plead that the writing sued on was a mere option, which became void under its express terms by failure on their part to pay the contract price of \$600 on or before the 31st of December, 1899. They also deny that either before or after the 31st day of December, 1899, they made a new verbal contract with the plaintiff by which they agreed that the written option should be extended, and that they should have sixty days from the 31st of December to pay the contract price; or that they had ever taken possession of the premises under either contract, or operated a mine thereon. A trial before a jury resulted in a verdict for the \$600 sued for.

Upon this appeal appellants ask a reversal on two grounds: First, because the court erred in overruling their demurrer to the petition as amended; and second, because the circuit judge refused upon their motion to direct the jury to find a verdict in their favor. The contract expressly stipulates that if the \$600 is not paid on or before the 31st day of December, 1899, that it should thereafter be null and void. It seems clear that after the 31st of December, 1899, appellants could not have required the appellees to have accepted a tender of the \$600 for the reason that their right to do so under the contract had terminated. We think there can be no doubt that the writing is a mere option which the appellants could have accepted at any time before the 31st day of December by the payment of the \$600, but that by their failure to comply with this requirement the option terminated. In *Lentz v. Gossling*, 14 Ky. Law Rep., 91, the writing was very similar to that in this case, and it was adjudged to be a mere option, and specific performance was refused. In *Stembridge v. Stembridge's Adm'r*, 87 Ky., 91, it was held that "where A. agrees to convey to B. upon condition that B. exercises his option to do a particular thing at a specified time, but the contract imposes no obligation

upon B. to do the specified thing, no interest passed to B. unless he complied with his agreement."

The question then arises whether the alleged parol agreement by which appellants were given sixty days from the 31st of December, 1899, to pay for and take possession of the leased property constitutes an enforceable obligation. Appellees claim that as the original option was in writing, the subsequent verbal agreement substituting a different day for the payment of the consideration continued the writing in force, or, in other words, it was competent for the parties to a contract required by statute to be in writing to modify and change its terms of payment by a subsequent verbal agreement of the parties thereto; and that the effect of such agreement was to continue in force such contract.

While the question is not free from difficulty, we think the great weight of authority is to the effect that a written contract within the statute of frauds can not be modified by a subsequent agreement between the parties unless such new agreement is also in writing. *Emerson v. Slater*, 29 Howard 28; *Swain v. Seamens*, 2 Wallace, 254; *Chitty on Contracts*, 11 American Edition, 154; *Bishop on Contracts*, 771; *Fry on Specific Performance*, 3d American Edition, 777.) But the contention of appellees in this case goes farther than the mere changing of a written contract by a subsequent verbal agreement. If we understand correctly their contention, it is that a contract which the statute requires to be in writing, and which by its terms expires on a particular day, was kept alive and extended by a verbal agreement of the parties thereto postponing the time for the payment of the consideration. Subsection 6 of section 470 of the Kentucky Statutes provides "that no action shall be brought to charge any person upon any contract for the sale of real estate, or any lease thereof, for a longer term than one year" unless in writing. As the option of 1899 was for the sale of an interest in real estate, and was for a longer period than one year, it was necessary that it should be in writing to bind the parties thereto. That contract died on the 31st of December by the failure of appellant to perform its conditions. The alleged verbal agreement subsequently entered into between the parties was also for the sale and purchase of an interest in real estate, and was also for a longer period than one year. In our opinion the statute requires that this contract also should have been in writing before it could be made the basis of a claim against the appellants, and the trial court erred in overruling appellants' demurrer to the amended petition, and also erred in refusing appellants' motion to give to the jury a peremptory instruction to find in their favor on this ground.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

CENTRAL COAL AND IRON CO. v. BAILEY'S ADM'R.

Filed November 17, 1903—Not to be reported.)

Master and servant—Negligence—The relation of master and servant did not exist between one who had contracted with another to do certain work and an employe of the contractor; and he is not liable for the death of the employe resulting from a defect in a rope furnished by him to the contractor which became defective after the contractor began to use it.

H. P. Taylor and R. Y. Thomas for appellant.

W. L. Reeves for appellee.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Barker.

There were two men instantly killed in the accident involved in this case, the appellee's decedent, Allen Bailey, and Daniel Grider. Grider's administrator instituted an action and recovered a judgment against the Central Coal and Iron Co., which, upon appeal, was reversed by this court in an opinion to be found in 25 Ky. Law Rep., 165. The question in that case, as in this, was whether or not the relation of master and servant existed between the decedent and appellant, or whether Foley & Nunan, who were digging the shaft in which the accident occurred, were independent contractors. Upon that question this court said: "The court concludes that the relation of master and servant did not exist between appellant and Foley & Nunan, or between it and the intestate, and that it was not under a duty to look after the rope and keep it in a reasonably safe condition. If any one was guilty of actionable negligence, Foley & Nunan were in using the rope after it got in an unsafe condition. Suppose a pick and shovel which appellant had furnished them had become unsafe for use after they had commenced using it, and in consequence thereof, one of their employes had been injured, would the appellant have been responsible therefor? We think not. Neither is it any more responsible in the case at bar than it would have been in the supposed case. The undisputed facts show that negligent act (if such there was) did not consist in furnishing an insufficient or defective rope, but in allowing it to become so by those to whom it was furnished, the intestate's employers, between whom the relation of master and servant existed. Without passing upon the question (it not being before us) as to whether or not the appellant would have been responsible had it furnished a defective rope and the intestate had been killed in consequence thereof, it is sufficient to say that, as there was no evidence to show that it was defective when it was delivered to Foley & Nunan; and further, as the relation of master and servant did not exist between appellant and intestate, no duty rested on it to see that the rope continued safe for use in the shaft, the court should have given the jury peremptory instructions to find for the appellant."

This is conclusive of the case at bar. Wherefore, the judgment is reversed for proceedings consistent with this opinion.

HOLCOMB v. BLAIR.

(Filed November 17, 1903—Not to be reported.)

Waters—Encroachment upon lands—Obstruction—The owner of lands binding upon a navigable stream, which have been slowly and imperceptibly encroached upon by the stream, has no right to obstruct the channel by constructing a stone wall therein where the bank originally stood, resulting in injury to the property of others located further up the stream.

D. D. Fields for appellant.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Hobson.

Appellant Holcomb is the owner of a mill and dam across the north fork of the Kentucky river in Letcher county, erected about thirty years ago by appellee, S. H. Blair, and another, who sold the property to appellant's vendor. Appellant has been in possession of the property something over fifteen years. Appellee Blair owns a tract of land on the north side of the river just below the dam, and just opposite his land Pert creek runs into the river. The sediment from Pert creek in the channel of the river has gradually thrown the river over against the north bank of the stream, and has caused the bank to wash away. To protect his bank appellee built out in the river a rock wall running from the bank in a semicircular shape and extending out perhaps to the middle of the present channel. As the sediment from Pert creek washed into the space between this dam and the mouth of the creek opposite, filling it up, insufficient room was left for the water, and by reason of this the water was backed up on the water wheel of appellant's mill just above, seriously impairing its efficiency. He thereupon filed this suit to compel appellee to take his dam out of the channel of the river. The proof for him tended to show that the dam extended out more than half way of the stream, and considerably beyond the point where the north bank of the river stood when appellee sold the mill. On the other hand, the proof for appellee tended to show that his dam extended out into the stream no further than the original location of the bank at the time of the sale of the mill. The circuit court dismissed appellant's petition, and he appeals.

The proof leaves no doubt that the dam obstructs the flow of water down the river, and backs it up on appellant's wheel. It also leaves no doubt that the only justification claimed by appellee for putting the dam in the river is that the bank originally stood where the dam is placed, and has been washed away by the gradual pressing of the river over against it by the rocks, sand and gravel washed down on the opposite side of the stream by Pert creek. The weight of the evidence would perhaps show that the dam extends out further in the stream than where the bank stood when appellee sold the mill. But this is immaterial, for under any view of the evidence the dam is an unlawful obstruction of the stream, and must come down. No rule is better settled than that if a stream slowly and imperceptibly changes its course, the accretion on the gaining side belongs to the proprietor on that side, and the land gradually encroached upon by a navigable stream ceases to belong to the former owner as the channel of the stream shifts and covers it. (Gould on Waters, sections 155-159.) The rule is otherwise if the change is violent, and arising from a known, sudden cause, like a freshet. (Sweatman v. Holbrook, 18 Ky. Law Rep., 870.) But in the case before us the change has been so slow that there is great diversity in the testimony as to its extent, some witnesses saying that there has been no change at all, or but little. And while we are satisfied there has been some change, still it is of that gradual kind constantly occurring at such points on streams and under which the thread of the stream in law follows the center of the channel as it changes. (Hunter, &c. v. Witt, 21 Ky. Law Rep., 35; Cruikshanks v. Wilmer, 98 Ky., 19.) The appellee may build a stone wall along his bank to keep the water from washing under it, but he can not encroach upon the channel of the stream, or place any obstruction in it.

Judgment reversed and cause remanded for a judgment as prayed in the petition.

EWELL, &c. v. TYE.

(Filed November 17, 1903—Not to be reported.)

1. Practice—Verification of pleading—Making up issue—Where the plaintiff in an action for the allotment of dower had not verified her petition and the defendants had entered a motion to require her to do so, they were not required to plead to it and make up the issues until it was verified or until their motion was overruled.

2. When action stands for trial—The widow of a decedent having instituted an action against several persons for the purpose of having dower allotted to her out of lands claimed by them, and one of them having died, the action did not stand for trial as to the others until it was revived against the representatives of the one deceased or abated as to them.

3. Dower—Under section 2139 of the Kentucky Statutes, in allotting dower to the widow in lands held and aliened by the husband during coverture the allotment should be made with reference to the value at the time of alienation.

R. L. Ewell for appellant.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Hobson.

Appellee, Sarah F. Tye, married P. N. Tye in the year 1860, and was his wife until his death on November 11, 1896. During the coverture he owned the land in contest, lying in Laurel county, and on May 5, 1897, she filed this suit for the allotment of dower to her therein, making Robert S. Hood, R. L. Ewell and J. D. Smith defendants. She alleged in her petition that she did not know how the defendants came in possession of the land, or under what claim they held, or how much each of them held, or whether they were holding jointly, except she understood that the defendant, Hood, purchased some part of the land from Ewell and Smith. She called upon them to show what part of the land each of them held. Hood filed an answer on February 8, 1898, traversing the allegations of the petition. He also pleaded that on March 9, 1874, the land was sold under an execution against P. N. Tye and purchased by E. J. Freeman, who received a sheriff's deed therefor on October 7, 1886, and took possession of the land, Tye failing to redeem it; that after this Freeman sold the land to Ewell and Smith, who sold it (with some other land belonging to Ewell) to him. Ewell and Smith entered a motion to have their names stricken from the action, and in support of this motion filed the affidavit of Ewell, stating that Ewell and Smith neither held, claimed nor were in the possession of the land in controversy. A few days later, and before the motion was acted on, the defendants, by leave of court, withdrew the answer of Hood and the affidavit of Ewell, and entered a motion that the plaintiff verify her petition. In support of this motion the affidavit of Ewell and Smith was filed. No further steps were taken in the action until January 23, 1900, when the plaintiff gave her deposition. On February 4, 1902, an order was made as follows: "Submitted." On February 7, this order was made: "This cause is submitted on exceptions to

depositions." But on February 18 affidavits were filed on the exceptions, and on the same day a judgment was entered in favor of the plaintiff, adjudging her dower in the land and appointing commissioners to lay it off. On February 20 the defendants, Hood and Ewell, filed their affidavits and moved the court to set aside the judgment and allow them to prepare their defense. In the affidavit of Ewell it was shown that the defendant, Smith, died on December 17, 1900, and that there had been no revivor against his representatives or abatement of the action as to them; that no steps had been taken in the action since February, 1898, and in both the affidavits it was shown that the place lay waste for a number of years before Hood took possession, the buildings and fences rotting down and the land growing up in thickets, and that Hood had put lasting and valuable improvements on the land, greatly enhancing its value. The court overruled the motion to set aside the judgment, and the defendants appeal.

The plaintiff had not verified her petition, and until she did so, or the motion of the defendant was overruled requiring her to verify it, they were not required to plead to it and make up the issue. Smith was a defendant to the action, and when he died the action did not stand for trial as to the other defendants until it was revived against his representatives or abated as to them. There is no order in the record overruling the exceptions to the deposition of Mrs. Tye, or acting on them.

On the whole record it seems clear that the defendants were caught unprepared, and that the condition of the record did not warrant a submission. The affidavits are sufficient to show that notice was served on the defendants of the taking of Mrs. Tye's deposition, and we conclude from an inspection of the whole deposition, including the officer's certificate, that it was concluded on January 25, 1900. The exceptions to the deposition are not, therefore, well taken and should be overruled, but the defendants should have leave to cross-examine the witness if they desire to do so. On the return of the case the circuit court will rule on the motion for the plaintiff to verify her petition, and after the action is revived or abated as to Smith's representatives will allow the defendants to file their answer, and after the issues are made up to take their proof. Section 2183, Kentucky Statutes, provides: "Whether the recovery is against the heir or devisee or purchaser from the husband, the wife shall be endowed according to the value of the estate when received by the heir, devisee or purchaser, so as not to include in the estimated value any permanent improvements he has made on the land; against the heir or his devisee or his alienee her claim for rent shall not exceed five years before action, and against a purchaser from the husband shall only be from the commencement of the action, and in either case it shall continue up to final recovery."

In *Pepper v. Thomas*, 85 Ky., 546, construing the statute, the court said: "The master was directed to ascertain the then value of the land, when it should have been its value at the time of the sale to Lee. The value of any permanent improvements which the purchaser or his vendee may have made can not be taken into estimate. The land must be considered in the same condition as it was in when it was alienated by the husband and without amelioration or deterioration arising from the acts of the purchaser."

On the return of the case the deed from Crawford and wife to P. M. Tye should be filed.

Judgment reversed and cause remanded for further proceedings consistent herewith.

MURRAY, &c. v. RODMAN.

Filed November 17, 1908—Not to be reported.)

Construction of will—Title to real estate—Where the testator devised to one of his daughters certain interests in his "entire estate, real and personal," in trust for the use of two other daughters, and in the event of their death for the use of their surviving children, a devise of testator's homestead to the three daughters did not vest in the trustee the fee-simple title, with power to sell and convey same in the absence of express authority to do so, and such property could be sold only by a judgment of court in the manner indicated by the Civil Code, section 489.

T. H. Crockett and W. L. Jett for appellants.

T. L. Edelen for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was brought by the appellees for a construction of so much of the will of Thomas Rodman, deceased, as affects the title to the residence occupied by him at the corner of Second and Steele streets in South Frankfort. It will be necessary for us to consider the fourth, sixth, ninth and tenth clauses of the will of decedent, which reads as follows:

"4th. I devise to my daughter, Lizzie Rodman, in trust for the sole use and benefit of my daughter, Johanna Murray, free from the debts and control of her husband, one-seventh of my entire estate, real and personal. * * * The property herein devised shall be held by Lizzie Rodman in trust for the use and benefit of the surviving children of Johanna Murray. The trustee in her discretion can invest this interest in real estate, to be held in the same manner.

"6th. I devise to Lizzie Rodman, in trust for the sole use and benefit of my daughter, Sue Mallory, free from the debts and control of her husband, one-seventh of my entire estate, real and personal. * * * In the event of the death of my daughter, Sue Mallory, the property herein devised to Lizzie Rodman in trust for said Sue shall be held by, and I hereby devise it to, Lizzie Rodman in trust for the use and benefit of the surviving children of the said Sue Mallory. The trustee is hereby authorized to invest, in her discretion, this interest in real or personal estate, or to pay a proportion of it in her discretion to Harry Mallory, the husband of my daughter, Sue, to establish him in business.

"9th. I direct that my house and lot on which I reside, and all the household and kitchen furniture therein, shall be taken by my daughters, Lizzie, Johanna and Sue, at the price of \$3,500, for which they will be charged each \$1,166 66 in the settlement of my estate, my desire being to retain in my family my homestead. If they can not hold the homestead and furniture together,

then they can make such arrangements as will suit themselves as to which of them will keep the same or part thereof.

"10th. I desire that Lizzie Rodman, as trustee aforesaid, shall invest the trust funds as they shall come into her hands as her best judgment indicates, and pay the interest to the beneficiaries. If in her judgment it seems best to use any of the principal, she can do so, but it must not be used without her best judgment demands it."

It appears from the petition and evidence in the case that Mrs. Murray lives in California, Mrs. Mallory in Washington, D. C., and Miss Lizzie Rodman has ceased to be a resident of Kentucky. It is also shown that the interest of Mrs. Murray, Mrs. Mallory and Miss Lizzie Rodman alike require that the home place should be sold, as the taxes and cost of repairs and insurance leave little, if any, income from the property, and the real question which we are asked to determine is whether Miss Lizzie Rodman, by the sections of her father's will quoted supra, was vested with the fee-simple title to the residence, with full power to sell and convey it. Neither of the sections of the will expressly confer upon her the power to sell and convey the real estate devised to Mrs. Murray and Mrs. Mallory during their lives, and at their death to their children. And in the absence of express testamentary authority such power will not be inferred. This court has often held that the power to decree the sale of the land of an infant was purely statutory, and could only be exercised in the manner pointed out by the statute; and that it must be sold at public outcry to the highest and best bidder, on such terms as the chancellor might decree. (*Walker v. Smyser*, 80 Ky., 620; *Henning v. Harrison*, 76 Ky., 728; *Kinsloe v. Grove*, 98 Ky., 66; *Clark v. Stanhope*.) We are, therefore, of the opinion that Miss Rodman has no power to sell and convey the title to the residence devised to herself and sisters, but that this can only be done under the judgment of the court in the manner pointed out by subsection 5 of section 499 of the Civil Code.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

C. E. BURGE v. B. W. BURGE'S ADM'R.

E. H. BURGE v. J. O. BURGE, &c.

C. E. BURGE v. POTTER, ADM'R., USE, &c.

(Filed November 17, 1903—Not to be reported.)

1. Gift inter vivos—Decedents' estates—Although it abundantly appeared that it was the intention of an intestate that a note executed to him by his son should not be paid, there was no gift inter vivos on account of his failure to deliver the note to his son; and the administrator was entitled to maintain an action for the recovery thereof.

2. Parties to action—The administrator of the intestate could maintain an action on the note for the use of the intestate's widow on the idea that there was no personal property from which she should receive the articles allowed to her by statute and no other money to be used for that purpose, the cause of action being in him although she was entitled to have the money adjudged to her finally.

3. Decedents' estates—Gift inter vivos—Where an intestate during his life—

time deposited a sum of money with another and took a certificate therefor payable to his son, there was a valid gift *inter vivos* and the money was held in trust for the son and did not pass to the intestate's administrator; hence the widow of the intestate was not entitled to subject it to her claim for articles allowed by statute out of the estate.

4. Same—The son of an intestate is not indebted to the estate for debts which his father paid out for him without his consent or request.

W. B. Gaines for appellant, C. E. Burge.

W. E. Garth and W. G. Chapman for appellant, F. H. Burge.

Edward W. Hines and Wright & McElroy for appellee, H. H. Burge.

Appeals from Warren Circuit Court.

Opinion of the court by Judge Paynter.

Two questions are discussed by counsel on these appeals. One is, should the judgment be affirmed on the appeal of C. E. Burge, the court having rendered judgment against him for \$330? The other is, should the judgment be affirmed giving H. H. Burge \$300 of the sum in the hands of J. E. Potter?

C. E. Burge is a son of the intestate, B. W. Burge. C. E. Burge executed to him his note for \$330. Subsequently the father endorsed upon the note that it was not to draw interest. The evidence abundantly shows that the father said the note was not to be paid, and during his last illness he had an endorsement made upon a memorandum book that it was not to be paid. The evidence makes it perfectly clear that the father never intended his son should pay the note. There never was a delivery of the note to the son, hence there was no gift of it *inter vivos*. J. E. Potter qualified as the personal representative of the estate of the intestate, and brought suit on the note for the use of the widow, E. H. Burge. The judgment was so entered upon the note. It is urged that as the widow was not made a plaintiff in the action, the judgment could not be recovered. The recovery was sought by the personal representative for her use upon the idea that there was no personal property out of which to give the widow certain articles of property which section 1403 of the statutes secure to her, and that there was no other money or choses in action which could be used for that purpose, unless it was \$300 placed in the hands of J. E. Potter, which the decedent intended for H. H. Burge. To sustain the contention of the appellant, C. E. Burge, *Carrigus v. Blakey*, 7 Ky. Law Rep., 678, is cited. In that case the party who brought the suit had no interest in the debt sought to be recovered, and the court held that as he had no interest in it himself, and as the party for whose use the suit was brought was not a party to the action, the action could not be maintained. In this case the note went into Potter's hands as personal representative and the cause of action was in him, notwithstanding the widow may have been entitled to have the money finally adjudged to her.

The appellant, E. H. Burge, married B. W. Burge March 12, 1895. She remained his wife until his death, which occurred in September, 1896. On January 29, 1894, B. W. Burge deposited \$1,100 with J. E. Potter, for which he gave him a certificate payable on demand. On November 12, 1894, the intestate surrendered that certificate and received \$500, and Potter gave him a certificate for the remaining \$600. On May 12, 1895, the intestate surrendered to Potter the \$600 certificate, and in lieu thereof took a certificate from Pot-

ter, in which it was recited he received of H. H. Burge \$300. Thus the matter stood until a few days before the death of the intestate, when he realized that he could not recover, and desiring the expenses of his last illness and funeral expenses, etc., should be paid, he delivered to Potter the certificate and directed him to use \$300 of it for that purpose, and to pay the remaining \$300 to his son, H. H. Burge.

Unquestionably, under the authorities, if H. H. Burge did not acquire the right to the debt evidenced by Potter's certificate payable to his order. Potter became trustee to hold the \$300 for him. It is claimed on behalf of the widow that this \$300 should be paid to her, because there was no money with which to pay the amount due her by reason of the fact there was no property out of which to assign her the articles to which she was entitled under the law as exempt from sale and distribution. The intestate gave the \$300 in question to H. H. Burge. It was a valid gift *inter vivos*, because it was delivered to Potter for him. The intestate having given away the \$300 in his lifetime, it did not go into Potter's hands as an asset of the estate. The widow seeks to avoid the gift upon the ground that she was prejudiced thereby. She fails to aver that the gift was made with a view of committing a fraud against her rights, or that it had that effect. The question discussed was not raised by the averments in Mrs. Burge's pleadings.

We are of the opinion that H. H. Burge was not indebted to the estate for debts which his father paid for him at Trenton, because they were paid without his consent or request.

The judgment is affirmed on all the appeals.

TRAYNOR v. BECKHAM, GOVERNOR.

(Filed November 17, 1903—Not to be reported.)

Appeal from Franklin Circuit Court.

The court delivered the following response to petition for rehearing:

From the conclusion of the court in *Daugherty, Judge v. Arnold*, 22 Ky. Law Rep., 1504, the governor has the authority to fill vacancies in the office of justice of the peace by appointment.

TURNER v. COMMONWEALTH.

(Filed November 17, 1903—Not to be reported)

1. Appeal—What not subject to exception—The decision of the trial court on a motion for a new trial, based upon the grounds that the jury received evidence out of court other than that resulting from a view of the premises, that the verdict was decided by lot, and that important facts material to the defense had been discovered since the verdict and could be proved, was not subject to exception and can not be considered upon appeal. (Criminal Code, section 231.)

2. Appeal—Grounds for reversal—The Court of Appeals has no power to reverse a judgment of conviction in a criminal case upon the sole ground that the verdict was against the weight of the testimony, being restricted to

the inquiry as to whether there was any evidence before the jury conducting to show the guilt of the accused.

3. Same—Alleged misconduct of a witness when on the stand is not ground for reversing a judgment of conviction in a criminal case, where no objection was made thereto at the time.

Colson & Herd and M. H. Rhorer for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Chris. Turner, and his brother, Pres. Turner, were charged by the grand jury of Bell county with the murder of William Mills. Upon motion of the defendant he was granted a separate trial, which resulted in a verdict and judgment convicting him of the offense of voluntary manslaughter, and fixing his punishment at confinement in the State penitentiary for a period of twenty-one years. He asked a new trial upon the following grounds:

1st. That the jury received evidence out of court other than that resulting from a view as provided by the Code.

2d. That the verdict was decided by lot, or in another manner than by a fair expression by the jurors.

3d. That the court misinstructed or refused to instruct the jury.

4th. That the verdict was against and contrary to the law and evidence in the case.

5th. That he had discovered since the verdict that he could prove important facts, material to his defense, by Ed. Shipman and Samuel Bryan, which he did not know and could not have discovered by the exercise of ordinary care and diligence before the trial.

6th. That the mother of deceased was permitted whilst deposing to the dying declaration of deceased to indulge in crying, moaning, and giving other evidence of her grief, which improperly influenced the minds of the jury.

The decision of the trial court upon the first, second and fifth grounds relied on in the motion for a new trial are not under section 281 of the Criminal Code subject to exception, and can not for that reason be considered by this court upon this appeal. The instruction given in the case have often been approved by this court in similar cases, and fully and fairly cover all the law applicable to the facts. And this court has often held that it has no power to reverse a judgment of conviction in a criminal case upon the sole ground that the verdict was against the weight of the testimony in the case; but were to restrict the inquiry as to whether there was any evidence before the jury conducting to show the guilt of the accused. (Section 240 of the Criminal Code and authorities there cited.) The record fails to show that any objection was made by the defendant to the alleged misconduct of the mother of deceased when testifying before the jury, and, therefore, that question is not properly before us.

After a careful reading of the record we have been unable to discover any error of law which would justify a reversal.

Judgment affirmed.

MUTUAL LIFE INSURANCE CO. OF KY. v. O'NEIL, &c.

(Filed November 17, 1908.)

1. Witnesses—Transaction with dead person—Under section 606 of the Civil Code the insured is not a competent witness to testify for himself as to a transaction with reference to a policy of life insurance had with one who was dead at the time the testimony was offered to be given and who was the agent of the insurance company at the time of the transaction.

2. Life insurance—Paid-up policy—Laches—Where the provisions of a life insurance policy gave to the insured the right to demand a paid-up policy for the equitable value of the original policy within thirty days after a forfeiture for the nonpayment of premiums, the failure of the insured to make demand for the paid-up policy within five years was such laches as to defeat his right thereto.

3. Same—Evidence of demand—The fact that the original policy was found among the personal papers of an agent of the insurance company after his death and six years after he had ceased to be an agent for the company does not prove a demand by the insured through the agent for the paid-up policy; nor are the mere statements of the insured that he made demand for the policy without giving the date sufficient to show a demand within the required period.

Proctor K. McElroy, Henry W. Price and John J. McHenry for appellant.

C. S. Hill for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hobson.

On April 27, 1870, the Southern Mutual Life Insurance Co. of Kentucky, appellant's predecessor, issued to Francis M. O'Neil a policy insuring his life in the sum of \$2,500 for the benefit of his wife, Catherine E. O'Neil, and his children, payable at his death, in consideration of semiannual premiums of \$27.89, to be paid on the 23d of April and October, in every year during the continuance of the policy, which contained, among others, the following condition: "In case the said assured shall not pay the said semiannual premiums on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable for the payment of the sum insured, or any part thereof, and this policy shall cease and determine: Provided, That if this policy shall become null and void by reason of the violation of any of the foregoing conditions, all payments made hereon shall be forfeited to said company; but if three or more full years' premiums shall have been paid hereon, a new and paid-up policy will be issued by said company, upon demand thereof, within thirty days after the said forfeiture, for the equitable value of the original policy."

O'Neil paid the semiannual premiums as they fell due until October 23, 1883, but was unable to pay the semiannual premium then due, and executed therefor to the company his note, due in four months, which contained this stipulation: "In consideration hereof, the policy is extended until default is made in the payment of this note, when all rights and benefits secured thereby shall cease and determine without notice, and this note shall be void; but if this note shall be paid at its maturity, then the said policy shall continue in force with like effect as if the said premium were this day paid.

The receipt of this date given by said company is subject to the provisions of this note."

O'Neil failed to pay the note and the records of the company show that the policy was terminated on February 26, 1884, by reason of its nonpayment. This is shown on the cancellation blotter of the company, giving the date when it was cancelled and the reason for it. The record also shows that notice of what had been done was sent to O'Neil on June 25, 1884. On August 22, 1901, O'Neil and wife filed this suit against the company for a paid-up policy for the equitable value of the original policy at the time of default in the payment of premiums. He testified that he received no notice of the cancellation of the policy and that as soon as he found that he could not pay the note, and about the time the note fell due, he delivered his policy to T. L. Chaplin, the agent of the company at Lebanon, where he resided, and demanded a paid-up policy; that he did not get a paid-up policy; that he asked Mr. Chaplin about it once or twice; that Chaplin said he would send it in to get a paid-up policy. After Chaplin's death, which occurred in 1892, the policy was found among Chaplin's papers and was then returned to O'Neil. Chaplin ceased to be agent for the company in the year 1886. He was the agent of the company at Lebanon to solicit life insurance between June, 1883, and January, 1886. He had no other power or authority except to take applications for life insurance. The application for the policy, which was made in 1870, was taken by T. W. Blandford, who was then the agent at Lebanon.

The defendant filed written exceptions to the testimony of O'Neil in so far as he stated what occurred between him and Chaplin, on the ground that Chaplin being dead O'Neil could not testify for himself as to these matters. The court overruled the exceptions. The propriety of this ruling is the first question to be determined.

F. M. O'Neil was a party to the contract and one of the plaintiffs in the action. He was, therefore, testifying for himself. Chaplin, the person with whom the transaction occurred, died in the year 1892. By section 606 of the Civil Code no person can testify for himself as to a transaction with one who is dead, and it has been held that the same reason which excludes the testimony of a party testifying for himself concerning a transaction with a principal who is dead, when the testimony is offered to be given, applies equally where the transaction was with an agent who is dead. (*Harpending v. Daniel*, 80 Ky., 449; *Tarr v. Kimbrough*, 17 Ky. Law Rep., 1284; *Breckinridge v. McRoberts*, 20 Ky. Law Rep., 699; *Knight v. Wilson*, 22 Ky. Law Rep., 545.) The court, therefore, erred in overruling the defendant's exceptions to this much of the testimony of O'Neil.

It remains, therefore, to determine whether without this evidence there is sufficient testimony in the case to sustain a judgment. The fact that six years after Chaplin ceased to be agent for the company the policy was found among his papers at Lebanon and returned to O'Neil proves nothing against the company. In answer to the question whether at any time he demanded of the defendant a paid-up policy, O'Neil states in his deposition that he wrote the company to grant him a paid up policy, but he does not say when this was. He also says in another place that after the death of Chaplin he wrote to the defendant, demanding a paid-up policy, and the company an-

swered that the policy had not been presented in time, and that just before he instituted the suit he again made this demand, and was again refused. The proof for the company shows that it kept a record of its correspondence, and the only demand shown by this record was made in June, 1901.

The policy itself provides that a paid-up policy will be issued upon demand thereof within thirty days after the forfeiture. This court has in a number of cases held that time is not of the essence of the contract in such cases, and that a paid-up policy may be had if demanded within a reasonable time after the default, although not demanded within the time fixed by the contract; and it has laid down the rule that five years is a reasonable time for making the demand. (*Mutual Life Insurance Co. v. Jarboe*, 102 Ky., 80; *Manhattan Life Insurance Co. v. Patterson*, 22 Ky. Law Rep., 1282; *Washington Life Insurance Co. v. Miles*, 23 Ky. Law Rep., 1705; *New York Life Insurance Co. v. Warren Deposit Bank*, 25 Ky. Law Rep., 325.) In the last case it was held that the failure to make a demand within five years defeated the right to a paid-up policy where the company simply remained silent without attempting to collect the note.

In this case the defendant took no steps to collect the note and did nothing to waive its right to insist upon the forfeit. Outside of the testimony of O'Neil as to what took place between him and Chaplin, which can not be considered, there is nothing to show a demand on the company for a paid-up policy within five years after the forfeiture occurred. The only time fixed by O'Neil as that at which he wrote to them making this demand is after the death of Chaplin, which was in 1892, or more than seven years after the default. No explanation is given of the long delay after Chaplin ceased to be agent in 1886, or even after his death in 1892, to file this suit. It is a cardinal principle of equity to refuse relief to those who have unreasonably slept on their rights. The suit was not filed for something like seventeen years after the right accrued to demand a paid-up policy, and under the rule heretofore laid down there can be no recovery.

The insured had an option to stand upon his original policy and his rights thereunder or to take a paid-up policy for the equitable value of his original policy. The provisions of the contract as to a paid-up policy are not self-executing. He was to demand the paid-up policy in thirty days after default in the payment of premiums if he wanted it. Although the court refuses to enforce strictly the limit as to time and allows a demand within a reasonable time, still it must follow from the contract on well-settled legal principles that if no demand is made within the proper time for a paid-up policy the right thereto will be deemed waived, for the policy expressly provides that on default in the payment of premiums it shall cease and determine, and unless something is done to arrest the operation of this provision the policy is no longer in force. The insurance company must have some basis for carrying on its business with the living and settling the claims of the dead; and as in other cases of failure to make an election, it must be presumed, after a reasonable time, that the insured did not elect to exercise his option to surrender his original policy and take a paid-up policy for its equitable value.

Judgment reversed and cause remanded for a judgment as herein indicated. Whole court sitting.

Judges Paynter and Nunn dissenting.

JOHNSON v. COMMONWEALTH.

(Filed November 17, 1908—Not to be reported.)

Reward for arrest of fugitive—Certification of claim—One who arrests a person for whose arrest and delivery in a certain jail the governor has offered a reward and who receives from the jailer a receipt for the prisoner is entitled to a certificate of the circuit court to his claim upon the presentation of the jailer's receipt; and the fact that other persons, conceiving that the arrest was not properly made, made a futile attempt to take the prisoner from him and accompanied him to the jail with the prisoner, does not affect his right to the certificate.

P. F. Stillings and W. R. Ramsey for appellant.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Barker.

The governor of the Commonwealth of Kentucky issued a proclamation offering a reward of \$250 for the arrest and imprisonment, in the Laurel county jail, of Joe Harp, Jr., under the provisions of section 1982 of the Kentucky Statutes. In order to obtain this reward appellant, E. H. Johnson, organized a party, and, as he alleges, arrested Harp, placed him upon the train, and were on their way to the Laurel county jail. While on the train Fred Blakely, in company with one George Thompson, conceiving that Harp was not really under arrest, although in company with Johnson and his party, undertook to capture him, and take him from the possession of Johnson. This was resisted by Johnson's party, and, as a result, all remained together, and conducted Harp to the Laurel county jail, where he was surrendered to the jailer, and imprisoned.

The jailer delivered the receipt for the prisoner to appellant, whereupon he went before the judge of the circuit court of Laurel county, and moved that he certify the receipt issued by the jailer, as by law required, in order that he might obtain the reward. Fred Blakely was also a party to this motion, and contended that the court ought to give him the certificate. After hearing all the evidence on the merits of their respective claims, the court refused to give a certificate to either party, and dismissed the proceedings, requiring each party to pay his own cost. Of this judgment appellant is now complaining.

Section 844 of the Kentucky Statutes is as follows: "The reward offered by the governor, not exceeding \$500, for the apprehension and delivery into the custody of the officer named in the proclamation of a fugitive from the justice of this Commonwealth, to be paid upon the production of the officer's receipt for the fugitive, approved and certified by the circuit judge of the county of his residence."

The evidence in this case shows that appellant Johnson arrested the fugitive, and delivered him to the jailer. There seems to be no evidence of collusion, or fraud, in the matter; and the futile effort of Blakely and Thompson to take the prisoner from the possession of appellant in nowise militates against his right to the certificate of the court upon the presentation of the receipt of the jailer for the prisoner. Blakely seems to have acquiesced in the opinion of the court as to the merits of his claim for the

reward, as he is not here on appeal. As the auditor of public accounts was not a party to this proceeding he is not concluded by this judgment.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

BRAND v. BRAND, &c.

(Filed November 18, 1908.)

1. Nonresidents—Jurisdiction of courts—The circuit court has jurisdiction to subject, by attachment proceedings and constructive service of process, the property of a nonresident located within this State to the satisfaction of claims against him.

2. Same—Where the nonresident failed to stand on his special demurrer, which he had filed on the ground of want of jurisdiction, but plead to the merits of the controversy, the jurisdiction of the court necessarily attached.

3. Conflict of laws—Effect of judgment of court of another State—It being the rule in New York that a judgment rendered upon the plea of the statute of limitation in one jurisdiction does not bar another jurisdiction having a different statute of limitation, a judgment entered by a court of New York in an action on a note by one to whom it had been assigned merely for the purpose of collection, based upon the statute of limitation, is not a bar to an action on the same note by the payee in this State, which has a different statute of limitation.

Geo. L. Edwards and Morton, Webb & Wilson for appellant.

Breckinridge & Shelby and H. A. Herold for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Virginia Brand, brought this suit against the appellees, in the Fayette Circuit Court, to collect the following promissory note:

"\$4,999.91.

Kirkwood, Mo., March 1, 1886.

"Twelve months after date we promise to pay to the order of Virginia H. Brand forty-nine hundred and ninety-nine dollars and ninety-one cents for value received. Negotiable and payable without defalcation or discount, and with interest from date at the rate of eight per cent. per annum. Payable at the St. Louis National Bank, St. Louis, Mo.

"BRAND & HOLTZMAN."

The following endorsements appear on the back of the note:

"September 18, 1886.

"Allowed on this note against the estate of Brand & Holtzman \$5,128.19.

"Y. PITTMAN,

"Ass'ee of Brand & Holtzman."

"Paid on this note the first dividend of twenty per cent., being \$1,042, September 30, 1886.

"Y. PITTMAN, Assignee."

"Paid January 7, 1887, \$196.48.

"Y. PITTMAN, Assignee."

She alleged in her original and amended petition that the defendant, George C. Brand, H. H. Herold and Ella Fletcher Brand were nonresidents

of the State of Kentucky and citizens of the State of New York; that the defendant, George C. Brand, was a son of W. M. and H. W. Brand, deceased, and that he owned an undivided interest in certain specifically described tracts of real estate in Fayette county, Kentucky, in the city of Chicago, Ill., and lands in the State of Texas, and also in a trust fund, all of which was in the possession of and controlled by the defendant, Shropshire; that after the creation of her debt on the 15th of December, 1900, George C. Brand had, in fraud of her rights as creditor, conveyed to the defendant, Herold, without valuable consideration, all of his interest in the trust estate for the use and benefit of Ella Fletcher Brand. A warning order was issued against all of the nonresidents, and a corresponding attorney appointed to notify them of the pendency of the suit, and the objects thereof. She prayed for a personal judgment against the defendant, George C. Brand, for a cancellation of the conveyance made by him to Herold, and issued out a general attachment, which was levied upon the real and personal estate, located in Fayette county, and she had a garnishee served on Shropshire as testamentary trustee, and called on him to answer, and state the amount and aggregate of the trust funds in his hands, and that the interest of George C. Brand should be applied to the payment of her debts. She also set out the provisions of the will of W. M. Brand, creating trust, which are as follows: "It is my will, and I do hereby direct, that my executrix and executors shall have the right, and I do hereby empower them, or those of them who qualify as such, to sell and dispose of and convey any part of my real or personal estate, and invest the same as a productive fund in any other estate; and I do direct that the profits of my estate shall be left in the hands of my executrix and executors to rear and educate my children, or so much thereof as shall be sufficient and necessary for the support of my wife for life, or during her widowhood; and that in distributing it to my nine children to each a ninth part, a due proportion of each part shall be retained out of each ninth to support my wife for life, or during her widowhood. * * * At the death of my wife the estate devised to her for life is to be equally distributed as the residue of my estate devised to my children."

She asked a settlement of the trust and an ascertainment of the interest of George C. Brand, and that it be applied to the payment of her debt.

The defendant, George C. Brand, filed a special demurrer to the petition as amended on the ground that the Fayette Circuit Court had no jurisdiction of the defendants, or to grant the relief sought by the petition. The special demurrer was overruled, and he then filed an answer, in which, after denying the jurisdiction of the court, he alleges that the plaintiff assigned and transferred and delivered the note sued on to one Mordecai L. Gotthelf; and that in October, 1899, Gotthelf instituted an action thereon in the Supreme Court of the State of New York, alleging that he was the owner thereof, and that it had been endorsed, transferred and delivered to him for value, and prayed for judgment thereon against the defendant, George C. Brand, for the amount thereof; that in answer to this petition George C. Brand stated that the note had been paid, and also plead and relied upon the New York statute of limitation; and that in this proceeding a judgment upon the merits of the controversy had been rendered upon the verdict of a jury in his favor, which had never been appealed from, and was in full

force and effect, and plead this judgment as a conclusive bar to the prosecution of this suit. Plaintiff in her reply admits that in October, 1899, the note sued on had been endorsed and delivered to Gotthelf, but alleges that this transfer was solely for the purpose of enabling Gotthelf to collect it; admits that a trial was had in the New York court before a jury on the 20th of February, 1900; and that the judgment was rendered solely upon the plea of the statute of limitation, and denies that the judgment in that action was rendered upon the merits of the petition; that under the laws of the State of New York the statute of limitation relied upon by the defendant in his answer, and filed in said action, instituted in the State of New York, was not a defense to said action upon the merits thereof; * * * that under the laws of the State of New York the judgment rendered in said action in the State of New York upon the aforesaid plea of limitation neither impaired nor extinguished the right or cause of action set up or alleged in said suit. The only effect of said judgment in said suit under the laws of the State of New York was to deny the plaintiff in said action the remedy sought for the enforcement of the cause of action set up by the plaintiff in said suit; and that said judgment under the laws of the State of New York was no bar to another suit in said State upon the same cause of action; that the effect of such a judgment under the laws of the State of New York was to deny to the plaintiff in a second suit in the same State the remedy denied him in the first suit."

A copy of the record in the New York suit was filed as an exhibit with the reply. Whereupon the defendant, George C. Brand, filed a general demurrer to the reply as amended, which was sustained by the court, and the plaintiff declining to plead further, judgment was entered dismissing her petition and discharging her attachment. To which action of the court the plaintiff excepted, and prayed an appeal to this court. The defendant, George C. Brand, also prosecutes a cross appeal from the judgment of the circuit court overruling his special demurrer to the jurisdiction of the court.

The first question to be determined is whether the Fayette Circuit Court had jurisdiction, by attachment and constructive service of process upon the defendant, to subject the property levied on by the attachment to the payment of the claim of plaintiff. At least a part of the property sought to be subjected is located in Fayette county. Subsection 2 of section 194 of the Civil Code provides that "the plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees as is provided in section 227, as a security for the satisfaction of such judgment as may be recovered against a defendant who is a nonresident of this State."

The right of a State, through its tribunals to subject property situated within its limits owned by nonresidents to the payment of demands against them, and that this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled, is too well established to admit of argument. Thus in *Picquet v. Swan*, 5 Mass., 85, Mr. Justice Story said: "Where the party is within the territory he may justly be subjected to its process and bound personally by the judgment pronounced against him. Where he is not within such territory and is not personally subject to its laws, if on account of his supposed ownership of actual property being within the

territory, process by the local laws may by attachment go to compel his appearance, and for his default to appear judgment may be pronounced against him, such judgment must, upon general principles, be deemed only to bind him to the extent of such property, for the reason that, except so far as the property is concerned, it is a judgment *coram non judice*."

In *Boswell's Lessee v. Otis*, 7 Howard, 386, the court said: "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*."

In *Cooper v. Reynolds*, 10 Wallace, 308, *Pennoyer v. New*, 94 U. S., 714, this question was fully considered, and the conclusion reached that a State having within her territory property of a nonresident might appropriate it to the satisfaction of claims against him. Numerous authorities could be advanced in support of this view, but we deem the above sufficient.

Besides, in this case the defendant, George C. Brand, did not elect to stand by his demurrer, but entered his appearance, and plead to the merits of the controversy. We think, therefore, that the court necessarily had jurisdiction of him.

It is conclusively shown by the testimony that the assignment of the note by the plaintiff to Mordecai L. Gotthelf was solely for the purpose of collection, and was done upon the advice of her attorney in New York City, and that it still remains the property of the plaintiff. It is also conclusively shown by the copy of the record of the pleadings, instructions and testimony in the New York suit that the verdict of the jury was rendered pursuant to a peremptory instruction of the court to find for the defendant upon the sole ground that it had been shown that the defendant, Brand, at the time of the commencement of the action, and had for more than six years prior thereto been a resident and inhabitant of the State of New York, and that under the statute of limitation in that State the action could not be maintained. Besides, it appears that the defendant, George C. Brand, upon the trial admitted the execution of the note, and that he was entitled to no credits other than for the payments made by his assignee. The question is squarely presented as to whether the judgment rendered for the defendant by the Supreme Court of New York upon the plea of the statute of limitation in that State extinguishes the causes of action and is a bar to another suit upon the same cause of action in another jurisdiction, which does not have the same statutory limit in which such action may be commenced. This contention is mainly based upon section 1 of article 4 of the Constitution of the United States, which provides: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof;" and upon section 905 of the Revised Statutes of the United States, wherein it is provided that the judgment of any court of any State in the Union shall have the same force and effect in any other State as in the State

where rendered. The effect of this provision of the Federal Constitution and the statute rendered pursuant thereto was fully considered by this court in *Williams v. Preston*, 26 Ky., 600, and more recently in *Calloway v. Glenn, Trustee*, 105 Ky., 651, in which the conclusion was reached that the judgments and decrees of a sister State were entitled to precisely the same effect in this State as they would have had by the laws of the State wherein they were rendered. It follows that if the judgment relied on in this case would be conclusive of the plaintiff's cause of action on its merits in the State of New York, it must be conclusive here.

Counsel for appellant contends that the courts of New York hold that the statutes of limitation of that State operate exclusively upon the remedy, and do not in any respect affect the cause of action; and that a judgment for defendant rendered upon the plea of the statute of limitation in one jurisdiction is not a bar to another suit upon the same cause of action elsewhere; and that this holding of the New York courts is the generally accepted construction of the statute of limitation both in England and in the various States of the United States, and in support of this contention he has collated in his brief numerous authorities, to which our attention has been directed. First, in the case of *Whittemore v. Adams*, 2 Cowan, 626, a case decided by the Supreme Court of New York. The action was upon divers promissory notes, the pleadings admitting the indebtedness. Under the laws of New York the person of the debtor might be taken under execution, and imprisoned, etc. To avoid the imprisonment, in consequence of a judgment, the defendant plead an act of the District of Columbia for the relief of insolvent debtors, by complying with the provisions of which the person of said debtors were exempt from imprisonment. The defendant alleged prior imprisonment and discharge under said act. And the court, in passing upon the issues thus joined, said: "The defendant relies upon an insolvent discharge granted pursuant to an act of congress of the United States for the relief of insolvent debtors, within the District of Columbia. The 10th section of that act declares the effect. If a debtor is arrested for any debt contracted before the discharge the court issuing the process, or a judge, are to release him on common bail. * * * Giving to this discharge all the effect which can possibly be claimed under the act of Congress, it does not operate upon the contract, but merely upon the mode of enforcing it. It is a personal discharge of the defendant, nothing more; and must, from its very nature, be confined in operation to the District of Columbia. The *lex loci contractus* does not apply. Imprisonment is a part of the remedy, not of the contract. * * * The defendant can not be imprisoned there; but it does not follow that he is exempt from imprisonment in this State. The same principle has been repeatedly acted upon by this court, in relation to the statute of limitation of adjoining States (*Nash v. Tupper*, L. I. Caines, Rep., 402), even where the contract arose and both parties reside there. And a long and unbroken series of decisions has denied any effect to these personal discharges beyond the boundaries of the State where they are granted, upon the principle that the statutes upon which they are granted are inapplicable, as part of the *lex loci contractus*, but constitute a part of the *lex fori* merely. The case principally relied upon by the defendant's counsel is *Hicks v. Brown*, 12 John., 142. That case gave effect to a New Orleans discharge which ex-

tended both to the person and the contract of the debtor, and the principle of that case was again recognized by this court in *Sherill v. Hopkins*, 1 Cowen, 103. Both cases are plainly distinguishable in this particular from the present. They go beyond imprisonment, the mere remedy to the contract itself. * * * Nor is this discharge operative within the clause of the Constitution which declares that full faith, credit and effect shall be given to the judicial proceedings of another State."

This case was approved in *Stern, &c. v. Schlesinger*, 25 N. Y. State Reports—and the following is taken from the statement of facts in the latter case: "An order of arrest was granted herein, and defendant's motion to vacate, on the grounds that, having been arrested in Michigan on the same cause of action, he could not be again arrested on it in New York, and that the action being on a foreign judgment, the cause of action was merged, and there could be no arrest, was denied. Defendant now moves to vacate the order on affidavits showing that the defendant took the 'poor debtor's oath' in Michigan, and was there discharged from imprisonment after opposition offered by the creditor, and that the effect of such discharge under the laws of Michigan is to forever exempt the defendant from imprisonment on the same cause of action."

In the course of the opinion the court said: "The poor debtor's act of Michigan (3 How. St. C., 309) is a beneficent statute, under which impecunious debtors may be relieved from imprisonment. The discharge does not affect the debt, which remains unimpaired, but terminates the imprisonment, and provides that 'the debtor after being so discharged shall be forever exempted from arrest or imprisonment for the same debt.' The effect of the discharge, under the enactment, was to prevent a second arrest in that State for the same debt. The act can have no greater effect, for it has no extra-territorial force, and can not be invoked here. True, the creditor opposed the discharge, but this circumstance adds nothing to the extra-territorial operation of the statute. If the proceedings under the act in question had discharged the debt or obligation, and the creditor had entered the foreign jurisdiction, and there contested the discharge, a different question would have been presented; for a debt once lawfully extinguished in Michigan, by payment or operation of law is, as a rule, discharged everywhere. A discharge from debts granted under the laws of one State may be inoperative on the citizens of other States unless the obligations are to be performed in the place where the discharge was granted; yet where such citizens submit themselves to the jurisdiction of the foreign law, by voluntarily becoming parties to the proceedings there pending, they may be concluded by the adjudication made. (*Soule v. Chase*, 39 N. Y., 342.) But the application made in Michigan did not affect the debt. It merely affected the remedy provided for its enforcement in that State, and the discharge from imprisonment granted therein merely put an end to the right to imprison the debtor within that jurisdiction. Imprisonment is no part of the contract, and notwithstanding the discharge in Michigan, the debt remained unimpaired, and the right to enforce it in other jurisdictions, according to the laws thereof, followed the obligation as a legal incident, for the *lex fori* governs the remedy. * * * In other words, the remedial statutes of other States in no manner affect or concern us in the manner of executing our laws. Each

State enforces its provisional remedies according to its own peculiar methods. Obligations are determined, and contracts construed, with reference to the law of the place where they were made, or are to be performed. But when we come to remedies, it is another thing. * * * A discharge from imprisonment relates only to the remedy, and not to the contract or obligation. It is limited in its object and local in its effect, having no force beyond the boundary of the State where it was granted, and the creditor is entitled to all the remedies provided by the *lex fori*."

These cases announce the rule that the *lex fori* always governs the remedy, and that judgment, based upon statutes which operate simply upon the remedy, do not affect the cause of action. In the case of the Bank of the United States v. Donnelly, 33 U. S., 361, the suit was upon a promissory note executed in Kentucky, and payable there, on which suit was commenced in the district court for the western district of Virginia. Among other defenses, the defendant plead the statute of Virginia in bar of the action. In consideration of this defense the counsel for the plaintiff urged the following for the consideration of the Supreme Court of the United States: "Mr. Sergeant, in reply, urged upon the court the propriety of leaving to the plaintiffs in error their remedy on the note should a suit be brought upon it in the State of Kentucky, or elsewhere. If the court should consider the limitation law of Virginia as governing the case, they would apply that law, by their judgment to the remedy which had been sought in this suit in Virginia, and not give such a judgment as would impair the plaintiff's right elsewhere. He contended that the sole ground of the cases cited for the defendant was the effect of the statute of limitation upon the remedy. They do not decide that the right to the debt is destroyed by the lapse of time."

In response to this question, so urged upon the consideration of the court, Justice Story, on page 370, said: "As the contract upon which the original suit was brought was made in Kentucky, and is sought to be enforced in the State of Virginia, the decision of the case in favor of the defendant, upon the plea of the statute of limitation, will operate as a bar to a subsequent suit in the same State; but not necessarily as an extinguishment of the contract elsewhere, and especially in Kentucky. But a general judgment in favor of the defendant upon his demurrer to the declaration (it is supposed) may, as a judgment upon the merits of the claim, have a very different operation, as *res adjudicata* or final judgment. Hence there arises a very important consideration as to the correctness of the judgment upon that demurrer. It has accordingly been argued at large by counsel for the bank as vital to the rights, as well as the remedies, of the bank in other States. We are of the opinion that the fourth and fifth counts are upon general demurrer good; and that the judgment of the court below was as to them erroneous. * * * Upon the whole, our opinion is that the judgment upon the demurrer by the defendant, to the fourth and fifth counts, ought to be reversed; in all other respects, it ought to be affirmed. But as the pleas of the statute of limitation is a good bar to all the counts, the judgment of the court below, that the plaintiffs take nothing by their writ, is right, and ought to be affirmed with costs."

On the same page then, *loc. cit.*, 374, is found the form of the judgment directed to be entered by the court, which reversed the judgment entered

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"on the merits," or professedly on the merits, and the judgment is made to show upon what ground it is based, to wit: That it went upon the plea of the statutes of limitation. In the case of *Brent v. Washington Bank*, 1 Peters 35 (U. S.), 596, in discussing this question, Judge Baldwin, speaking for the court, said: "But they allege that the debt is extinguished by the verdict in their favor, rendered on the plea of the statutes of limitation. In *Bank of the United States v. Donnelly*, 8 Peters, 361, this court laid it down as an established principle that the act of limitation operated only to bar the remedy, not to extinguish the right or cause of action; and that a judgment on a plea of the statute was only to bar the remedy on a contract, when sued for in Virginia, as the limitation act of that State embraced the one declared on; but did not operate to extinguish the contract when sued on elsewhere, or in Kentucky, where by the *lex loci* it was not affected by any limitation. We can not take this case out of the established rule; the legal remedy is barred, but the debt remains as an unextinguished right; and the bank when called in a court of equity may hold any equitable lien, or other means in their hands, till it is discharged."

In *Jacobs v. Marks*, 162 U. S., 591, the court had before it the question whether a judgment rendered in the court of Michigan had received full faith and credit in the courts of Illinois, and the court said: "It is a general rule that a plea of former recovery, whether it be by default, verdict or demurrer, is a bar to any new action of the same or the like nature for the same cause. This rule conforms to the policy of the law which requires an end to the litigation after its merits have been determined. But there must be at least one decision on the right between the parties before there can be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit."

In *Minor on Conflict of Laws*, section 210, the author says: "It may be observed in passing that a judgment for the defendant upon the plea of the statutes of limitation will not prevent another suit upon the same transaction elsewhere."

Mr. Foote, in his work on *Private International Jurisprudence*, page 512, in speaking of laws which limit the time for the enforcement of a civil remedy, says: "So exclusively is such a law a matter of procedure that a foreign judgment declaring that a claim is barred by a local statute of limitation is no bar to an action in the tribunal of another State, the laws of which fix a longer term of limitation of suit in the original cause of action. In such a case the maxim '*nemo bis debet vexari pro eadem causa*' does not apply, the plea upon which the foreign judgment has been given not going to the merits of the cause of action."

Mr. Dicey, in his work on *Conflict of Laws*, page 422, says: "A foreign judgment in favor of the defendant in the foreign action is a complete answer to any proceedings here or the same matter by the plaintiff in such action, provided the judgment be final and conclusive on the merits; but it is not an answer to an action in England, if it be merely an interlocutory judgment, or a judgment which, though it decides the cause finally in the country where it is brought, does not purport to decide it upon the merits, if it is given in favor of the defendant on the ground that the action is barred by the statutes of limitation."

Whilst the adjudication of courts of last resort in the United States on this question are not entirely uniform, we think it can not be denied that the overwhelming weight of authority is to the effect that a judgment rendered on the plea of the statute of limitation in one jurisdiction does not bar another jurisdiction having a different statute of limitation, and this is undoubtedly the rule in New York. It follows, therefore, that the only effect which we can give the New York judgment is that it conclusively establishes that the plaintiff had, under the laws of that State, no remedy for the enforcement of her claim, but that that judgment did not extinguish her "cause of action" in the courts of Kentucky, where a different statute of limitation prevails.

For reasons indicated the judgment is reversed on appeal of the plaintiff and affirmed on cross appeal of defendant and cause remanded, with direction to overrule defendant's demurrer to plaintiff's reply and for other proceedings consistent with this opinion.

CITY OF LOUISVILLE v. WEMHOFF, &c.

SAME v. ALVEY, &c.

SAME v. PIRTLE, AGENT.

SAME v. SMITH, MANAGER.

(Filed November 18, 1903.)

1. Appeal—Where an appeal to the Court of Appeals was dismissed because of a clerical misprision of the clerk of the circuit court made by incorrectly stating the name of the plaintiff in the style of the case, and the misprision was thereafter corrected, a subsequent appeal by the true plaintiff, whose name was correctly stated by the correction of the misprision, was in no way affected by the former dismissal.

2. Constitutional law—Local acts—The provisions of section 2922 of the Kentucky Statutes, which is a part of the charter of cities of the first class, that either the city or the defendant may prosecute an appeal from a decision of the police court of the city to the circuit court where the penalty fixed by ordinance is as much as \$20, and where the penalty is less than \$20 the validity of the ordinance may be tested by an appeal to the circuit court by the city or by the defendant by a writ of prohibition, are not in violation of section 59 of the Constitution, which forbids the enactment of local laws by the legislature regulating the jurisdiction of courts of justice.

3. Prosecutions—Style of proceeding—The provisions of section 123 of the Constitution, that "all prosecutions shall be carried on in the name of the 'Commonwealth of Kentucky,'" do not apply to prosecutions for violations of municipal ordinances in which the penalty fixed is a fine only, and such prosecutions may be carried on in the name of the city.

4. City ordinance—Powers of general council—The general council of cities of the first class has the power, under the provision of section 2782 of the Kentucky Statutes, that "the general council shall have power to pass ordinances imposing fines, not exceeding \$100, for any designated misdemeanor not provided for by the general laws of the Commonwealth," to pass an ordinance to punish the offense of operating a pool room, and is not precluded from doing so by reason of the fact that such act was an offense at common law.

5. Validity of city ordinance—A city ordinance, entitled "An ordinance to prevent the operation of pool rooms," which imposes a penalty upon the operator of a pool room, upon his servants and employees engaged in operating it, upon the owner of the property who knowingly lets it or suffers it to be used for that purpose, upon the telegraph or telephone company which transmits messages to be used in the operation thereof, and upon the person who buys or has possession of a pool ticket, is not in violation of the provision of section 2777 of the Kentucky Statutes, that "no ordinance shall embrace more than one subject, and that shall be expressed in its title."

6. Same—Exercise of police power—An ordinance which makes it an offense for any telegraph or telephone company to deliver "to any owner, proprietor, agent or employe of any pool room maintained, kept, operated or conducted in the city of Louisville for any of the purposes defined in section 1 of this ordinance, any message, communication or information to be used at such a pool room as is defined in section 1 of this ordinance, concerning any horse race or races in or out of the city of Louisville," is a valid and proper exercise of police power.

7. Sufficiency of warrant—The same technical strictness is not required in a proceeding on a warrant as by indictment, but if it be made to appear that a defendant can not intelligently make defense, it should be made more specific. A warrant which charges one with having "violated an ordinance to prevent the operation of pool rooms," which ordinance embraces several offenses, should be amended so as to apprise the defendant as to which of its sections he is charged with having violated, but it is not proper to dismiss it on the ground of its indefiniteness.

Henry L. Stone for appellant.

Kohn, Baird & Spindle, Fred Forcht, Richards & Ronald and Geo. H. Fearons for appellees.

Appeals from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge O'Rear.

These actions originated in the police court of Louisville on four summonses or warrants taken out in the name of the appellant, city of Louisville, against the appellees, respectively, for the violation of an ordinance entitled, "An ordinance to prevent the operation of pool rooms in the city of Louisville." The appellees, in that court, demurred to the warrants against them, respectively. The demurrers being each sustained, the city prosecuted an appeal to the Jefferson Circuit Court, Criminal division. That court, on motion of the appellees, dismissed the appeals on the ground that the statute attempting to confer jurisdiction on it was unconstitutional. From the judgments of dismissal, appeals were prosecuted to this court. Here the appeals were dismissed because it appeared that the cases in which the judgments appealed from had been rendered were styled in the circuit court "Commonwealth of Kentucky, Appellants v. Henry Wehmhoff, &c., Appellees." It was said that for aught the record showed the prosecutions begun in the police court styled "City of Louisville, Plaintiff," were yet pending on the appeals in the circuit court. (*City of Louisville v. Wehmhoff, &c.*, 24 Ky. Law Rep., 438.) In the course of the majority opinion on that appeal it was said: "If a clerical misprision in regard to the prosecutions of the appellant against appellees has occurred in the city court, the appellant has a right to have such misprisions corrected upon proper proceedings, and the dismissal of this appeal in nowise affects that right."

"There is nothing in this judgment or the record as now before us for consideration which would preclude the appellant from obtaining a trial of the appeals which it took from the police court to the circuit court, and we expressly hold that this judgment of dismissal is no bar to the right of appellant to have a trial of the appeals prosecuted by it as aforesaid or from obtaining a correction of the records of the Jefferson Circuit Court, if it is otherwise entitled to such correction."

Upon the filing of the mandate in the circuit court appellant city took appropriate steps to correct the clerical misprision indicated, and it was corrected by a judgment of that court, as follows (after reciting the fact of the misprision and its nature): "It is now further adjudged by the court that said errors and misprisions of the clerk be, and the same are hereby, corrected by the entry of the foregoing orders and judgments in the above-styled appeals in the name of the city of Louisville as appellant, instead of the Commonwealth as appellant, as of the dates aforesaid, including the final judgment therein, on November 25, 1901, *nunc pro tunc*."

Among the orders referred to in the foregoing quotation was this one (correctly styled): "This day, the court being advised, sustained the motion to dismiss the four above-styled appeals. Therefore, ordered by the court that the four above styled appeals be, and the same are, dismissed, to which the plaintiff objects and excepts, and prays an appeal to the Court of Appeals of Kentucky, which is granted."

Thereupon this appeal was perfected by the filing in the clerk's office of this court the transcript of the record. The first question made by appellees is, that there is no appeal pending, because, they say, that the appeal being prosecuted is the one heretofore actually dismissed, and that none other has ever been granted, either by the clerk of this court or by the trial court. We regard the judgments as entered in October, 1902, on the return of this case from this court as the only judgment in this case in that court. Until it was entered, as corrected, there could be no appeal from it by the appellant, city of Louisville; that is the precise point decided on the former appeal. The appeal therein granted could not be exhausted till it was taken, or until it was barred by limitation. It could not be legally prosecuted before a final judgment was rendered in the proceedings. Such judgment, under the rulings of the former opinion, was not entered in the old record, and hence was not entered till the correction of the clerk's misprision. The motion to dismiss the appeals must be overruled.

The very careful preparation of the case presents a number of other questions, the importance of which is earnestly pressed in the argument. We have given them all close consideration, and will dispose of them in their proper order.

2d. It is claimed by appellee that the Jefferson Circuit Court had not the jurisdiction of the appeals from the police court. If this be so, the decision of that question terminates our authority to pass upon the merits and other questions in these cases.

The city of Louisville, in Jefferson county, is a city of the first class, and the only city of that class, or that has ever been in that class in this State, under the classification required by the present Constitution. In the act providing for the organization and government of cities of the first class,

among its other governmental agencies, it was provided with a police court and a general council. The powers of the council to pass ordinances, and the jurisdiction of the courts to construe and enforce them, was necessarily provided for.

In allowing appeals from the judgments of the police court of cities of the first class, as well as in providing a method for testing the validity of the ordinances passed by the general council, it was enacted (section 2922, Kentucky Statutes): "Appeals shall be from the decisions of said court to the circuit court in all cases where the amount of the fine imposed is as much as \$20. In cases where a fine of \$20 or less is imposed under an ordinance, the legality of said ordinance may be tested by the city by an appeal to the Jefferson Circuit Court or by the defendant by a writ of prohibition to the Jefferson Circuit Court, and after a decision has been rendered in the circuit court, as provided for in this section, either the city or the accused may appeal to the Court of Appeals as other cases in the circuit court are appealed."

Appellees' contention is that this section of the statutes violates section 59 of the Constitution, which limits the power of the legislature in passing local acts, and forbids those regulating the jurisdiction of courts. The importance of this question is emphasized when it is reflected that there is no other provision of law than section 2922 for the city's prosecuting appeals from the judgments of the police court of Louisville, or for testing the validity of the ordinances of that city, as well as that almost the same provision alone is made for appeals and the testing the validity of the ordinances of the cities of the fourth class. (Section 3519, Kentucky Statutes.)

The appellate jurisdiction of the circuit courts of this Commonwealth, as fixed by section 978, Kentucky Statutes, is made to include certain named appeals, "and in all other cases allowed by law." Prior to the passage of the act governing cities of the first class the city of Louisville was governed under a charter granted by the legislature before the present Constitution. In that charter there was substantially the same provision for appeals from the police court, and especially for testing the validity of ordinances passed by the general council, as is contained in section 2922. It is found in Burnett's City Code (1884), section 27, page 149.

Although the Constitution does not require the jurisdiction of the circuit courts to be uniform throughout the Commonwealth (section 124), and although by statute they are not, as, for example, the Franklin Circuit Court is made the fiscal court of the Commonwealth, with jurisdiction concurrent or exclusive in such matters, as well as in certain other penal matters, we are of opinion that this statute does not affect that question. The jurisdiction of the circuit courts is already (section 978, Kentucky Statutes) made to include "all cases allowed by law," and by general laws applicable to all the cities of a particular class, provision is made for testing the validity of ordinances and for appeals from the police courts. The statutes affecting the jurisdiction of the circuit court need not all be embraced by one act.

The only thing required is, they shall be general laws only. It would hardly be claimed that an act creating an offense, fixing a penalty and naming the court which should have jurisdiction of the prosecution, is violative of section 59 of the Constitution as being a local act regulating the jurisdiction of the courts.

The Constitution allows the establishment of police courts in the cities and towns of this Commonwealth (section 143), with jurisdiction in cases of violation of municipal ordinances and by-laws occurring within the corporate limits of the town, and criminal jurisdiction within the limits of the town as justices of the peace have. In providing these courts it is competent for the legislature to provide for appeals from their judgments, and to provide in what instances and to what courts the appeals will lie. It must be manifest that the final jurisdictions of these minor courts might well be differentiated for the same reasons that the cities are classified differently, so that in providing a government for cities of any class it is competent to provide for it a police court from whose judgments appeals in given instances will lie to the circuit court of the county. Nor is it at all necessary that all police courts in the State should have the same regulation in this respect. This section allowing appeals or prohibition to test the validity of municipal ordinances is really more of an incident in providing a city government, although it incidentally affects the jurisdiction of the courts in the counties where such cities may be located.

We regard the use of the words "Jefferson Circuit Court" in the section as an inadvertence, growing out of drafting the bill from the old city charter. The same immaterial lapse is noticed in other places in the act. It should be ignored as surplusage, rather than be suffered to defeat the clear purpose of the legislature as well as to invalidate an important right of the city and of its inhabitants. We construe this section to mean that either party, the city or the defendant, may prosecute an appeal to the circuit court of the county, where the penalty fixed by the ordinance is as much as \$20. Upon such an appeal the case would be tried upon its merits *de novo*. But if the penalty be less than \$20, either party, for the purpose of testing the validity of the ordinance, may go to the circuit court of the county, the defendant by prohibition and the city by appeal. If in a reclassification of the cities of the Commonwealth another or others are added to the first class this section would apply to them, the words "Jefferson Circuit Court" being read the "circuit court of the county." We are of the opinion that the Jefferson Circuit Court, Criminal division, had jurisdiction of these appeals.

8d. The next proposition is, it is argued that the prosecution was improperly in the name of the city of Louisville. Appellees contend that under the Constitution the prosecutions must have been in the name of the Commonwealth of Kentucky.

Section 123 of the Constitution is in part: * * * "All prosecutions shall be carried on in the name and by the authority of the 'Commonwealth of Kentucky,' and conclude against the peace and dignity of the same."

This identical language was used in all the previous Constitutions of this State. The word "prosecutions," as used in this section and in other sections, has been construed to embrace only such transgressions as were at common law indictable offenses, or were punishable by imprisonment or other infamous mode. In *Commonwealth v. Avery*, 14 Bush, 625, it was held that a statute imposing a fine for betting on an election was neither an indictable offense at the common law, nor was it visited with any infamous punishment by statute. It was then held that a penal action would lie to recover the fine, without an indictment having been found, and that it was

not a "criminal prosecution" as contemplated by the use of the term in the Constitution.

In *Lowry v. Commonwealth*, 18 Ky. Law Rep., 483, the appellant was arrested on a warrant, without indictment and tried before a minor judicial officer and convicted of a violation of the local option law. Answering his objection that he was being deprived of a constitutional right, in that he was being tried for an indictable offense upon information merely, the court said: "Misdemeanors created by statute, for which no infamous punishment is provided, may be tried in such manner as the legislature shall provide."

The legislature in granting the charter of the city of Lexington in 1842 authorized it to prosecute and recover in the name of the city for all infractions of its ordinances. The city council passed an ordinance providing a punishment for breaches of the peace. In *Williamson v. Commonwealth*, 4 B. Mon., 146, the appellant had been convicted under the ordinance in a proceeding upon a warrant issued in the name of the city of Lexington. He contended that the act of the legislature in attempting to confer authority upon the city to prosecute for offenses in the name of the city, as well as allowing the proceeding upon information without indictment, was violative of the Constitution. This court held that proceedings for offenses, punishable by fine only, are of a quasi civil nature, and did not violate either of the provisions of the Constitution. This case has since been approved and its doctrine applied in allowing penal actions, without indictment, to recover for offenses where the only penalty was a fine. (*Commonwealth v. L. & N. R. R. Co.*, 18 Ky. Law Rep., 610; *Harp v. Commonwealth*, 28 Ky. Law Rep., 1792; *Commonwealth v. L. & N. R. R. Co.*, 80 Ky., 291; *Commonwealth v. Sherman*, 85 Ky., 686; *L. & N. R. R. Co. v. Commonwealth*, 28 Ky. Law Rep., 1900.)

These and similar constitutional guarantees of the citizen, like that of trial by jury, have been variously and frequently considered by the courts of last resort of many of the States. The weight of authority seems to be that such summary proceedings by municipal courts for the violations of municipal by-laws are not repugnant to these constitutional provisions. (*Dillon on Munic. Corp.*, sections 433, 368; *Smith Modern Law of Munic. Corp.*, section 1353, et seq., and cases there collated.)

The only question left under this head is, has the legislature authorized the proceedings to be in the name of the city? Section 2917, Kentucky Statutes, being a part of the law governing cities of the first class, reads: "All fines and recoveries realized in said court, whether the prosecution be in the name of the city or Commonwealth, shall be paid to the city treasurer as a contribution toward the expenses of said court."

By section 2922, already quoted, appeals are allowed to either the city or the accused, clearly indicating that the city was to be one of the parties to the proceeding. Strictly, violations of municipal ordinances are not violations of laws of the Commonwealth; the municipality alone is concerned, and it properly ought to be, and has always been regarded in this State by universal practice, so far as our attention has been directed, as being the prosecutor.

We conclude, therefore, that the correct practice is to style the prosecutions in the name of the city.

4th. Probably the most important question is as to the power of the gen-

eral council to pass ordinances to punish those acts which are offenses at the common law. Of course the municipality has only such power in this respect as has been granted to it by the legislature. The only grant to cities of the first class to pass such ordinances is contained in the following sections of Kentucky Statutes:

"Section 2742. That the inhabitants of cities of the first class are hereby continued corporate by the name and style which they now bear, with power to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act, nor the Constitution and laws of this State, nor of the United States

"Section 2782. Ordinance imposing fine for misdemeanor—The general council shall have power to pass ordinances imposing fines, not exceeding \$100, for any designated misdemeanor not provided for by the general laws of the Commonwealth; but in case where the general statutes of the Commonwealth impose a fine not exceeding \$100 such fine may be increased by ordinance.

"Section 2783. Power to pass ordinances not in conflict with the Constitution and statutes—The general council shall have power to pass, for the government of the city, any ordinance not in conflict with the Constitution of the United States, the Constitution of Kentucky, and the statutes thereof."

Appellee insists that the proper construction of these sections is that the general council is restricted by the particular language of section 2783 to passing ordinances making unlawful within the city only those things which at common law were not offenses; or which have been made such by statutes; that the operation of a pool room, that is, a place where betting on horse races was habitually indulged, was at common law a nuisance, and being unprovided for by any statute of this State, it was beyond the power of the general council to legislate with reference thereto.

We think there has been a total misconception of the purpose and scope of this action of the statute. In the first place, the cardinal test must be the legislative intention in enacting the sections. We must presume that that body intended to vest in the local legislative board of the largest city in the State at least as much power with respect to passing by-laws for the police regulation of its inhabitants, and for the conservation of the morals and welfare of that population, as was given to the lesser towns and cities. In all the others specific authority is granted to them to pass by-laws to suppress and punish nuisances. In defining the powers of the legislative bodies of all the other municipalities they are minutely given, with reference to enumerated specific subjects. In the grant to cities of the first class there is an entire absence of such careful restriction. This alone, in view of the ample general terms employed, would seem to indicate that the power granted the first class cities over such subjects was broader and more comprehensive than those granted the others. But, however, that may be, we think that section 2782 was not enacted to restrict the general council's powers in defining what should be offenses within the city, but was intended solely to define its authority in prescribing the limits of punishment for such matters as were made offenses by ordinance. Section 168 of the recent Constitution had for the first time in this State placed a constitutional restriction upon the power of all municipalities as to the extent of punishment

to be inflicted by the city where the same act was an offense against the Commonwealth, punishment for which was fixed by statute. That section is as follows: "No municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense."

The purpose of this statute (2782) was to apply section 168 of the Constitution. It allowed the city to punish the same act that was by statute a misdemeanor by the penal laws of the State. But it required the council to fix the same penalty as the statute did, where the penalty was more than \$100 fine. Where the statutory penalty was less than \$100 fine, the municipality might impose a higher penalty for an infraction of its ordinance. Where no penalty was fixed by statute, the municipality was at liberty to fix such penalty as it deemed proper. The only other limitation on this power was that found in the succeeding section (Kentucky Statutes, section 2783), which was that the ordinance should not be in conflict with the Constitution or statutes of the United States or of this State; that such is the correct meaning of these sections we think is made plain by opinions of this court in *City of Owensboro v. Simms*, 99 Ky., 49 (17 Ky. Law Rep., 1898), and *Respass v. Commonwealth*, 107 Ky., 139 (21 Ky. Law Rep., 789). In the *Respass* case the city of Covington had, by ordinance, fixed a penalty for operating pool rooms within the city. A conviction in the police court was interposed as a bar to an indictment for the same offense in the circuit court. It was denied. This court held that section 168 of the Constitution limited the power of the municipalities as to fixing penalties to those cases only where a penalty for the same act was fixed by statute, and that as operating pool rooms was not a statutory offense in this State, but one punishable at common law only, the section of the Constitution did not apply, and the punishment by the ordinance was held not to be a bar to a prosecution for the same offense by the State. The exercise of police power by the State, or as delegated by it to its municipalities, is an essential and inalienable attribute of sovereignty and government. It's at the very bottom of all social government, and while jealously scrutinized in its application lest the rights of the citizen be arbitrarily encroached upon under its guise, yet its existence never has been, and never can be, denied. The rights of persons in conducting their business or using their property is subordinate to this power. The regulation of commerce between the states by the Federal government likewise yields to its legitimate application. (*Cooley Const. Law*, 709; *Patterson v. Commonwealth*, 11 Bush, 312, affirmed on appeal to the Supreme Court, 97 U. S., 501; *Moore v. Illinois*, 14 How., 18; *Chicago, &c., R. Co. v. Fuller*, 17 Wall., 560; *Passenger Cases*, 7 How., 283; *Morgan Steamship Co. v. Louisiana Board of Health*, 118 U. S., 455.) Of its general nature a comprehensive definition is given by Jeremy Bentham in his *General View of Public Offenses* (Edinburgh Ed. of Works, Part IX, page 157), in part thus: "Police is in general a system of precaution, either for the prevention of crimes or of calamities."

"Laws and regulations necessary for the protection of the health, morals and safety of society are strictly within the legitimate exercise of the police powers." (*Smith Munic. Corp.*, 1319.)

"Municipal corporations have exercised the police power eo nomine for

time out of mind by making regulations to preserve order, etc., * * * and this power of local legislation may be conferred upon the smallest village that the legislature sees fit to incorporate as well as upon the largest city in the State." (Id., 1820 and 1831.) The strife generally is over the question whether the particular business or use of property prohibited by the act or ordinance is within the proper exercise of that power. We will not go further into the subject than its application to the particular matter embraced by the ordinance under examination. Tiedman on Limitations of Police Power, a very conservative treatise upon the subject, declares (sections 99-102), when parties "pursue gambling as business, and set up a gambling house, like all others who make a trade of vice, they may be prohibited and subjected to severe penalties."

In California, under the police power delegated generally by the Constitution to the cities and counties, it was held in *Ex parte Tuttle*, 91 Cal., 589, that the municipality of San Francisco could lawfully provide a penalty against pool selling on horse races committed within the city, although there was no statute of the State on the subject. The same was held in Georgia, in *Odell v. City of Atlanta*, 97 Ga., 670. In that case it was said: "We are not aware of any statute of this State which makes the carrying on of this so-called 'business' penal, and it is, therefore, strictly within the purview of municipal legislation. Under the general welfare clause of the charter of the city of Atlanta the mayor and council had authority to pass the ordinance of which the plaintiff in error complains; that ordinance forbade, under a penalty, the keeping or maintenance of any office or place of business in the city, in which any persons were allowed to bet on horse races or any other kind of races, whether run within the city or outside of its limits. We think it was perfectly lawful and proper both to adopt and enforce an ordinance of this kind."

Indeed it would seem that citation of authority that the State or a municipality may lawfully prohibit gambling, as a proper exercise of police power, is unnecessary in this day and time.

5th. This brings us to the consideration of appellees' next contention, which is, does the title of the ordinance sufficiently indicate the subjects treated therein, and does the ordinance embrace more than one subject?

Section 2777, Kentucky Statutes, on this subject, reads: "No ordinance shall embrace more than one subject, and that shall be expressed in its title."

The ordinance in question is as follows:

"AN ORDINANCE TO PREVENT THE OPERATION OF POOL ROOMS IN THE CITY OF LOUISVILLE.

"Be it ordained by the general council of the city of Louisville:

"Section 1. That it shall be unlawful for any person, firm or corporation to establish, set up, maintain, keep, operate or conduct in the city of Louisville a pool room, or what is commonly called 'pool room,' wherein or whereat any money or other thing of value shall be, or can be, bet, won or lost on the result of any horse race or races, run or to be run in or out of the city of Louisville, or wherein or whereat any money or other thing of value shall be received or paid for any ticket, lot, pool or chance on the result of any such horse race or races ran or to be run in or out of the city of Louisville; and any person, firm or corporation that shall violate any provision

of this section shall, on conviction, be fined \$100 for each offense; and each day such pool room is thus maintained, kept, operated or conducted shall constitute a separate offense.

"Sec. 2. That it shall be unlawful for any person to aid, abet or assist any other person or corporation, or to act as the agent or employe of any other person or corporation in establishing, setting up, maintaining, keeping, operating or conducting any such pool room as is defined in section 1 of this ordinance; and any person who shall violate any provision of this section shall, on conviction, be fined in any sum not less than \$35 nor more than \$100 for each offense; and each day any person shall thus aid, abet or assist in maintaining, keeping, operating or conducting such a pool room, or shall act as agent or employe of any person or corporation in maintaining, keeping, operating or conducting such a pool room, shall constitute a separate offense.

"Sec. 3. That it shall be unlawful for any person, firm, or corporation, either as owner or agent, to let, lease or rent to any other person, firm or corporation any room, house or building to be used or occupied as a pool room, or for any of the purposes defined in section 1 of this ordinance; or as owner or agent, to permit any room, house or building to be so used or occupied, after receiving notice thereof; and any person, firm or corporation that shall violate any provision of this section shall, on conviction, be fined in any sum not less than \$50 nor more than \$100 for each offense, and each day such room, house or building shall be so used or occupied shall constitute a separate offense.

"Sec. 4. That it shall be unlawful for any telegraph, telephone or messenger company, or any officer, agent, messenger or employe thereof, to furnish, deliver or communicate to any owner, proprietor, agent or employe of any pool room maintained, kept, operated or conducted in the city of Louisville for any of the purposes defined in section 1 of this ordinance, any message, communication or information, to be used at such a pool room as is defined in section 1 of this ordinance, concerning any horse race or races in or out of the city of Louisville; and any company, person, firm or corporation that shall violate any provision of this section shall, on conviction, be fined in any sum not less than \$25 nor more than \$100 for each offense, and each message or communication so furnished, or delivered, or communicated, shall constitute a separate offense.

"Sec. 5. That it shall be unlawful for any person to buy or to have in his possession any ticket, lot, pool or chance in or of any such pool room as is defined in section 1 of this ordinance, on any horse race or races ran or to be run in or out of the city of Louisville; and any person who shall violate any provision of this section shall, on conviction, be fined in any sum not less than \$5 nor more than \$50 for each offense.

"Sec. 6. That it shall be the duty of the board of public safety, and each member of said board, to suppress all such pool rooms as are defined in section 1 of this ordinance, and by and through the police force to faithfully execute all the provisions of this ordinance; and it shall be the duty of the chief of police and each member of the police force of the city of Louisville to detect and arrest all violators of any provision of this ordinance, and any wilfull failure or refusal to do so by any officer, patrolman or detective on the police force shall subject him to a fine of not less than \$50 nor more than

\$100 for each offense; and on conviction for such offense in the police court of the city of Louisville it shall be the duty of said board, after notice to and trial of such convicted member of the police department, to dismiss him from further service therein, and to not thereafter appoint him to any position in said department, or place him on the pay rolls thereof.

"Sec. 7. That any member of the board of public safety who shall willfully fail or refuse to execute any provisions of this ordinance, or to join with any other member of said board in executing the same, or who shall willfully fail or refuse to dismiss or to join with any other member of said board in dismissing from further service in the police department any member thereof who shall have been convicted in the police court of the city of Louisville of violating any provision of this ordinance, or any member of said board who shall appoint or join any other member of said board in appointing any such convicted member of the police department to any position therein, or who shall place, or join with any other member of said board in placing any such convicted member of the police department on the pay rolls thereof, shall, on conviction, be fined \$100 for each offense.

"Sec. 8. That all other ordinances or parts of ordinances in conflict or inconsistent with this ordinance are hereby repealed.

"Sec. 9. That this ordinance shall take effect and be in force from and after its passage.

"Approved February 14, 1901."

Appellees' criticism of this act is that it embraces a number of different offenses. We fail to see that that puts the ordinance in conflict with the section of the statute. The statute is that the ordinance shall embrace but one subject. In order to effectuate the object of this ordinance, which is covered by the one subject, viz., "to prevent the operation of pool rooms in Louisville," it may be necessary to deal with more than one feature of the subject. This is frequently so. In construing a similar constitutional provision (section 51) this court has had occasion to pass upon the subject of the sufficiency of the title. It has always been held that if the various provisions of the act all relate to and are germane to the subject expressed in the title, the requirement is satisfied. (*Collins v. Henderson*, 11 Bush, 74; *Commonwealth v. Bailey*, 81 Ky., 395; *Burnside v. Lincoln Co.*, 86 Ky., 423.) The latest utterance of this court on that subject is the case of *Weber v. Commonwealth*, 24 Ky. Law Rep., 1726. The title of the act involved in that case was, in substance, the better preservation of the peace and the suppression of mobs and other unlawful confederations. The first section of the act provided against persons banding themselves together for the purpose of injuring or disturbing another; the second, against those banding themselves together for the purpose of injuring property; the third, against those who send out intimidating or threatening letters. It was held that all the parts of the act related to the one subject named.

A very similar question to the one under discussion came before the Supreme Court of Appeals of Virginia in the case of *Ex parte Lacy*, 31 L. R. A., 825. The same point was made as to the title of the act of the Virginia legislature, which was as follows: "An act to prevent pool selling and so forth upon the results of any trials of speed of any animals or beasts taking place without the limits of the Commonwealth." The Virginia Constitution declared "that no law shall embrace more than one subject, which shall

be expressed in its title." The court, on this point, observed: "We do not consider the act as obnoxious to that part of the clause of the Constitution just quoted, which says that 'no law shall embrace more than one subject.' The object of this law is the suppression of gambling, or that form of gambling where the bet or wager is made upon the speed or endurance or skill of animals or beasts, for, as was said in *Ingles v. Straus*, 91 Va., 209, 'if the subjects embraced by the act, but not specified in the title, have congruity or natural connection with the subject stated in the title, or are cognate or germane thereto, the requirement of the Constitution is satisfied.' * * * The Constitution, moreover, is to be construed so as to uphold the law if practicable. All that is required by the constitutional provision is that the subjects embraced in the statute, but not specified in the title, shall be congruous, and have natural connection with, or be germane to, the subject expressed in the title. (*Commonwealth v. Brown*, 91 Va., 762.)"

Every provision of this ordinance looks to the prevention of the operation of pool rooms in the city of Louisville. The great purpose of the act is to suppress that form of gambling known as pool selling. To do this the general council has struck at the operation of the pool rooms as the most certain remedy. To prevent their operation five classes of persons, who are known to contribute thereto, are brought within the terms of the ordinance, viz.: First, the operator of the pool room; second, his servants or employes engaged in operating it; third, the owner or controlling agent of the building or lot who knowingly lets it, or knowingly suffers it to be used, for that purpose; fourth, the telegraph, telephone or messenger company, who, as carrier of messages, knowingly, and for the purpose of enabling the selling of pools, transmits or delivers messages to such operator, to be used at the pool room; and, fifth, the person who buys or has the possession of the ticket of any pool, issued or to be redeemed by any pool room operator in the city of Louisville. To reach any one of these classes tends to "prevent the operation of pool rooms in the city of Louisville." To reach and restrain them all effectually accomplishes the object of the ordinance. The title of the ordinance fairly and comprehensively embraces every phrase of the subject treated of in its several sections, and is not repugnant to the statutes.

6th. For appellee Smith, manager of the Western Union Telegraph Co., it is insisted that this ordinance is invalid because it is, so it is argued, an arbitrary and unauthorized interference with a legitimate business, to wit, the contract and duty of a common carrier of messages to deliver the messages according to its contract. Counsel insist that an enforcement of section 4 of the ordinance is invalid, because:

"1st. The prohibition is not limited to messages to be used in the business or operation of the pool room; they may be entirely foreign to such business and operation, and still be a violation of the ordinance.

"2d. The message may be addressed to and delivered at a place separate from and having no connection with the pool room.

"3d. The defendant may be guilty under the ordinance, although he may not know the contents of the message; he may not know that it is to be used at a pool room; he may not even know that the addressee is the owner or proprietor, or agent, or employe of a pool room."

No such construction of the ordinance is contended for by the city, nor do

we believe that it is fairly susceptible of it. The messages which the telegraph and telephone companies and their employes are prohibited from delivering are those messages only that are communications "to any owner, proprietor, agent or employe of any pool room maintained, kept, operated or conducted in the city of Louisville for any of the purposes defined in section 1 of this ordinance, any message, communication or information to be used at such a pool room as is defined in section 1 of this ordinance, concerning any horse race or races in or out of the city of Louisville."

The message must contain matter which on its face shows it is to be used in the operation of a pool room in Louisville, by furnishing information concerning horse races that would enable the operator of the pool room to make or sell pools, or chances based upon such information; or the knowledge of such purpose must be otherwise established; and it must be shown that the message was delivered to such pool room operator or his agent, with knowledge of the purpose that it is to be used in making bets or selling pools on the information contained in the message; the telegraph company or its agents handling the message must be shown to have guilty knowledge that it is to be so used. Messages not concerning horse racing, and to further the pool selling business, are not affected by the ordinance.

It is not argued that the ordinance is invalid as to this appellee on any other ground than above named. The case of the Commonwealth v. Western Union Telegraph Co., 23 Ky. Law Rep., 1833, is relied on by appellee as sustaining this position. The question involved and decided in that case was whether a telegraph company that delivers such messages to an operator of a pool room was guilty of the common law offense of maintaining a nuisance. The court held, first, "at common law a gaming house is a nuisance. It is detrimental to the public, because it promotes cheating and other corrupt practices; it encourages idleness and excites the desire to obtain money in an improper way. Persons who are in the occupation and control of such houses are guilty of maintaining a common nuisance;" and, second, that a telegraph company who merely furnished messages to the proprietors of the gambling house were not "in control" or "occupation" of such house; that it was never at common law a nuisance to furnish such messages. Beyond that the court was not called upon to, and did not, decide. Certain expressions used in the opinion by way of illustration or argument seem to have misled counsel. For example, the court cited section 1346, Kentucky Statutes, which punishes telegraph companies by fine for corruptly, or willfully, or for any other improper motive, failing to deliver a message. The whole section is as follows: "If any agent, officer or manager of a telegraph or telephone line in this State, or other person, shall knowingly transmit, on or through the same, any false communication or intelligence with intention to injure any one, or to speculate on any article or merchandise, commerce or trade, or with intent that another may do so; or if any agent, officer or manager of a telegraph or telephone line, from corrupt or improper motives, or willful negligence, shall withhold the transmission or delivery of messages or intelligence, for which the customary charges have been paid or tendered, he shall be fined not less than ten nor more than \$500."

This section aimed at three things: First, to punish a telegraph operator,

or any one else, who knowingly sent false messages with intention to injure another; second, to punish the operator or other person who transmits such telegraphic or telephone message for the purposes of speculation in articles of merchandise and commerce; and, third, to punish the operators who corruptly or by willful negligence failed to deliver a message. Judge Paynter in the opinion in *Commonwealth v. Western Union Tel. Co.*, supra, commenting upon the last mentioned feature of the statute, observed: "If a person desires to transmit a message over a telegraph line, if it is couched in decent language, it is the duty of the company to receive and transmit it upon the tender or payment of the customary charges for such services."

Counsel for appellee construe this language to mean that a telegraph company is bound, and, therefore, of course may voluntarily, accept and transmit any message couched in decent language, upon payment of customary charges. The same section expressly prohibits the transmission of two classes of messages, without regard to the absence or presence of terms that might shock the modesty, viz., false messages intended to injure another, and those for speculation upon the state of the markets. Of course the opinion did not mean to hold that the last annulled the first two provisions of the statute. Nor did the court intend to subscribe to the doctrine that any one, whether a common carrier or not, could be compelled to do an unlawful act, or to become a party to an immoral one. The court did not intend to overrule the case of *Smith v. Western Union Tel. Co.*, 84 Ky., 665, nor to depart from the principles therein announced. It was held in that case that a telegraph company would not be compelled by injunction to furnish service to one who purposed using it in gambling transactions with his customers. In the case of *Commonwealth v. W. U. T. Co.*, supra, the court merely announced that if the telegraph company did furnish such service it was not an indictable offense at the common law. Since the decision in the *Smith* case, supra, section 1346, Kentucky Statutes has made it an indictable offense for a telegraph company to furnish the character of information therein mentioned, viz., bucket-shop quotations. It would be neither courteous nor fair to the legislative branch of the State government to impute to it, in construing one of its statutes, a purpose to encourage crime and foster immorality; to say that it had in mind the compulsion of facts by its citizens which had but the sole object of perpetrating other acts which in every enlightened jurisdiction are deemed vicious and degrading. To hold that the statute being considered compelled the transmission of messages by the telegraph company known to be designed for purposes of gambling within this Commonwealth, would be to convict the legislature of favoring the vice of gambling. On the contrary, the true rule of interpretation is, the purpose of the legislature in passing such act will be presumed to be in harmony with the general public policy, evidenced by innumerable statutes against gambling in almost every conceivable form. A telegraph company, at common law, might become liable for the transmission of a libel, where the matter conveyed information of its nature. (*Whitfield v. S. E. R. Co.*, 1 El. B. & El., 115; *Peterson v. W. U. T. Co.*, 72 Minn., 41; *Manson v. Lathrop*, 96 Wis., 386; *Archambault v. Great Northwestern Tel. Co.*, 4 Montreal, Q. B., 123.) So a common carrier of messages is bound to transmit all messages upon payment of customary charges, when couched in decent terms,

and which it is not prohibited by law from carrying; or which, if delivered, would not subject it to indictment or to an action for damages, or which are not intended for treasonable, unlawful or immoral purposes, known to the carrier. The words "if couched in decent language," used in *Commonwealth v. W. U. T. Co.*, supra, are not in the statute, yet they are properly read into it, as should be the terms above used, for the policy of the law will not discriminate merely in the exclusion of words which might offend the sensibilities, yet allow matter obviously vicious and detrimental to society. (*State of Alabama v. Stripling*, 36 L. R. A., 81; *Gray on Telegraphs*, section 15; *Melchert v. American Union Tel. Co.*, 11 Fed. Rep., 198; *Bryant v. W. U. Tel. Co.*, 17 Fed. Rep., 825; *Cochran v. W. U. Tel. Co.*, 83 Ga., 25.) As said in the *Smith* case, supra, "of course a telegraph company, in assuming to refuse to send a message because it is illegal or immoral, acts upon its peril."

Or, as was observed in *Gray v. Western Union Tel. Co.*, 87 Ga., 350: "When a dispatch is ambiguous, the law would give the benefit of the ambiguity to the company dealing with it, either civilly or criminally, for transmitting the dispatch, and hence it would be the duty of the company, in deciding whether to transmit or not, to give the benefit of the doubt to the sender."

But, however, the matter may be regarded in other respects, it is left in this State, so far as the State policy is concerned, to the discretion of the telegraph company whether it will receive and transmit messages concerning gambling transactions, other than gambling in "futures." It was competent then for the general council of Louisville, in the exercise of that police power delegated to it by the State, to punish the willful transmission of messages furnished to known gambling establishments for the purpose of enabling them and their customers to make bets or lay wagers on horse races. The telegraph company, whether or not it has a conscience, has a duty. It is claimed that this duty is only to serve the public. Not so. Its first duty is to obey the laws, just like other people. The public can not demand a service which in and of itself involves a violation of the law. The ordinance is a clear exercise of police power, and not an improper one.

7th. The final contention of appellees is that the warrants in question are too indefinite, and fail to state any charge against any of appellees. By the warrants the defendants were summoned to show cause why they should not be fined "for violating ordinance to prevent the operation of pool rooms in the city of Louisville." It is complained that no acts are charged. There may be as many as five different offenses under this ordinance. The warrants in these cases do not describe any one of the offenses.

In the recent case of *Commonwealth v. Leak*, 25 Ky. Law Rep., 761, it was held: "The same technical strictness is not required in a proceeding by warrant as by indictment, and ordinarily a warrant in the form prescribed by the Code sufficiently describes the offense, but if made to appear to the satisfaction of the court that a defendant can not intelligently make defense, it should be made more specific."

In *Commonwealth v. Robert VanMeter*, MS. opinion by Judge Cofer, decided in 1876, this court held that a warrant issued in a misdemeanor case not requiring an indictment could be amended, when it was not sufficiently

specific, and that the amendment could be made in the circuit court after the appeal there, inasmuch as it would not have changed the prosecution.

In these cases the warrants can be amended on their return to the circuit court, if demanded by appellees, so as to apprise them as to which sections of the ordinance they are charged with having violated. But it was error to have dismissed the warrants.

The judgments are reversed and causes remanded to the circuit court for trial under proceedings not inconsistent herewith.

Whole court sitting.

GAMEWELL FIRE-ALARM TELEGRAPH CO. v. FIRE AND POLICE TELEGRAPH CO., &c.

(Filed November 18, 1908.)

1. Corporation—Double Liability of stockholders—A corporation organized for the purpose of "conducting a general electric business" and "purchasing or otherwise acquiring stock, bonds or other obligations of other corporations, and selling, transferring and disposing of the same" does not come within the exception of section 547 of the Kentucky Statutes, which excludes from the double liability therein imposed on stockholders corporations organized for the purpose of "constructing or operating water, gas or electric plants."

2. Same—Parties to action—The liability of the stockholders of a corporation under the double liability provision of section 547 of the Kentucky Statutes is several, and it is not improper for the court to adjudge the liability of one stockholder without first bringing the others before the court.

3. Same—The fact that the sole stockholder of a corporation was a corporation does not relieve the latter from double liability to the creditors of the former.

4. Counterclaim—Where a nonresident creditor corporation seeks to have an insolvent resident corporation placed in the hands of a receiver and its assets collected and distributed, a creditor of the insolvent corporation may by counterclaim in the suit enforce the liability of the nonresident as a stockholder therein and force it to pay its statutory liability before it is allowed to receive its pro rata of the assets.

5. One creditor to defend for all—Where the trial court entered an order in an action for a receivership and the settlement of the affairs of an insolvent corporation permitting one of the numerous creditors to sue and defend for all and enjoined the creditors from suing or prosecuting their claims except in that suit, a judgment in favor of all the creditors who had filed their claims with the master commissioner was proper, although they had not filed in the action separate pleadings setting up their claims.

6. Practice—The action of the trial court in charging an attorney's fee adjudged in favor of attorneys who represented the creditors against those creditors only who were not represented by special counsel can not be reviewed at the instance of a creditor who had no part of it to pay, those interested not having appealed.

Dodd & Dodd for appellant.

Randolph H. Blain and McDermott & Ray for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Nunn.

The record in this case is voluminous, and we will state only such facts as are necessary for a proper understanding of the questions involved. It appears that the appellant, the Gamewell Fire Alarm Co., is a foreign corporation organized under the laws of the State of New York. The New Gaynor Electric Co. is a corporation organized under the laws of this State, and likewise the Fire and Police Telegraph Co.

It appears that the New Gaynor Co. was organized in June, 1892, and that the Fire and Police Co. was organized in July, 1894; that prior to this last date the New Gaynor Co. was a competitor of the appellant, Gamewell Co., in this territory, they being engaged in the same line of business. The Gamewell Co. had three or four agents representing it in Louisville, and they, with the president and other officials of the appellant, conceived the plan and purpose of organizing the Fire and Police Co., and preventing further competition by the New Gaynor Co. by purchasing its stock; that since the organization of the Fire and Police Co. it has owned all the stock of the New Gaynor Co., and there has not been held, or pretended to be held, any stockholders' meeting of the New Gaynor Co., or the election of any officers thereof; that since that date the New Gaynor Co. has only had nominal existence at the dictation of the Fire and Police Co. for the purpose of acting as a pretended competitor in obtaining business, and that it had no independence whatever; that this absorption of the New Gaynor Co. by the Fire and Police Co., and holding it out as a pretended competitor for business, was at the instance, dictation and for the benefit of the appellant. There was placed in the hands of agent of appellant, after the absorption of the Fire and Police Co., enough of the New Gaynor Co. stock for the purpose of officering it. These persons continued to hold themselves out as the officers of the New Gaynor Co. until the institution of this action. The public had no notice or information whatever that it only had nominal existence, and was in fact owned by the Fire and Police Co., and during this time it contracted debts to the amount of many thousand dollars, and they also transferred to the Fire and Police Co. all the personal property belonging to them by a simple entry on the books of both companies, without notice to any one, and without visible change of ownership of the property. During the existence of the Fire and Police Co. it contracted debts to the extent of many thousand dollars.

The appellant claimed to be one of the creditors of the Fire and Police Co., and in the year 1900 brought this action against it for about \$8,000, and also made the New Gaynor Co. a defendant, claiming that by reason of the matters hereinbefore stated its property and effects were also liable to the payment of the claims of the Fire and Police Co.'s creditors, and made the necessary allegations for the appointment of a receiver to take charge of the property and assets of both defendant corporations. Appellant also alleged in its petition that the property of the defendant corporations was in danger of being lost, wasted and largely consumed unnecessarily in costs and in enforced sales under executions of their property in behalf of their divers and sundry creditors, and that its interest as a stockholder and creditor, and the interests of all other creditors and stockholders in these defendant companies would be materially injured unless the court appointed a receiver to take charge of this property and convert the proceeds thereof

and pay the same into court for equal distribution among their creditors, and that all the creditors of these defendant corporations be enjoined and restrained from instituting or prosecuting any suit against either the Fire and Police Co. or the New Gaynor Co. The court, on the application of the appellant, appointed a receiver as requested, and granted the injunction enjoining and restraining the creditors of these corporations from instituting or prosecuting suits except in this action.

The New Gaynor Co. and the Fire and Police Co. filed their answers, admitting and stating that the allegations of appellant's petition were true, and joined appellant in its prayer for relief.

The real appellees in this case are the creditors of the New Gaynor Co. and of the Fire and Police Co. The E. A. Kinsey Co., as a creditor of the New Gaynor Co., filed its petition, asking that it be made its answer and counterclaim to appellant's petition and cross petition against the Fire and Police Co. In these petitions and amended petitions the Kinsey Co. allege that the creditors of the New Gaynor Co. were numerous, and that its interest and the interest of all the other creditors of the New Gaynor Co. were identical, and that the questions involved a common and general interest of many persons; that the parties were numerous; that it was impracticable to bring all of them before the court within a reasonable time, and that the expense would be great if each and all of the creditors were required to file independent and separate pleas in presenting their claims, and that it, the Kinsey Co., be allowed to sue and defend for the benefit of all the creditors of the New Gaynor Co. The appellee, Southern Electric Co., a creditor of the Fire and Police Co., filed a similar pleading, with like allegations, for the benefit of all the creditors of the Fire and Police Co., and the court made an order allowing the Kinsey Co. to sue and defend for the New Gaynor Co. creditors, and the Southern Co. for the Fire and Police Co. creditors.

These appellees, the creditors of the two defendant corporations, admitted the attempted transfer of the property of the New Gaynor Co. to the Fire and Police Co. and of the purchase by the Fire and Police Co. of the New Gaynor Co. stock, but say that it was done without any notice to them, or their having any knowledge or information thereof, and for a fraudulent purpose, and with intent to cheat the creditors of the two companies, and with intent to benefit the appellant. They further allege that the appellant, Gamewell Co., the Fire and Police Co. and the Gamewell Fire Alarm Auxiliary Co. (which was a Maine corporation) were at and during the times mentioned in the petition organized and had become a pool, trust, combine and confederation for the purpose of regulating, controlling, increasing and fixing the price of electrical apparatus and appliances and fire alarms in the city of Louisville and community, and for the purpose of fixing, establishing and limiting the amount and quantity of such articles to be produced and manufactured, bought or sold, and that the notes sued on in appellant's petition and transactions and contracts of which they were evidence were made and executed for the purpose of carrying out such illegal combination, pool or trust, and that the money loaned, pretended to have been loaned or furnished by the appellant, Gamewell Co., to the fire and police company, as claimed in the petition, was loaned or furnished for such

illegal purpose and in furtherance of such unlawful scheme; that these transactions were in violation of provisions of the statutes of this State, and that the notes and contracts alleged and set forth in appellant's petition by reason of these facts were each and all null and void, and that the appellant had no claim against the assets of the Fire and Police Co. by reason of such pretended notes and contracts. They further alleged that the assets of the New Gaynor Co. and the Fire and Police Co. were not sufficient to pay their indebtedness, and would only pay a small pro rata thereon, naming the amounts, which was also reported by the commissioner of the court, and that the Fire and Police Co. owned all the stock of the New Gaynor Co.; that the New Gaynor Co. was not organized for any of the purposes mentioned in section 547 of the Kentucky Statutes, and that by reason thereof the Fire and Police Co. was liable to all the creditors of the New Gaynor Co. to the extent of the amount of stock held by it in the New Gaynor Co. at par value, in addition to the amount of its stock not exceeding the total amount of the respective debts of such creditors after the assets of the New Gaynor Co. had been exhausted; that the settlement of the affairs of the New Gaynor Co. and the Fire and Police Co. were then in the hands of the receiver appointed by the court in that action, and were about to be wound up, and the assets of each company about to be distributed, and unless the liability of the Fire and Police Co., as stockholder in the New Gaynor Co., be determined in that action, and its liability be enforced, great and irreparable injury would be done to the creditors of the New Gaynor Co., and they would be powerless to enforce their respective rights and claims against the Fire and Police Co. as such stockholder. They asked the court not to allow the Fire and Police Co. its pro rata on the claim it had filed against the New Gaynor Co., but to distribute its part among the other creditors, and give the Fire and Police Co. credit on its liability therefor. The appellees also alleged in their pleadings that the appellant, Gamewell Co., was a foreign corporation; that its chief office and place of business was in the city of New York, and that appellant was claiming in its action to be one of the creditors of the Fire and Police Co. to the extent of about \$6,000 and interest, and was seeking to subject the assets of the Fire and Police Co. and the New Gaynor Co. to the payment of its claims, and that the appellant was the owner in its own right of seventy shares of stock of the par value of \$100 each in the Fire and Police Co., and that the Fire and Police Co. continued to contract and be contracted with until the commencement of this action; that the assets of the Fire and Police Co. will only pay a very small pro rata part of the claim of its creditors, and that the larger part of the respective claims can not be satisfied from the assets of the company then in the hands of the receiver of the court; that the Fire and Police Co. was not organized for any of the purposes mentioned in section 547 of the Kentucky Statutes, and that by reason thereof the stockholders of the Fire and Police Co., including the appellant, the Gamewell Co., were each individually liable and responsible equally and ratably, and not one for the other, for all contracts and liabilities of the Fire and Police Co. to the extent of the amount of their stock at par value, in addition to the amount of their stock, and that the Fire and Police Co., organized with a capital stock of \$50,000, divided

into 500 shares of the par value of \$100 per share, and that 450 shares of this stock was issued to, and then owned by, various persons, all of whom were unknown to the petitioners, except the appellant, who then held seventy shares of the stock; that of the stock issued by the Fire and Police Co. the appellant owned seven forty-fifths thereof, and that it was liable for its proportional part to the creditors of the Fire and Police Co., after deducting therefrom the assets in the hands of the receiver, not to exceed the par value of the stock held by it in the Fire and Police Co.; that the appellant is seeking to withdraw from this State whatever sum it recovered, if any, against the Fire and Police Co. on its claim and remove it from the State of Kentucky and out of the jurisdiction of this court, and asked the court not to permit it to do so, and also that it be required to account to the creditors on its stock liability by virtue of section 547 of the Kentucky Statutes.

The issues were made up, the proof was heard and the court adjudged in substance as follows:

Among other things, it gives judgment to the creditors of the New Gaynor Co. for the amount of their respective claims by confirming the commissioner's report allowing their claims. It gives judgment to the creditors of the New Gaynor Co. against the Fire and Police Co. as stockholder in the New Gaynor Co. upon the balance of these claims of the creditors of the New Gaynor Co. remaining unpaid after its assets had been distributed. It gives judgment to the ordinary creditors of the Fire and Police Co., including the appellant, upon their respective claims. It distributes the assets of the Fire and Police Co. pro rata among all of its creditors, including those to whom it was liable as stockholder in the New Gaynor Co., as well as those to whom it was liable by reason of its ordinary transactions. It gives judgment over against the appellant, the Gamewell Co., a foreign corporation, for the amount of its statutory fixed proportional liability as stockholder in the Fire and Police Co. to all of the creditors of this company. It subjects to the payment of this last-mentioned judgment against the appellant, so far as they would go, the funds of this nonresident appellant in the hands of the court, to wit, the pro rata allowed it upon its claim against the Fire and Police Co., and in a subsequent judgment fixed the fee of the attorneys representing the creditors of the two defendant corporations and allowed them a certain per cent. out of the amounts recovered, but only made those of the creditors responsible who were not represented by other counsel in the preparation and trial of the case.

The appellant asks for a reversal of this case for several reasons. It contends that the court erred in adjudging that the stockholders in the Fire Police Co. were subject to the double liability imposed by section 547 of the Kentucky Statutes, claiming that it appeared from the charter of the Fire and Police Co. that its business was solely and exclusively that of selling agent of appellant, Gamewell Co., in the construction and installation of fire arm, telegraph and police alarm telegraph plants, and that by this section of the statutes the stockholders therein were expressly exempt from this double liability. The statutes, in so far as is necessary for the determination of this question, read as follows: "The stockholders of each corporation shall be liable to creditors for the full amount of the unpaid

part of the stock subscribed for by them, and stockholders of corporations, not organized for educational, religious, charitable or benevolent purposes, or for the purpose of building, constructing or grading turnpikes or bridges, lines of railroad, telegraph or telephone, or developing or improving lands, mines or waterways, or constructing or operating water, gas or electric plants, or operating for petroleum, natural gas or salt water, shall be individually responsible, equally and ratably, and not one for the other, for all contracts and liabilities of such corporations to the extent of the amount of their stock at par value, in addition to the amount of such stock."

The latter portion of section 573 of the Kentucky Statutes reads as follows: "After the 28th day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

The Fire and Police Co. having been organized in 1894, before these acts became laws, the stockholders therein were nevertheless liable because it continued to do business after the law went into effect and up to the time of the institution of this action in 1900, provided they are not relieved by the exceptions contained in the statute, which is the contention of the appellant. We quote so much of the charter of the Fire and Police Co. as will aid in determining the question under consideration: "The business which said corporation proposes to carry on shall be the manufacturing and dealing in electric machinery, apparatus and supplies; conducting a general electric business, and exploiting or promoting the fire and police telegraph business; the purchasing or otherwise acquiring stock, bonds or other obligations of other corporations, and selling, transferring and disposing of the same, and the doing and performing of all things incident to or connected with or necessary or proper to be done in carrying on the general business herein stated as fully, and to the same extent, as a private person may do."

It appears that the statutes only exempt stockholders in corporations from double liability when the corporation is organized for educational or other like purposes, or for the purpose of building, constructing or operating telegraph or other lines, or constructing or operating electric or other plants. It appears that the Fire and Police Co. was organized for other purposes than those exempted in the statutes. It was permitted to manufacture and deal in electric machinery and supplies, and to exploit or promote the fire and police telegraph business; to purchase or otherwise acquire stock, bonds or other obligations of other corporations, and sell, transfer and dispose of the same, and to do and perform all things incident to or necessary or proper to be done in the conduct of the general business herein stated to the same extent that a private person might do. Even admitting that the proof of appellant shows that the Fire and Police Co. only acted as its agent in disposing of its electric supplies, this would not relieve its stockholders from the double liability under the statutes. Their liability must be determined from the language of the statutes and its charter showing the purposes for which it was organized. Any other construction would place a burden upon those dealing with corporations that would be onerous and unjust. Persons dealing with corporations have the right, and it is their duty, to look to their charters for their powers and responsibilities. The statute says if the cor-

poration was organized for the purpose. It does not say that if they were engaged in such business they would be exempt. The case of *Arthur v. Willius*, 44 Minn., 409, is in point. The Constitution of that State provided that corporations organized for manufacturing purposes should be excepted from the general provisions of the Constitution making stockholders of corporations doubly liable. In the opinion the court said: "And if the corporation is organized for the purpose, as declared in the articles of association, of carrying on both a manufacturing business and also some other kinds of business not properly incidental to, or necessarily connected with, a manufacturing business, the mere fact that the corporation never exercised all its corporate powers, and never in fact engaged in or carried on anything but a manufacturing business, will not bring the case within the constitutional exception."

The statutes except such companies as are organized for the construction or operation of electric plants. It does not except all corporations dealing in electric machinery and buying and selling electric supplies. The field covered by electric machinery and electric supplies is entirely too broad to come within the meaning of the statute. The statute does not except corporations organized for the purpose of conducting a "general electric business." A general electric business would include the manufacture of, the buying and selling of every electric contrivance or apparatus known to modern science, and there are no exceptions in the statutes in favor of corporations organized for the purpose "of acquiring stocks and bonds or other obligations of other corporations, and selling and transferring the same." There is not an intimation in the charter of the Fire and Police Co., that its only business was to be that of acting as selling agent of appellant, Gamewell Co., in selling and disposing of its appliances. Even if the proof sustained this contention, the petition of plaintiff states that it did engage in other business by buying and dealing in stocks of other corporations, to wit, the New Gaynor Co.

The appellant, the Gamewell Co., contends that even admitting its double liability under the statutes as a stockholder in the Fire and Police Co., it was error of the court in so adjudging in this action for the reasons that the other stockholders in the Fire and Police Co. were not made parties to this action, and that it, the sole stockholder before the court in this action, was made responsible upon its statutory liability. From the record it appears that the stockholders in this corporation were unknown to appellees, and the presumption is that the appellant knew the stockholders in the Fire and Police Co., it being one of them, and if it deemed it necessary that the other stockholders should be made parties to the action it could have, by appropriate pleadings and proceedings, made them parties, but it made no effort in this direction. Even if this was error, it was not prejudicial to the substantial rights of the appellant. All the stockholders of the Fire and Police Co. were responsible for the double liability under the statute quoted, but the liability of each stockholder therein was several and individual, equally and ratably, but not one for the other. The only thing necessary to be done was to ascertain the indebtedness of the corporation and deduct its assets therefrom, and then ascertain the amount of liability of appellant under the statute quoted. The case of *Castleman v. Holmes*, 4 J. J.

M., 5, was where stockholders in a corporation had been sued. In that case the court said: "The liability of the defendants is several, and not joint. They were properly united in the same action, as we have already seen, but when the rule of apportionment was ascertained, and the cause prepared as to any one, we can not see any sufficient reason why he should not be directed to do justice, without delaying, until others can be reached."

Section 28 of the Civil Code is as follows: "The court may determine any controversy between parties before it, if it can do so without prejudice to others." * * * The presence and appearance of the other stockholders of the Fire and Police Co. in this action could not have, under any possibility, increased or diminished the amount of appellant's liability under the statute quoted.

There can be no question as to the double liability of the Fire and Police Co. to the creditors of the New Gaynor Co. Its being the sole stockholder and a corporation does not alter the case. The statutes says that all stockholders (unless within the excepted class) shall be liable. It does not make any distinction between the stockholding corporation and an individual. Their responsibility under the statutes are the same. Nor does it relieve it of liability because it was the sole stockholder of the New Gaynor Co. It placed stock in the hands of three persons, who were thus qualified to be, and did continue to be, officers of the New Gaynor Co. until a receiver was appointed in this action. This was a fraudulent transaction entered into by the appellant, the Fire and Police Co. and the New Gaynor Co. for the purpose of holding the New Gaynor Co. out as a real corporation, and as a pretended competitor, when it was in fact only a dummy for the appellant and the Fire and Police Co. with a view to test the public. This fraud might have been taken advantage of by parties in interest not implicated, but it can not relieve the parties, who caused or induced the wrong, from liability imposed by their own acts. (20 Ky. Law Rep., 1069; Louisville Banking Co. v. Eisman, 94 Ky., 893.)

The appellant contends that appellees' pleadings, by which they sought to enforce appellant's liability as a stockholder under section 517 of the statutes, did not constitute a counterclaim, and being by a defendant against the plaintiff, could not be a cross petition. We are of the opinion that the facts stated constituted a counterclaim. A counterclaim is defined by section 96 of the Civil Code to be a cause of action in favor of a defendant against a plaintiff or against him and another, which arises out of the contract or transaction stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action. The purpose of this action, as stated by appellant in the prayer of its petition, was to have the affairs of the insolvent resident corporations placed in the hands of a receiver of the court, and their assets collected, and the same paid to the creditors of the two corporations. The assets of the two corporations consisted, in addition to visible personal property, in debts due them by contract, as well as sums due from stockholders under their liability created by the statutes. It was certainly connected with the subject of this action and the settlement of those insolvent corporations for the appellees to ask the court to require the appellant, a nonresident corporation, to pay and settle the amount it owed under its statutory liability. This would not have been

improper even if it had been a resident corporation. The court was right in not permitting appellant, a foreign corporation, to receive its pro rata on its claim and then leave the State and compel its creditors to seek a foreign jurisdiction for their relief. (*Forbes & Bro. v. Cooper & Co.*, 88 Ky., 288; *Tinsley v. Tinsley*, 15 B. M., 459.) A nonresident creditor who owns stock in an insolvent Kentucky corporation can not come into a court of equity in this State and subject to the payment of its debts the assets of the insolvent domestic corporation, upon which other creditors have equal claims, and escape from the jurisdiction of our courts with a part of this trust funds in its hands, and thereby lessen the pro rata of other creditors, without first doing equity by paying to the other creditors the amount of its statutory liability to them upon these corporate debts as a stockholder in the insolvent corporation. The other creditors can protect themselves and enforce their rights by a counterclaim.

The appellant also objects to the relief granted by the lower court to all the creditors of the insolvent resident corporation other than the appellees, Kinsey Co. and Southern Co., they being the only creditors to file written pleadings setting forth their claims. The appellant contends that the judgment rendered in behalf of the other creditors are erroneous and should be reversed. All these creditors had a common or general interest in requiring the appellant to account for its statutory liability as a stockholder of the Fire and Police Co., and the creditors were numerous, and it would have been impracticable to bring them all before the court within a reasonable time; for them to appear in the circuit court by written pleadings would have been unnecessary and exceedingly expensive and the court had, at the beginning of the action, on the application of appellant, enjoined and restrained all these creditors from bringing or prosecuting any action or actions on their claims except in this action. The Kinsey Co. and the Southern Co. were authorized by an order of court to prosecute and defend for all of these creditors under section 25 of the Civil Code. Under section 432 of the Civil Code it is provided: "A creditor appearing before the commissioner and presenting his claim becomes thereby a party to the action, and is concluded by the final judgment of the court in allowing or rejecting his claim." In view of the fact that these creditors had filed their claims before the master commissioner, as required by statute, and that the Kinsey Co. and the Southern Co. had prepared and filed pleadings for the benefit of themselves and all the creditors having a common or general interest with them, and had been permitted by an order of court to sue and defend for all, and in view of the provisions of the Code last quoted, and the further fact that those creditors had been enjoined and restrained at the instance of appellant from prosecuting actions for their relief except in this action, and the enormous additional expense herein if they had been required to file separate written pleadings in behalf of each of the hundred or more creditors, setting forth their claims, it would be a travesty on justice to say that they were not entitled to the relief granted them herein by the lower court.

The appellant further complains of the action of the lower court in allowing a certain per cent. of the amounts recovered to be charged against all the creditors who were not represented by special counsel. Admitting this to be true, it is not a cause for reversal of the judgment, for the reason that

the creditors who were required to pay it have not appealed, and the appellant has no interest in the matter, as it does not have to pay any part of it.

Perceiving no error prejudicial to the substantial rights of the appellant the judgment of the lower court is affirmed.

COMMONWEALTH v. WOOD.

(Filed November 18, 1903.)

Malfesance in office—Sufficiency of indictment—An indictment charging an officer with malfesance in office must charge that the act complained of was accompanied by an evil intent or motive, or that it was done with such gross negligence as to be equivalent to fraud.

Clifton J. Pratt, M. R. Todd and Jas. R. Mallory for appellant.

Petrie & Standard for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Judge O'Rear.

Appellee was indicted by the grand jury of Todd county for malfesance in office. It is charged that he, as county court clerk of Todd county, "willfully and unlawfully" issued a liquor license to one Greenfield, to sell liquor by retail in the town of Trenton, when previously that town had, at an election regularly held, voted in favor of the local option law; and that the result of the vote duly certified was of record in his office. The only question presented that we have felt called upon to decide or consider is the sufficiency of the charge as made in the indictment. It is not averred that appellee's action was from a corrupt motive, or fraudulent, or that he knew at the time that it was unlawful for him to issue the license.

While malfesance in office is defined generally to be the wrongful or unjust doing of some official act, which the doer has no right to perform, or which he has stipulated by contract not to do, it is essential that an evil intent or motive must accompany the act, or that it must have been done with such gross negligence as to be equivalent to fraud. As said in Bishop's New Criminal Law, section 972: "The court requires evidence of something more than a mere mistake of duty; there must be corruption. This also is necessary to sustain an indictment."

And in the same author's work on New Criminal Procedure, section 834, it is said: "Corruption in some form of words must generally be averred; it is believed, always at common law."

An honest mistake of an officer concerning the discharge of an official duty, although it may be the result of ignorance, ought not to, and can not, unless the express terms of the statute impels to such construction, make him a criminal. If the act is done with a corrupt purpose, or from a corrupt motive, or with a knowledge by the officer at the time that his official act is a violation of the law, or if the act is done so negligently, or carelessly, or recklessly as to show an utter want of care or of concern, and such as would be tantamount to a fraud, and, therefore, could be said to be fraudulently done, his act will be a malfesance, but not otherwise. (Commonwealth v. Arnold, 3 Litt., 309; Commonwealth v. Barney, 24 Ky. Law Rep., 2852;

Lynch v. Commonwealth, 24 Ky. Law Rep., 2180; Commonwealth v. McPeck, 14 Ky. Law Rep., 215; Commonwealth v. Rodes, 6 B. Mon., 171; Commonwealth v. Chinn, 22 Ky. Law Rep., 1931.)

Wherefore, the judgment of the circuit court sustaining the demurrer to the indictment is affirmed.

MCDOWELL, SHERIFF V. GRUBBS.

(Filed November 18, 1903.)

Life estate in lands—Allotment of homestead—In allotting homestead to a debtor who owns only a life estate in the lands levied on under execution the fee-simple value of the land should be estimated and \$1,000 worth thereof should be set aside to him; the value of the life estate is not the proper basis of allotment.

Emmet V. Puryear, W. Reed Embry and John C. Voris for appellant.

Chas. H. Rodes, C. C. Bagby and R. C. McKee for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Nunn.

The appellant, as sheriff of Boyle county, having had placed in his hands an execution against the estate of the appellee, Grubbs, issued from the Boyle Circuit Court upon a judgment rendered in favor of Nanny Pence against appellee, the sheriff levied this execution upon appellee's life estate in a tract of land lying in Boyle county, containing about thirty acres, subject to the homestead right of appellee in this property. Appellant caused to be appraised and set aside to appellee Grubbs a portion of this land, including the dwelling house and appurtenances of the value of at least \$1,000 as his homestead therein, and advertised for sale under this execution the life estate of appellee in the residue of this land. Appellee filed his petition in equity in the Boyle Circuit Court, alleging that he had, and was entitled to, a homestead in this tract of land, and that the interest owned therein by him was a life interest or life estate only; that the value of his life interest in the whole of this land was worth less than the sum of \$1,000, and that he was entitled to hold the whole of this tract of land as a homestead, and obtained an injunction against the appellant enjoining and restraining him from selling this property, or any part thereof, and asked that the whole of it be adjudged to him as a homestead. Appellant filed his answer, averring that he levied this execution upon appellee's life estate in this land subject to his homestead exemption therein, and that before advertising his life estate for sale under the execution he selected two disinterested housekeepers of Boyle county not related to either party, who being duly sworn, valued and set apart to appellee, as his homestead in this land, a certain part of same, including the dwelling house and appurtenances; this valuation and allotment being made in writing, and that the portion of this property so valued and set apart to appellee as his homestead was worth more in fee-simple than the sum of \$1,000, and that he was seeking to sell only the life estate and life interest of appellee in the remainder of this property and denied that plaintiff was entitled to the whole of the land as a homestead. Appellee filed a general demurrer to this answer, which was sustained by the

court, and the court granted a permanent injunction against appellant perpetually enjoining him from selling this land or any part thereof, and the appellant has appealed from that judgment.

The only question raised on this demurrer, as shown by the judgment, was whether the homestead right of the appellee should be based upon the value of the fee or upon the value of the life estate. The court below took the view that the homestead right of appellee should be based upon the value of the life estate, and for that reason sustained the demurrer. The sole question arising then on this appeal for the consideration of this court is, did the court below err in sustaining this demurrer, or, in other words, in allotting homestead to a debtor who owns only a life estate therein, shall the fee simple value of the land be estimated and he have set apart to him as a homestead \$1,000 worth of the land, including the dwelling house and appurtenances, or shall the value of the life estate only be estimated and he be allotted as his homestead not \$1,000 worth of land, but such a quantity of land, his life estate in which is worth \$1,000?

This question must be determined upon the construction of the sections of our statute applicable thereto. We quote so much of section 1702 of the Kentucky Statutes as relates to the question involved: * * * "There shall * * * be exempt from sale under execution * * * so much land, including the dwelling house and appurtenances, owned by debtors * * * as shall not exceed in value \$1,000." * * *

Section 1703 says: "Before a sale under execution, attachment or judgment of land occupied as a homestead the officer in whose hands the writ or judgment may be shall cause such part thereof * * * as shall not exceed in value \$1,000 to be valued under oath and set apart to him, etc."

In our opinion it was the intention and purpose of the legislature in the enactment of these statutes to exempt to the debtor entitled to the exemption \$1,000 worth of land in which he had a sufficient estate or ownership to support a homestead. It is the settled law of this State that the owner of a life estate in land may be entitled to a homestead therein; that his title is sufficient to support a homestead. (Robinson v. Smithey, 80 Ky., 636.) It seems to us plain from the foregoing sections of the statutes that the amount of the exemption is to be limited to \$1,000 worth of land regardless of the title or tenure by which it is held. No reference is made to the estate or interest of the debtor in the property, but the amount of the exemption is simply limited to \$1,000 worth of land. The statute says "so much land as shall not exceed in value \$1,000." Section 1703 in substance says that the officer shall cause such part of the land as shall not exceed in value \$2,000 to be set apart to the debtor. It makes no reference to the character of title held by the owner or occupier of the homestead.

It surely was intended by the legislature in the enactment of our homestead laws that they should operate uniformly and equally upon all persons coming within the operation of the statutes; that homestead debtors should have equal rights and benefits thereunder; that there should be a uniform rule for determining the amount of the exempted property and that no one class of debtors should have an advantage over any other class or classes. This result can only be reached by making the value of the fee the basis in all cases, regardless of the interest owned by the debtor in the land. Such

would certainly not result from the application of the rule contended for by appellee in this case. Should the view contended for by appellee be sustained and the debtor owning only a life estate in land be allowed to hold, use and occupy as a homestead, and enjoy the rents and profits from the land in which the life interest is worth \$1,000, then this class of debtors, by reason of their owning a lesser estate in the land, would have an advantage over and receive greater benefits from the homestead right than debtors owning the fee simple or absolute title to their land. To illustrate: Suppose a like execution debtor owned in fee thirty acres of land adjoining appellee; under the construction of the statutes as contended for by appellee the appellee would be given a home and the use of the whole thirty acres for the balance of his life free from sale under execution, while his neighbor owning the fee would be compelled to take as his home against the execution his house and possibly ten acres of land, at any rate less than the thirty acres.

The purpose and object of these laws is the conservation of family homes; to secure to the housekeeper with a family the possession of his home, where he may shelter, support and rear his family without being in constant danger and fear of judicial writs and the auctioneer's hammer. They were intended to merely protect the possession and right of occupancy, and not to provide for the debtor something that he might sell or barter away and realize \$1,000 therefrom. The value of the possession and right of occupancy of \$1,000 worth of land in which a person owns only a life estate is exactly the same as if he owned the fee. The following cases, in our opinion, support the views above expressed: *Crigler v. Connor*, 10 Ky. Law Rep., 958; *Franks v. Lucas*, 14 Bush, 335, and *Suter, &c. v. Quarles, &c.*, 23 Ky. Law Rep., 1080.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

Whole court sitting.

Judge O'Rear dissenting.

Judge O'Rear delivered the following dissenting opinion:

I have always been of the opinion that the legislature intended by the statute quoted to exempt to a debtor not exceeding \$1,000 worth of his own land which may be occupied by him and his family as a homestead.

I do not see that it could matter to the creditor whether the debtor's exempted homestead consisted in the fee or the life estate. The question is not how much enjoyment the debtor may get out of his property, but what value of property shall be exempted to him from liability for his debts.

I, therefore, respectfully dissent from the majority opinion in this case.

COMMONWEALTH V. SCHLITZBAUM.

(Filed November 18, 1903—Not to be reported.)

1. Appeal—Time for filing transcript in criminal case—The Court of Appeals has no jurisdiction of an appeal from a decision of a trial court in a criminal case where the transcript was not filed in the clerk's office within sixty days after the decision was rendered.

2. Same—The failure to file the transcript within the time required by statute can not be cured by the entry of an order granting the appeal, at a term subsequent to that at which the decision was rendered as section 337

of the Criminal Code requires that the appeal must be prayed and noted of record during the term at which the judgment was rendered.

3. Agreement of parties—An agreement of the parties to disregard the requirements of the Code as to the time of filing the transcript can not confer jurisdiction on the court in a felony case.

H. P. Taylor, C. J. Pratt and M. R. Todd for appellant.

Glenn & Ringo and Heaverin & Woodward for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Settle.

This is an appeal taken by the Commonwealth to obtain of this court a review of certain rulings of the lower court upon questions of law involved in this case, though the case is yet undetermined, such an appeal being permissible under section 335, Criminal Code, which provides that "an appeal shall only be taken on a final judgment, except on behalf of the Commonwealth." * * * Subsection 1, section 336, directs that "the appeal must be prayed during the term at which the judgment is rendered, and the prayer noted on the record in the circuit court." * * *

Section 337 provides that "if an appeal on behalf of the Commonwealth be desired, the Commonwealth's attorney shall pray the appeal during the term at which the decision is rendered, whereupon the clerk shall immediately make a transcript of record and transmit the same to the attorney general, or deliver the transcript to the Commonwealth's attorney to be transmitted by him. If the attorney general on inspecting the record be satisfied that error has been committed to the prejudice of the Commonwealth upon which it is important to the correct and uniform administration of the criminal law that the Court of Appeals should decide, he may, by lodging the transcript in the clerk's office of the Court of Appeals within sixty days after the decision take the appeal."

We find from the record that the judgment appealed from was rendered, and the appeal prayed and noted of record on March 17, 1908, and the transcript of record was not filed in the clerk's office of this court until June 15, 1908, which was more than sixty days after the decision appealed from was rendered. It is manifest, therefore, that the transcript was not filed in time to give this court jurisdiction of the appeal. The difficulty was attempted to be obviated by having an order entered at the subsequent term of the circuit court, viz., on May 29, which again granted the appeal from the judgment of March 17 preceding, but the second order can not cure the delay in filing the record in this court, for, as already stated, the appeal must, as required by the mandatory provision of the Code supra, be prayed and noted of record during the term at which the judgment appealed from was rendered.

It has more than once been decided by this court that when the transcript in a felony case is not filed within sixty days after judgment, and no order is made within that period by this court extending the time for filing the transcript, this court is without jurisdiction to try the appeal. (*Metcalf v. Commonwealth*, 84 Ky., 485; *Stratton v. Commonwealth*, 84 Ky., 190; *Aikins v. Commonwealth*, 19 Ky. Law Rep., 1800; *Commonwealth v. Fryman*, 17 Ky. Law Rep., 400.)

In case of failure to file the transcript in time even an agreement between the parties to the appeal to disregard the requirement of the Code as to the time of filing the transcript can not in a felony case confer jurisdiction upon this court to entertain the appeal.

Wherefore, the appeal is dismissed.

Whole court sitting.

LOUISVILLE & NASHVILLE R. R. CO. v. BARBER ASPHALT
PAVING CO., & CO.

(Filed November 19, 1903—Not to be reported.)

Street improvements—Liability of railroad right of way to cost—A perpetual right of way owned and used by a railroad company is subject to its proportionate share of the cost of improving a city street upon which it abuts.

Helm, Bruce & Helm for appellant.

William Furlong and B. F. Washer for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Paynter.

The appellant owns the perpetual right of way over a strip of land which parallels the street improved under the city ordinance. It is admitted by counsel that the facts of this case raise the question decided in *Figg v. Louisville & Nashville R. R. Co.*, 25 Ky. Law Rep., 350. The opinion in that case reads as follows: "The main line of the Louisville & Nashville R. R. Co. runs southwardly from near Tenth and Broadway streets, Louisville, Ky., to and beyond Nashville, Tenn. Its right of way is sixty feet in width. Under appropriate proceedings in the general council Magnolia avenue was improved by original construction, and the taxing district was properly designated. Within that district east of Seventh street and south of Magnolia avenue is a parcel of land sixty feet wide used by the appellee as a road bed, or what is commonly called the right of way, and as a part of it a triangular parcel north of Magnolia avenue and east of Seventh street.

It is insisted on the behalf of the railroad company that, first, the property sought to be subjected to part of the cost of street improvement is only a right of way, and, therefore, can not be charged therewith; second, it receives no benefit from the improvement; third, the right of way is not a lot in the meaning of the statute governing street improvement. It is not the intangible right to use it, but the strip of land which the railroad company appropriates for its use, and upon which it builds its roadbed, is its right of way. The railroad company has been in possession of the strip of land in question for fifty years. It is a part of a great railroad system. Its right of way is perpetual. In *Elizabethtown, Lexington & Big Sandy R. R. Co. v. Combs*, 10 Bush, 393, the court held the injury resulting from the location of a railroad in such proximity to adjacent property so that smoke, soot and fire from passing engines was thrown, blown into or upon it, entitled the owner to a single recovery, as the injury was permanent and enduring. In other words, the court regarded that the railroad had appropriated it for all

time to come, and the injury would be permanent. It is the very remotest possibility imaginable that the appellee would ever abandon its right of way. The court concludes that its use of its right of way will be perpetual. It is, therefore, practically the owner of the land. If this strip of land was not occupied by the railroad company as a right of way it would not be suggested that it was not subject to the special tax for street improvement. The purpose for which the lot is used can not affect the question of its liability for the cost of street improvement. Counsel for appellee calls attention to cases of other courts holding that rights of way can not be charged with the cost of street improvement; while, on the other hand, counsel for the appellant calls attention to cases of other courts holding that such rights of way are liable for such cost. It is not necessary to discuss this class of cases further, because this court in *Louisville, Cincinnati & Lexington R. R. Co., and Louisville Railroad Transfer Co. v. Obst & Stengel, &c., Mss. opinion February 23, 1875, City of Ludlow v. Cincinnati Southern R. R. Co., 78 Ky., 357*, held that such special taxation could be imposed.

On the second question we quote from *Preston v. Rudd, &c., 84 Ky., 156*, which reads as follows: "Such assessments are made upon the assumption that a portion of the community are especially benefited by the improvement; the principle is that the territory is benefited; that it has a common interest, and that, governed by equitable rules, it must equally bear the burden. Necessarily individual cases of hardship will arise; but it approaches equality as nearly as it is practicable. It follows that a lot owner may be compelled to pay his proportion of the cost of an improvement, although in his particular case his property may not be benefited. This rule, however, can not be so extended as to entirely take from the citizen his property. This would work 'a manifest injustice.' It would be spoliation, and not taxation. Under the guise of benefit and taxation he can not be thus arbitrarily deprived of his property. It would be but an appropriation of it, by the exercise of arbitrary power, to public use without compensation." * * *

We do not understand that *Barfield, &c. v. Gleason, &c., 23 Ky. Law Rep., 128*, changes the rule announced in *Preston v. Rudd, &c.*, and other cases of this court. Spoliation is not shown in this case. Under the statute governing street improvement a lot is any piece of land within the territory defined by the statute or the general council where the territory to be assessed is not bounded by principal streets. The use or nonuse, or the character of the use to which the parcel of land is put, does not determine the question whether it is or is not a lot. The strip of land used by the railroad company the day before it was appropriated by it as a right of way was a lot in the meaning of the statute, and to thus appropriate it can not change its character."

The judgment is affirmed.

COMMONWEALTH v. BOOKER.

(Filed November 19, 1903—Not to be reported.)

1. Homicide—Evidence—It is competent for one accused of manslaughter to detail a conversation had with the deceased about a month before the
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killing with reference to certain statements which deceased had charged accused with having made about him for the purpose of showing the purpose which deceased had in stopping accused on the public road at the time of the killing and for the purpose of sustaining the defense that there was apparent necessity for killing deceased.

2 Same—It was also competent to allow the accused to testify that the deceased had, about a month before the killing, met accused in the road and had put his hands in his coat pocket, looked mad and passed without speaking; and also that he was a dangerous man and habitually armed.

Clifton J. Pratt and M. R. Todd for appellant.

Appeal from Green Circuit Court.

Opinion of the court by Judge Paynter.

The case was brought here by the Commonwealth to have the court determine the questions as to the admissibility of certain evidence, and as to whether a certain instruction should have been given the jury. There is evidence to the effect that Booker killed Henry E. Christie on a public road, near the store of Ed. Haskins, but we deem it unnecessary to state all the evidence relating to and the circumstances of the killing. It is sufficient to say that the defendant claims that he was riding along the public road on horseback when he met the deceased and Josh Inghram; that the deceased stopped him and began the difficulty, which resulted in the homicide. The defendant was permitted to testify that about one month before the difficulty mentioned he was at the house of one Cabell, when he received a telephone message that Christie and Ed. Haskins were at his home acting strangely (there is other evidence tending to show that they had gone there for the purpose of having a difficulty with the defendant); that afterwards he met Christie and Haskins, when they admitted that they had been at his house to see him about some alleged statements made by him, which were derogatory to the deceased and the mother of Haskins. The conversation detailed by the defendant tended to show that they were angry with the defendant for the reason indicated, and that although the defendant denied the statements imputed to him, the repeated question indicates they were not satisfied with his denial. There was evidence tending to show that the deceased had sent messages to the defendant calculated to bring on a difficulty between them. The evidence to which objection is urged tends to show the purpose which the deceased had in stopping the defendant on the public road, and to support the defense that there was an apparent necessity for killing deceased. We are of the opinion that the court properly allowed the defendant to detail the conversation with the deceased and Haskins.

The court, for the reasons given above, properly allowed the defendant to testify that about one month before the killing he had met the deceased in the road, when he put his hands in his coat pocket, looked mad and passed defendant without speaking; that the deceased was a dangerous man and went habitually armed.

The doctrine of *Utterback v. Commonwealth*, 105 Ky., 728, on the subject of mutual combat, does not apply to this case as the facts are essentially different.

This opinion is ordered certified to the Green Circuit Court.

ERNST, BY, &c. v. CITY OF WEST COVINGTON.

(Filed November 19, 1908.)

Municipal corporation—Defective condition of property—A municipality is not liable in damages for injuries to a pupil in the public schools resulting from the defective condition of property belonging to the city and voluntarily contributed by it for public school purposes.

J. T. Hanger and W. McD. Shaw for appellants.

Hall & McLean for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

West Covington is a city of the fifth class, with the power to acquire and hold real estate. It owned a two-story building situated within its corporate limits. The plaintiffs' cause of action may be best stated by quoting from the petition as follows: "That said defendant permits said building to be used as a public school, which is attended by many children, residents of said city. Said building is situated on said described ground fronting on Main street, and is about five or six feet back from the eastern boundary of said lot; that said above described realty is about four or five feet above the grade of Main street and the sidewalk abutting said property; that the defendant had, long previous to the times herein mentioned, erected and constructed a stone wall on the eastern line of said property and adjoining the said sidewalk; that said wall was and is about four or five feet high and the top of said stone wall was and is on a level with the said above described property. The space between the building and said stone wall is paved with brick and the school children all used this space as a passage to the back yard and a play ground, which defendant and its officers and servants well knew, or ought to have known; that the said eastern boundary of said property was and had been for many months, and for a long time, in a dangerous condition, in not having a fence or railing or some barrier along said eastern boundary, as defendant well knew, and that it was the duty of said defendant to place along the eastern boundary of said property a fence or railing or barrier to prevent children or persons from falling or being thrown over and upon the sidewalk below, and to thus protect children and persons using or passing over said property; that said defendant, its officers and agents, did willfully, negligently and carelessly fail to construct and erect any fence or railing or barrier on the top of said stone wall, or on any portion of the eastern line of said property, to prevent children, or others, from falling over same and upon the sidewalk beneath; and said defendant, its officers and agents, did willfully, negligently and carelessly permit said stone wall and the eastern part of said realty to remain for many months and years without any fence, or railing, or barriers which would prevent children and others from falling over same and upon the sidewalk below; and said defendant, its officers and agents and servants, well knew, or ought to have known, of the dangerous condition of the said eastern boundary of said property, and knew, or ought to have known, that no fence, or railing, or barrier was there at the time of the injuries herein complained of, or had ever been there; that

on or about the 4th day of October, 1901, plaintiff, Rosamond Ernst, was attending school at said building, as were numerous other children, and was rightfully on said property, and standing between said building and said stone wall and nearer the wall than the building; that while so standing, and without fault on her part or on the part of her parents, she was run upon and against and jostled by another child, or other children, and was violently thrown upon and over said stone wall and upon the pavement below said stone wall, and her left arm was broken, fractured and dislocated and injured at or near the elbow, and her right arm was badly bruised and injured."

The property was in the possession of and in the control of the common school district in the city of West Covington. The injured child was attending the public school, and sustained the injury in the manner described in the petition. The question is, can the city of West Covington be held liable for the damages sustained? The State regards it as her duty to establish and maintain a system of public education. When sums have been collected for that purpose they can not be diverted to any other use or purposes. If it could be done the system would be injured and the public suffer incalculable injury. If some one is injured by the faulty construction of a public school building or the maintenance of the grounds, no action can be maintained against the district for such injury. The law provides no funds to meet such claims.

In *Sherman & Redfield on Negligence*, section 207, it is said: "The duty of providing means of education, at the public expense, by building and maintaining school houses, employing teachers, etc., is purely public duty, in the discharge of which the local body, as the State's representatives, is exempt from corporate liability, for the faulty construction or want of repair of its school building or the torts of its servants employed therein."

In *Hill v. City of Boston*, 123 Mass., 844, the court held that there could be no recovery, and stated the facts as follows: "This was an action of tort against the city of Boston. Plaintiff, who sued by his next friend, offered to prove at the trial in May, 1874, he was of the age of eighteen years, and was a pupil attending school in Boston, which was one of the public schools which the city was bound by law to keep and maintain; that this school was on the third floor of the building in which it was kept; that the staircase was winding, and the railing thereof so low as to be dangerous; that the city negligently constructed and maintained the building and authorized the public school to be kept therein; that the plaintiff, while going to school, and being in the exercise of care, fell over the railing of the second flight of stairs, and was seriously injured. The plaintiff also offered to prove that the school committee of the city for a long time before the accident knew the building to be dangerous and unfit for the purpose of a public school, and had been notified by the teachers of the school of the dangerous condition, and had promised to repair same, and had neglected to do so."

The same court in *Sullivan v. City of Boston*, 126 Mass., 542, said: "As we have said before, the place where the injury happened was in the school house yard or lot, and even if the city allowed this to be defective, and dangerous, it is not liable therefor." The same doctrine is recognized in *Lane v. The District Township of Woodbury*, 25 Ia., 532; *Howard v. Worcester*, 118 Mass., 426; *Ford v. Kendal, &c.*, 121 Pa., 448.

In *Wexon v. Newport*, 18 R. I., 554, the court said: "This is an action brought against the city of Newport by the plaintiff, a minor, suing by her next friend, to recover damages which she suffered by being scalded and burned in one of the public schools of the city, by the heating apparatus there used which the declaration alleges was carelessly kept by the city in a defective, unsafe and dangerous condition, without sufficient guarding and protection. * * * If we understand the case aright, the ground of exemption from liability is not that the duty or service is compulsory, but that it is public, and that a municipal corporation in performing it is acting for the State or public in a matter in which it has no private or corporate interest."

Counsel for the appellant concedes the law to be as stated, but claims that the city was not required by law to furnish the building for common school purposes; that the city had nothing to do with the maintaining of the public school; that it occupies the same position with reference to the house and lot as if the building had been used for other purposes. Although the city was not compelled to furnish the school trustees with the building for public school purposes, still it did so, and made that contribution to the public to aid in the promotion of education. The use of the building accomplished the same purpose as it would have accomplished had it been owned by the common school district. The building was not owned by the city for private or municipal use, but for a public purpose. We are of the opinion that the doctrine of the cases cited should apply to the facts of this case.

The judgment is affirmed.

REED V. COMMONWEALTH.

(Filed November 19, 1903—Not to be reported.)

1. Indictment for rape—An indictment for rape which omits the word "feloniously" is fatally defective.

2. Instructions—Where a witness stated that the accused had stated to him that he had tried to rape a certain girl, but had been unable to do so, the court should have instructed the jury as to all the degrees of the offense of rape.

J. M. Bowling for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Barker.

The following indictment was returned by the grand jury of Pike county against appellant, Johnson Reed: "The grand jury of Pike county, in the name and by the authority of the Commonwealth of Kentucky, accuse Johnson Reed of the crime of rape, committed as follows: The said Johnson Reed, on the 4th day of October, 1902, in the county and circuit aforesaid, did unlawfully, carnally know Martha Hall, a female of and above twelve years of age against her will and consent and by force. Against the peace and dignity of the Commonwealth of Kentucky."

To this indictment appellant pleaded not guilty; upon trial, however, he

was found guilty by the jury, who fixed his punishment at death. An inspection of the indictment shows that it fails to charge that appellant committed the crime of rape feloniously. This court in the case of *Hall v. Commonwealth*, 15 Ky. Law Rep., 856, which can not be distinguished from the case under consideration, held that an indictment from which the word "feloniously" had been omitted was fatally defective. It is said in the opinion: "In *Kaelin v. Commonwealth*, 84 Ky., 854, after a thorough consideration of the authorities and a review of the case of *Jane v. Commonwealth*, 8 Met., 22, which was supposed to support the contrary contention, this court held that an indictment for a common law felony should charge that the act was done feloniously, or with felonious intent, and that the use of no other words would supply the omission of such an allegation. We need not repeat the argument, or recite the authorities used in those cases, to show the wisdom of the rule."

As this case must be reversed and go back for a new trial, we call attention to another error committed on the trial. Frank Raina, a witness for the Commonwealth, testified of a confession which appellant made to him in jail, of the offense with which he stood charged. In this confession appellant is alleged to have stated that he had tried to rape Martha Hall, but had been unable to do so. With this evidence in, the court should have instructed the jury as to all the degrees of the offense with which appellant stood charged. (*Bethel v. Commonwealth*, 80 Ky., 536; *Fagin v. Commonwealth*, 18 Ky. Law Rep., 714.)

For the reasons above indicated the judgment is reversed for proceedings consistent herewith.

HORNICK, &c. v. HOLTRUP, &c.

(Filed November 19, 1903—Not to be reported.)

Trial of equitable action—Courts of continuous session—An equitable action does not stand for trial in a court of continuous session until sixty days after the filing of the answer, and it is error for the trial court to dismiss the action within that time for the failure of plaintiff to plead further, the plaintiff having the sixty days within which to take proof and prepare the cause upon the issues raised by the answer.

T. F. Hallam for appellants.

B. F. Graziani for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted on the 17th of December, 1901, by the appellants, as heirs at law of Joseph Klosterman, for a cancellation of a deed executed by him in his lifetime to the appellee, Henry Holtrup, conveying the title to a house and lot in Covington, Ky., upon the ground of undue influence, want of consideration and want of capacity in the grantor. The petition also alleges that on the same day the deed was executed Joseph Klosterman made his last will and testament, which subsequently to his death was probated in the Kenton County Court, by which he gave the bulk of his estate to his daughter, Bernadina Holtrup, the wife of the appellee, Henry Holtrup.

It is also alleged that owing to the feeble condition of his mind and body he was not competent to execute the will, and that it was the result of fraud, undue influence and deceit on defendant's part. On the 11th of April, 1902, the defendants filed their answer in two paragraphs. In the first they deny the alleged lack of consideration, undue influence and want of capacity in the grantor. In the second paragraph of their answer, they allege that the plaintiffs took an appeal from the order of the Kenton County Court probating the last will and testament of Joseph Klosterman to the Kenton Circuit Court; and that upon a trial in the circuit court a jury found for the will and the judgment was rendered pursuant thereto, and ask that plaintiff's petition be dismissed. On the 12th day of May, 1902, the defendants moved to submit the action on the pleadings. On the 20th of May this motion was overruled, on condition that the plaintiff should pay the cost to date, and plead further within five days. On the 22d of May the defendant moved to dismiss for failure of the plaintiff to comply with the order of the court. On the 26th day of May an order was entered to the effect that the petition should stand dismissed on the 29th of May unless the order theretofore made was complied with. On the second day of June, 1902, plaintiff's petition was dismissed, and they have appealed to this court. Section 306 of the Civil Code provides "that the plaintiff in an equitable action shall be entitled to a trial at the first term after the summons has been served on all of the defendants, if no issue of fact be made by the pleadings, or if the plaintiff consents that the statements of the answer be taken as true."

The first paragraph of defendant's answer makes an issue of fact upon each of the grounds relied on by plaintiff for a cancellation of the deed. And if the judgment in the will case relied on as a bar to this proceeding in the second paragraph has become final, the property therein devised to appellee passes under its provisions to the appellee, Bernadina Holtrup, even if the cancellation of the deed should be decreed in this proceeding, and consequently no relief would be obtained by appellant. But as a matter of fact this paragraph of the petition wholly fails to allege that the judgment entered in the will contest had not been superseded, reversed or appealed from, or that it was in full force and effect, and, therefore, failed to state a defense. Whilst section 23 of the act of December 30, 1892, concerning practice in circuit courts of continuous session, provides that "every pleading subsequent to an answer shall be filed in fourteen days after the pleading is filed to which it responds."

It does not repeal section 364 of the Civil Code, which provides: "Equitable actions shall stand for trial at any term, if the pleadings have been, or by the provisions of sections 102, 103, 104, 105 or 106, should have been completed sixty days before the commencement of such term. But if they have not been so completed, though they should have been by those sections, the party in default as to time shall not be entitled to demand a trial."

The action did not stand for trial in courts of continuous session until sixty days after appellee filed their answer on the 11th of April, 1902.

Appellants had until that time to take their proof and prepare the cause for trial upon the issues raised by the first paragraph of the defendant's answer. We think, therefore, for this reason, that the court erred in dismissing the appellant's petition.

The judgment is reversed and cause remanded for proceedings consistent herewith.

MOUSER v. BOGWELL.

(Filed November 19, 1903—Not to be reported.)

Dismissal of appeal—Stranger to action—A stranger to an action to settle a decedent's estate, who shows no interest in the estate nor title to lands belonging thereto, is not entitled to have an order directing a deed made to the purchaser of the real estate set aside on the ground that it contained more land than he purchased; and this court will not entertain an appeal overruling his motion made for that purpose.

Ben Spalding for appellant.

J. P. Thompson for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hobson.

This action was brought in the Marion Circuit Court by Mary Jane Whitehouse and J. F. Roller, as plaintiffs against Lafayette Baxter, Harry Roller, Ellen Riggsby and John Riggsby, as defendants. It was alleged in the petition that Charles Roller had died intestate the owner of a tract of land on Beech fork in Marion county, containing sixty acres, also a small tract near Gravel switch, containing about twelve acres. The sixty-acre tract was described by giving the names of the adjoining proprietors. It was alleged that Charles Roller was a lunatic; that Baxter was his committee, and that the other parties were his heirs at law. A settlement was prayed of his estate and a sale of the land and a division of the proceeds among the heirs. In an amended petition it was alleged that the decedent owned also an undivided one-eighth interest in nine acres of land adjoining the farm on Beech Fork, for which he held a title bond of John H. Spratt. After numerous proceedings were had, the court entered an order for the sale of the Beech Fork farm, also the small tract near Gravel Switch. The sale was had and appellee H. A. Bagwell became the purchaser of the Beech Fork farm for the price of \$207, and Lafayette Baxter became the purchaser of the Gravel Switch tract at the price of \$23. The sale was reported to the court and was confirmed. At the next term, on motion of the plaintiffs, a deed was made to the purchasers for the land. At the next term it appearing that the deed made to Bagwell had not been accepted and did not conform to a survey of the land which had been made in the action, on motion of the plaintiffs, that deed was set aside and a deed conforming to the survey was made. After this Baxter filed the affidavit of appellant J. W. Mouser and entered a motion to set aside this order. Subsequently, the defendants filed another affidavit of Mouser and entered a similar motion, and still later Mouser himself appeared in the action and entered a like motion. The court, on hearing of Mouser's motion, overruled it and from this order he appeals.

In Mouser's affidavit, filed on the motion, it was stated in substance that the one-eighth undivided interest in the Spratt land referred to was not included in the decree under which Bagwell bought, but was included in the survey upon which the deed to Bagwell was based; that Bagwell did not buy this interest in the Spratt tract; that he was willing to pay \$12 for it, and that it cut him off from his road to his timbered land. None of the heirs of Charles Roller appeal. No one interested in his estate complains. The only complaint in this court is J. W. Mouser, who is a stranger to the

estate and a stranger to the action. If more land has been conveyed to Bagwell than he bought only those interested in Charles Roller's estate can complain. His purchase and his deed only pass to him the title of the parties to the action. Mouser does not set up any title in him to Charles Roller's interest in the Spratt land. And if Mouser has any right or title to the Spratt land, or any part of it, his rights are in no way affected by the judgment.

His appeal is, therefore, dismissed.

LOUISVILLE & NASHVILLE R. R. CO. v. PRICE'S ADM'R.

(Filed November 19, 1903—Not to be reported)

1. Practice—Judgment sustained by evidence—Where the evidence in a civil action is conflicting, the credibility of the witnesses is for the jury, and the verdict will not be disturbed unless it is palpably against the evidence.

2. Railroads—Trespasser—Where a railroad crosses one of the main streets of a town it is incumbent on those managing a train to look out for persons on the crossing and to exercise ordinary care to prevent injury to them. The fact that a person walks diagonally over the crossing does not render him a trespasser on the railroad property.

3. Instructions—In an action for damages for the killing of a person by a train at the public crossing an instruction which required those in charge of the train to give such signals of the train's approach as were reasonably necessary to warn persons thereof was not misleading in using the two words "signals and warnings," any signal being a warning.

4. Same—The question of what constitutes ordinary care on the part of one using a public crossing is one for the jury, and the courts will not lay down any rule defining it.

5. Gross negligence—The backing of a train over a railroad crossing at a leading thoroughfare in the main part of a town in the dark and without signal is gross negligence.

B. D. Warfield for appellant.

J. F. Gordon and W. J. Cox and Jonson & Jennings for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Hobson.

Madisonville in Hopkins county is a town of about 5,300 people. Appellant's railroad track runs through the town and crosses, in the main portion of the town, Center street, which is one of its leading thoroughfares. A freight train going south pulled across this crossing about 7 o'clock at night on January 17, 1902. It stopped a short distance south of the crossing and then backed northward over the crossing with a view of going down on what is known as Providence switch to get out of the way of a passing train. It had been standing across the street for some minutes and pulled south so that travel on the street, which had been stopped, might pass over, there being an ordinance of the town forbidding the obstruction of the crossing for more than a given number of minutes. The deceased, Ewing Price, lived at Providence, which was seventeen miles from Madisonville, and came to Madisonville that afternoon in a buggy, reaching there about half past six o'clock. He was going diagonally over the crossing as the train

backed up from the south and was struck in the back and run over and killed. The evidence introduced for the plaintiff tended to show that the train was backed without any signal being given and without any precautions to protect persons on the crossing. The evidence for the defendant showed that warning was given of the approach of the train and there was also evidence by it to the effect that the deceased got upon the steps of the backing caboose and attempted to cross over it while in motion and thus lost his life. The evidence was very conflicting, but the jury found for the plaintiff, fixing the damages at \$10,500, and on the whole case we do not think the verdict ought to be disturbed under the evidence. We think the weight of the evidence shows that the deceased was not aware of the approach of the train and was struck and run over while he had his back to it. And while the evidence would have sustained a verdict for the defendant on the ground that ample notice of the movement of the train was given, still on this question the jury, who saw and heard the witnesses, is the tribunal established by law to pass on the facts, and some weight must be given to their finding. It is only where their verdict is palpably against the evidence that this court is warranted in disturbing it. Where the evidence is conflicting the credibility of the witnesses is peculiarly for them.

The street was a public highway and the fact that the deceased was walking diagonally over the crossing did not make him a trespasser. It was incumbent on those managing the train to look out for persons on the highway and exercise ordinary care to prevent injury to them. The court instructed the jury as follows:

"No. 1. The court instructs the jury that if they believe from the evidence that the public frequently used Main Cross or Center street in the city of Madisonville, where the defendant's railroad crosses same, then it was the duty of the defendant, in backing its trains over Main Cross or Center street crossing in Madisonville, to give such signals and warnings of the train's approach as were reasonably necessary under the circumstances to warn persons in the act of using said crossing of the approach of the train and to use ordinary care to keep its engine and cars under such control as to avoid injury to persons, exercising ordinary care for their own safety, in using said crossing, and if the jury believe from the evidence that the agents and servants of the defendant engaged in the movement of its trains failed to give such signals and warnings or to have the train under such control, and the plaintiff's decedent, Ewing Price, lost his life by reason of such negligence of the defendant's employees, and he was at the time exercising ordinary care for his own safety, then the law is for the plaintiff and the jury will so find.

"No. 4. The court says to the jury that no particular kind of signals or warnings were required, but any kind or character reasonably sufficient to give notice of the movement of the train to a person who was about to use said crossing, and who at the time was exercising ordinary care for his own safety, and if the jury believe from the evidence that such signals or warnings were at the time given, then the jury will find for the defendant.

"No. 5. If the jury believe from the evidence that Ewing Price lost his life by reason of crossing over or between the cars while the train was in motion, then the jury will find for the defendant.

"Instructions 'D.' Even though the jury may believe from the evidence that the defendant's agents and servants were negligent in the operation of the train or cars which caused the accident in this action complained of, still, if the jury further believe from the evidence that plaintiff's intestate was also negligent, and that but for his negligence the accident would not have happened, then the law is for the defendant and the jury should so find."

Instruction 1 only requires defendant to give such signals of the train's approach as were reasonably necessary to warn persons using the crossing of the train's approach, and to use ordinary care to keep its train under such control as to avoid injuring them. Any signal was a warning of the train's approach. The use of the two words "signals and warnings," could not have misled the jury. Taken as a whole, the instruction only requires the exercise of ordinary care. The court properly left to the jury the question of ordinary care on the part of deceased in using the crossing. This court has time and again refused to lay down the rule of stop, look and listen. The court properly told the jury that if the deceased lost his life by reason of his crossing over the cars while the train was in motion, there could be no recovery, but there was no other state of facts shown by the evidence on which any instruction as to his conduct could have been predicated. (P. & M. R. v. Hohel, 75 Ky., 41; L., C. & L. R. R. v. Goetz's Adm'r, 79 Ky., 442)

The other instructions given by the court defined negligence and gave the measure of damages. There was sufficient evidence of gross negligence to submit the question to the jury; for the crossing was known to be much traveled and had just been vacated by the train for the purpose of the public's using it, and if the train was backed in the dark over the crossing as described by testimony for the plaintiff, noiselessly and without signal, there was gross negligence in the management of the train.

Judgment affirmed.

UNION CASUALTY AND SURETY CO. v. GODDARD.

(Filed November 19, 1903—Not to be reported.)

1. Accident insurance—Hazardous occupations—In an action to recover on a policy of accident insurance for the death of one who had met his death while cleaning a gun in his room, the defendant was not entitled to rely on the provisions of the policy limiting its liability in case of the hazardous occupation of hunting where the insured was engaged in the occupation of a druggist and had engaged in hunting for pleasure for a short time only previous to his death.

2. Presumption against suicide—Where the dead body of an insured is found under circumstances indicating that death may have resulted either from accident or suicide, the presumption is against suicide as contrary to the general conduct of mankind.

3. Proof of insanity—The refusal of the trial court to admit testimony to show that a certain person had died in a lunatic asylum and that another had committed suicide will not be disturbed in the absence of proof to show their relation to the insured.

4. Judgment supported by evidence—The questions of whether the insured knew the gun was loaded and voluntarily exposed himself to danger there-

from, and whether he shot himself with suicidal intent having been submitted to the jury and having been determined in favor of the insured, the finding of the jury will not be disturbed.

C. H. Shield and Percy Werner for appellant.

Dodd & Dodd for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Hobson.

On October 13, 1901, appellant issued to William H. Goddard a policy, insuring him in the sum of \$5,000, for the period of twelve months, against bodily injuries sustained through external, violent and accidental means.

The policy was for the benefit of his father, Edward A. Goddard. About Christmas, 1901, William H. Goddard went to Greensburg, Ky., on a hunting trip and stayed there hunting until the 1st of January. He concluded to go home the next morning and when he came in that evening said he would go up stairs, take off his hunting clothes, pack his grip and come down afterwards. He was staying with his uncle, W. H. Ward. He started up stairs, taking his gun with him. When he reached the steps there was another gun sitting in the corner belonging to his uncle, whose son had been hunting with Goddard and had left for college that morning. Goddard asked his uncle if the boy had cleaned the gun that morning before he left for college. His uncle said he had not. Goddard said he would take the gun up with him and clean it; he reached out and got the gun and went on up the stairs to his room. They heard him moving about up stairs whistling and singing. The uncle had invited some friends in that night to a game of carroms and when they came he went to the steps and called to Goddard to come into the dining room as his friends had come and he wished him to join them. Goddard was whistling and singing. He stopped and said "I will be down in a few minutes." The uncle went back to the dining room and had hardly taken his seat when a noise was heard and he ran up stairs to Goddard's room and found him lying on the floor dead with a gun-shot wound, which entered near the left nipple and tore away the left ventricle of the heart. He had pulled off his hunting coat, also his hunting shoes and had put on a pair of slippers. Near him was a rocking chair from which he had apparently fallen. His uncle's gun was lying on the floor near him and the gun rod with a rag on it, which was discolored with powder stains, was under the body on the floor. His own gun was clean. His uncle's gun had one empty shell in it and one loaded shell. It was a breech-loading gun. Near the chair was a bed. The wound in his chest ranged slightly upward, but not much. Up to the time he went up stairs he had been laughing and talking, and as shown by a number of persons who saw him that day, in excellent spirits. His grip was sitting by the side of the bed open and with things arranged in it in order. His uncle's gun was partly cleaned.

The plaintiff filed this suit to recover on the policy on these facts on the idea that the young man, while cleaning his uncle's gun, in ignorance that it was loaded, accidentally discharged it into his own person. He was crippled in his right hand, and the plaintiff's theory is that he was holding the gun with his left, or good hand, as he cleaned it, and was thus shot in the left side. The defendant pleaded that the insured shot himself with

suicidal intent; also that he was killed by reason of his voluntarily exposing himself to an avoidable danger, and relied on the provisions of the policy under which, in this event, it was only liable for \$250. It also pleaded that the occupation of hunting is, under the policy, specially hazardous, and relied on a clause of the policy limiting its liability to \$1,500, in the case of the more hazardous occupation of hunting. The court sustained a demurrer to the last defense and properly so, for the insured was a druggist by occupation and not a hunter. He was simply hunting on a little pleasure trip and was not killed while hunting, but while sitting in his uncle's house cleaning his uncle's gun simply as an accommodation. The court submitted to the jury the question whether the assured knew the gun was loaded and voluntarily exposed himself to danger therefrom, also the question whether he shot himself with suicidal intent. The jury found for the plaintiff on these issues, and we do not think the evidence warranted any other conclusion. While it is true that the assured had taken out about \$15,000 of life insurance in the fall of 1901, and had applied for \$15,000 more, the policy for which had not been received, it would seem that these were in some measure at least what are called "Flyer Policies," that is, policies issued at a very low rate by agents about the close of the year in order to increase the amount of insurance written by them. We do not see that the jury could have misunderstood the instructions or been misled by them. The assured either shot himself accidentally or with suicidal intent, and the finding of the jury was in effect that he did not shoot himself with suicidal intent.

The defendant offered to show by Dr. B. A. Williams that Sylvia Goddard had died in a lunatic asylum and by another witness that Mollie E. Knott had committed suicide. The court excluded this evidence, and of this complaint is made. We fail to find in the record anything showing that Sylvia Goddard or Mollie E. Knott were related to the assured. The evidence seems to have been offered upon the idea that it was competent to show insanity in his family with a view to showing that he was insane. But in view of all the evidence in the case and the uncontradicted proof as to his state of mind and body, and his conduct up to the time he was killed, we hardly see that this proof, if admitted, could have been of any value. On the whole case we see no reason for disturbing the verdict of the jury, for when the dead body of the insured is found under circumstances indicating that the death may have resulted from accident or suicide, the presumption is against suicide as contrary to the general conduct of mankind. (*Aetna Life Insurance Co. v. Kaiser*, 24 Ky. Law Rep., 2464.)

Judgment affirmed.

LEBANON CARRIAGE AND IMPLEMENT CO. v. FAULKNER, &c.

(Filed November 19, 1903—Not to be reported.)

1. Landlord and tenant—Nuisance—A landlord who leases to another a warehouse to be used for the purpose of storing fertilizers, under a contract to protect the tenant in the peaceable and uninterrupted use and occupation of the premises during the life of the lease, is not responsible to the tenant where the use of the premises by him constituted a public nuisance resulting in an injunction prohibiting such use.

2. Same—Contract against public policy—Although the landlord may—

have known that the use would amount to a public nuisance, no right of action arose out of the agreement of the landlord to protect the tenant from the consequence thereof, such a contract being against public policy.

Ben Spalding for appellant.

Lafe S. Pence for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 29th of October, 1898, the appellee, Ida B. Faulkner, entered into a written contract with the appellants, the Lebanon Carriage and Implement Co., to erect for them two houses on a lot owned by her on Market street in Lebanon, Ky., which were to be used by appellants as warehouses for the storage, in one of vehicles and farming implements and the other for fertilizers. The lease was to run for five years from the 1st of January, 1899, and appellants were to pay therefor a semi-annual rental of \$175.50. Appellants took possession of the property under the terms of the lease, and on the 18th of September, 1900, instituted this suit against the appellee, in which they allege that in accordance with the terms of the written contract they stored large quantities of fertilizers in the warehouse, which they had leased for that purpose; and that the 3d day of September, 1899, Mrs. Hardesty, who operated a hotel on the adjoining property, sued out an injunction restraining them from storing fertilizer in the warehouse on the ground that it was a "nuisance" by reason of the offensive odors emitting from the fertilizers; that they gave appellee notice of this suit and called upon her to defend it, which she refused to do; that they thereupon employed an attorney and defended the suit; but that it resulted in a judgment against them for \$150 in damages and \$63.15 in cost, and they were also compelled to pay an attorney's fee of \$150, and the injunction was made permanent. They further allege that they have been greatly damaged in being deprived of the use if the property for the purpose for which it was rented, and prayed a judgment for \$2,000 against the defendant. A general demurrer was sustained to the petition. Thereupon appellant filed an amended petition in which they alleged in substance that before they had stored any fertilizer in the warehouse, Mrs. Hardesty objected and notified them that she would enjoin such use thereof as a nuisance; and that they notified appellee of the threat of Mrs. Hardesty; and that she agreed with them that she would indemnify them against any damages which they might sustain by reason of the use by them of the warehouse for storing the fertilizer; and that they relied upon this agreement and proceeded to make use of the house for that purpose; and that appellee knew the nature and character of the business which they proposed to conduct therein; and prayed as in their original petition. A general demurrer was also sustained to the amended petition; and appellant declining to plead further, have appealed to this court and ask a reversal.

By the written contract the appellee is under obligations to protect appellants in the peaceable and uninterrupted use and occupation of the premises during the life of the lease, but there is no obligation on her part to protect them from the consequences of maintaining a public nuisance on the leased premises. While they were given the right to store fertilizers in the warehouse, the legal presumption must be indulged that it was contemplated

that it would be done in a lawful manner, and that they would only store fertilizers in such manner as not to violate the law. But if, as alleged, appellee knew that the purpose for which the warehouse was to be used by appellant was illegal and would amount to a public nuisance, no right of action would arise out of the agreement on her part to protect them from the consequences thereof. Such a contract is against public policy and can never become the foundation of a right as between the parties themselves. We, therefore, conclude that the trial court properly sustained the demurrers to plaintiff's amended and original petitions.

Judgment affirmed.

UNION BENEVOLENT SOCIETY NO. 8, OF ATHENS, KY. v. MARTIN, &c.

(Filed November 19, 1903—Not to be reported.)

1. Secret order—Schism—Controversy over property—Eight members of a secret society are not entitled to recover from 260 members the property belonging to the society on the ground that they are standing with and by the Grand Lodge to which the society formerly belonged, without showing that they are obeying the rules and carrying out the purposes of the organization; hence, it is proper for the court to instruct the jury to believe that the eight members organized and operated as the society "in good faith" before they are authorized to find a verdict in their favor.

2. Same—Where the schism in a secret order arose over an attempt to have the society restored to membership in the Grand Lodge, from which it had previously withdrawn, and to have it accept the ritual or hand book promulgated by authority of the grand lodge, the minority, who were in favor of the proposition, are not entitled to recover the property of the order from the majority, who opposed it, as there was no right in the Grand Lodge to force the society to renew its membership.

Forman & Forman and B. E. Smith for appellant.

J. Embry Allen and George Denny for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

This is the second appeal of this case. (Union Benevolent Society No. 8 of Athens, Ky. v. Martin, &c., 23 Ky. Law Rep., 2276.) On the first trial the court, upon hearing the testimony offered by the plaintiff, appellant here, gave a peremptory instruction to find for the defendants. It was the judgment entered on that verdict that was reviewed on the former appeal. But one side of the case was heard, and the court's opinion was based upon the facts then presented. Previous to the time the appellant submitted to the jurisdiction of the Grand Lodge, the society at Athens was in existence. Under the laws of the Grand Lodge, any society failing to pay the dues to it for two consecutive years, forfeits its charter and membership in the Grand Lodge. The Union Benevolent Society No. 8, of Athens, Ky., on September 2, when there was no schism in it, passed a resolution withdrawing from the Grand Lodge and refused thereafter to pay dues to it. In 1899 one Foley, representing the Grand Lodge, appeared before the society and endeavored to induce it to be restored to membership in the Grand Lodge, and to accept

the "ritual or hand book" that was promulgated by the grand council, which seems to have been some authority connected with the Grand Lodge, but subordinate to it. Against this proposition the entire society voted, except eight members, and the eight members claim in this proceeding to represent the appellant, and are using its name in this litigation. Two hundred and sixty members are standing by the action of the society in withdrawing from the Grand Lodge, and the eight members claim to be standing with and by the Grand Lodge, and are, therefore, entitled to the personal property belonging to the society. Two hundred and sixty members of the society have been carrying out all the purposes of the organization; burying deceased members, paying benefits, dues, etc.; meeting in the lodge room and conducting the business strictly in accord with its rules. The eight members seem to have been meeting at houses of neighbors; sending about \$2 a year and delegates to the Grand Lodge. They have not been attempting to carry out the purposes of the society; have not been burying or assisting in burying its members or paying benefits, etc. The society owned a hearse; harness for two horses; chairs for lodge room, and had some money on hands for paying the expenses assumed and promised by it in its organization.

The court, by instruction No. 1, in substance told the jury that if the Grand Lodge promulgated the "ritual or hand book," and if as many as seven members accepted the regulations, and in good faith organized and operated as the Union Benevolent Society No. 8, of Athens, Ky., they were entitled to the custody and possession of the property of the lodge. It is urged, that the court erred in using the words "in good faith." The weight of the testimony tends to show that the minority members did practically nothing that was required by the rules and purposes of the society. Therefore, if they were not obeying the rules and carrying out the purposes of the organization, they must be held as not proceeding in good faith to organize and operate as the Union Benevolent Society No. 8, of Athens, Ky., we think the court properly submitted that question to the jury.

By instruction No. 2, the court in substance told the jury to find for the defendants, if the society at the time the rules and regulations were presented to it in 1899, was not a member of the Grand Lodge. The court proceeded upon the idea that if the society was not a member of the Grand Lodge that body could not prescribe a ritual or hand book for its government. This is certainly true. Under the law of the Grand Lodge, if a society failed to pay its dues, it forfeited its charter and membership. The society not only refused to pay dues to the Grand Lodge, but it passed a resolution that it was no longer a member of the Grand Lodge. This resolution was passed when there was no schism in the society, and from the record the inference is to be drawn, that no member dissented from such action. No right existed in the Grand Lodge to force the society to renew its membership in it; besides the overwhelming testimony is that the representative of the Grand Lodge, at the meeting at which he endeavored to obtain its return to membership therein, said that they were not compelled to so return, or to accept the ritual or hand book promulgated by the Grand Lodge. We are of the opinion that the court properly gave instruction No. 2, to the jury.

The judgment is affirmed.

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KENTUCKY COURT OF APPEALS.

FERGUSON v. SMITH, &c.

(Filed November 20, 1903—Not to be reported.)

Purchase money—Affirmance on evidence—In this action for the recovery of alleged deferred purchase money payments on a conveyance of real estate, the judgment of the trial court adjusting the claims as between the various parties will not be disturbed in view of the conflicting testimony.

J. F. Butler and Roscoe Vanover for appellant.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Burnam.

On the 20th day of May, 1899, the appellant, John M. Ferguson, conveyed by general warranty deed to the appellee, Lee Smith, a tract of land in Pike county for the recited consideration of \$105 in hand paid, and other valuable consideration to be paid. On the 2d day of August, 1900, Lee Smith, in consideration of love and affection, conveyed the land to his wife, Louisa Smith. Subsequently, Louisa Smith, her husband uniting therein, sold and conveyed the same tract of land, by general warranty deed, to J. S. Cline, for the recited consideration of \$750, \$475 of which was paid in cash. On the — day of —, 1902, the appellant, J. M. Ferguson, brought this suit against Lee Smith, Louisa Smith and J. S. Cline, in which he alleged that there was a balance of purchase money due to him from Lee Smith of \$275, and asked that he be adjudged a lien on the land, and that enough thereof should be sold to pay his debt. Both J. S. Cline and Louisa Smith deny the balance alleged to be due by plaintiff, or that anything was due him thereon.

It appears from the testimony that the appellant, J. M. Ferguson, had made his home with the appellees, Lee and Louisa Smith, for many years prior to the execution of the deed on the 20th of May, 1899, and that he continued to reside with them until after the execution of the deed from Lee Smith to his wife, Louisa Smith. About that time Lee and Louisa Smith separated, and the two men went to live together. Both of them testify that Ferguson sold to Smith a portion of the tract of land covered by the deed at

The stipulated price of \$125; and that subsequently the boundary was extended so as to include another adjacent piece of land. When the deed was written it was made to cover both pieces; that no valuation was placed upon the second piece of land, but it was agreed that appellant should be paid therefor whatever in his judgment it should be reasonably worth. These statements are contradicted by Louisa Smith, and by facts testified to by a number of other witnesses, which tend to show that he had been paid in full. Upon final submission, the circuit judge decided that appellant, Ferguson, should be paid by the appellee, J. S. Cline, the vendee of Louisa Smith, \$100, and that the balance of the \$275 retained by him should be paid over to Louisa Smith, after taking out the costs.

In view of the contradictory character of the testimony we do not feel disposed to disturb the judgment of the trial court in the matter, and it is, therefore, affirmed, both upon the appeal of J. M. Ferguson and that of Louisa Smith.

MORON V. COMMONWEALTH.

(Filed November 20, 1903.)

1. Breach of the peace—Jurisdiction—Under the provisions of the charter of cities of the sixth class and of section 143 of the Constitution, the jurisdiction of the police court of such a city of the offense of a breach of the peace is only concurrent with other courts and not exclusive, notwithstanding the passage of an ordinance by the board of trustees fixing the same penalty for the offense as that fixed by statute.

2. Bar—Judgment of circuit court—Where the circuit court first began the prosecution it took jurisdiction of the case, and its judgment is, under section 168 of the Constitution, a bar to a prosecution for the same offense under the city ordinance.

Sam C. Hardin for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Nunn.

The appellant appeals from a judgment of the Laurel Circuit Court rendered against him on an indictment charging him with a breach of the peace, amounting to \$51.

The appellant on the trial introduced an ordinance passed by the trustees of the town of London, a sixth class town, fixing the same penalty for a breach of the peace as that fixed by the statutes. All the evidence showed that the offense for which the appellant was tried in the circuit court was committed within the city limits of London. At the conclusion of the evidence the appellant moved the court to give a peremptory instruction upon the theory that the charter of sixth-class towns gave to the police court exclusive jurisdiction of this offense. The court refused to give the instruction, and of this appellant complains.

We are of the opinion that the lower court was right. The cases of Commonwealth v. Wickersham, 99 Ky., 21; City of Owensboro v. Simms, 99 Ky., 49, and Commonwealth v. Hunter, 19 Ky. Law Rep., 1109, conclusively

settle this question. In addition to the reasons given in these cases, we may also add that the charter gives to the police court exclusive jurisdiction for the enforcement of all ordinances of the town and concurrent jurisdiction with justices of the peace, circuit courts and county courts for the enforcement of the criminal law within its limited jurisdiction. The circuit court in the case before us was not attempting to enforce an ordinance of the town of London; it had no jurisdiction except on appeal, to enforce such an ordinance, because such jurisdiction was exclusively given to the police court, but by the statutes and section 143 of the Constitution it had concurrent jurisdiction with the police court for the trial of such an offense as charged.

Where the jurisdiction is concurrent, as in this case, that court which, having jurisdiction of the subject matter, and in good faith first begins the prosecution for the enforcement of the law, gets jurisdiction of the case.

Under section 168 of the Constitution if the appellant had been tried under the ordinance it would have been a bar to a trial under the statutes, and vice versa. The appellant contends that there is a distinction between the powers given police judges in cities of the third class, under which the opinions above referred to were rendered, and the powers given police judges in sixth class towns. Reading the charters of cities of the third class and towns of the sixth class, and construing them in connection with section 143 of the Constitution, they are only given exclusive jurisdiction to enforce all ordinances, and concurrent jurisdiction with other courts in the enforcement of general laws within the territorial limits prescribed by statutes.

Wherefore, the judgment of the lower court is affirmed.

COMMONWEALTH v. DICKERSON.

(Filed November 20, 1903—Not to be reported.)

Local option—Violation of—It is not a violation of the local option law for a person to give another a drink of spirituous, vinous or malt liquors in the territory where that law is in force unless it appears that it was given for the purpose of being sold by the person to whom it was given within the district; but the offense is complete if the gift was made for that purpose even if the place of giving was outside of the local option district.

Clifton J. Pratt and M. R. Todd for appellant.

Appeal from Green Circuit Court.

Opinion of the court by Judge Settle.

The appellee, John W. Dickerson, was indicted in the Green Circuit Court for giving spirituous liquor to another, in a local option district. The charge in the indictment being that he did "unlawfully give, procure for, or furnish to, one Ed. Handy, a drink of spirituous or vinous liquor in a local option district, when the local option law was then in full force and effect."

In the trial of the appellee under the indictment, the only witness introduced was Ed. Handy, who testified that in November, 1902, in the town of Greensburg, the appellee gave him a drink of whisky, he being at the time twenty-one years of age, and not an inebriate. It was admitted that the town of Greensburg was in a local option district at the time. Upon the

conclusion of the evidence, the appellee moved the court to peremptorily instruct the jury to find him not guilty, which motion was sustained by the court, and the peremptory instruction given, in obedience to which the jury returned a verdict of acquittal. The Commonwealth's attorney excepted to the ruling of the court in granting the peremptory instruction, and prayed an appeal to this court, which was granted.

The question presented by the appeal for our consideration is, whether or not it is a violation of the local option law for a person to give another a drink of spirituous, vinous or malt liquor in territory where that law is in force? It is contended for the Commonwealth that the appellee was guilty of a violation of the local option law as amended by the act of March 11, 1902 (Acts 1902, page 41). The only provision of that law which makes it an offense to "give" to another "spirituous, vinous or malt liquors," is found in section 2, wherein it is declared that "it shall be unlawful for any person to sell, lend, give, procure for, or furnish to another any spirituous, vinous or malt liquors, or to have in his possession spirituous, vinous, or malt, liquors for the purpose of selling them in any territory where said act is in force, and any person so offending shall be fined not less than \$50, nor more than \$100, and imprisoned not less than ten, nor more than fifty days."

In *Huyser v. Commonwealth*, 25 Ky. Law Rep., page 608, this court, in construing certain provisions of the act of March 11, 1902, said of section 2: "It will be observed that the object of the foregoing section is not the punishment of the person who himself sells, or otherwise disposes of spirituous, vinous or malt liquors, where local option is in force, for his punishment is provided for by section five of the act, but its object is the punishment of the person who shall sell, lend, give, procure for, or furnish to another such liquors, to be sold by the latter where local option is in force, or for having in his (the former's) own possession such liquors for the purpose of selling them in the forbidden territory."

It is manifest, however, that the gift to another of spirituous, vinous or malt liquor, in territory where local option is in force, whether the quantity given be one drink or more, is not an offense under section 2 of the act, *supra*, unless it be made with the intent or purpose that it is to be sold by the person to whom it is given, in territory where local option is in force; but if given with that purpose, the offense is complete, even though the place of giving is outside of the territory where local option obtains.

As further said in *Huyser v. Commonwealth*, *supra*, "section 5 * * * takes the place of section 4 of the original act, and its object is the punishment of any person who sells liquors where local option is in force. Its language embraces any sale, barter or loan of spirituous, vinous or malt liquors that may be 'directly or indirectly' made within the inhibited territory. This section also makes it an offense for any person to knowingly furnish or rent a house, room, wagon, or other conveyance, or thing, in which such liquors are sold, bartered or loaned. And the punishment prescribed for the offenses named in this section is a fine of not less than \$50 nor more than \$100, or imprisonment in jail of not less than ten nor more than fifty days, or both fine and imprisonment, in the discretion of the court or jury." * * *

Though the language of section five makes it unlawful for one to "sell, barter or loan" spirituous, vinous or malt liquors in territory where local

option is in force, it does not make it an offense for one to give to another such liquors in the territory mentioned. The evidence in this case shows that the whisky given the witness by appellee was not given to be sold in a local option district, but was only a drink. It follows, therefore, that the trial court did not err in giving the peremptory instruction.

Wherefore, the judgment is affirmed.

HAYES, &c. v. WALKER.

(Filed November 20, 1903—Not to be reported.)

1. Peddler's note—Estoppel—While a note executed in consideration of the conveyance of the right to sell a patent window screen is void for failure to have written across its face the words "peddler's note," as required by section 4928 of the Kentucky Statutes, one of the obligors therein is estopped to deny its validity as against a purchaser who relied upon his statements that the note was all right and was thereby induced to purchase it.

2. Same—While the assurances of the obligor operate as an estoppel as to himself, they can not be extended so as to in any way bind his wife, who was his co-obligor, or to have the effect to convert the void note into a live obligation as to her in the absence of express authority from her to so bind her.

3. Same—Presumption—The fact that the husband made her a joint purchaser with himself of the patent right and she afterwards ratified his action by executing the note and a mortgage on her property does not raise the presumption that he also had authority to bind her by his assurances to the purchaser of the note as to its validity.

Hendrick & Miller for appellants.

Oliver & Oliver for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Settle.

The appellants, Sarah E. Hayes and M. L. Hayes, on January 24, 1900, executed to O. T. Gregory their joint and several note for \$387.50, due January 1, 1901, with 6 per cent. interest, and payable at the First National Bank of Paducah. To secure the payment of the note the makers gave a mortgage on their homestead, a house and lot in Paducah, the title of which was in Sarah E. Hayes. The appellants failing to pay the note at maturity, suit was thereafter instituted upon it in the lower court, and to enforce the mortgage lien by the appellee, C. C. Walker, to whom it was sold and assigned by the payee, Gregory, soon after its execution.

The appellants resisted its payment and the enforcement of the mortgage. The answer filed by them admitted the execution of the note and mortgage, but denied liability thereon, for the alleged reason that the execution of both the note and mortgage was procured by fraud, and further that the note was without consideration; that is to say, it is averred in the answer in substance that the note was executed for a patent "window screen," the right to sell which in certain counties of the State of Tennessee was conveyed to the appellants by a B. H. Oldfield, attorney in fact for Wm. Scott, and that they were induced to purchase the patent right by the false and

fraudulent representations of Scott, Oldfield and Gregory, as to its quality and value, when in fact it was worthless and known by them to be so at the time, for which reason the note was without consideration; that the persons who sold them the patent were at the time itinerant persons and peddlers in the meaning of section 4216, Kentucky Statutes, and the note was void, and its payment was not enforceable, because it did not have written across its face the words "peddler's note," as required by section 4223, Kentucky Statutes.

The reply filed by appellee denied the material averments of the answer, and in addition alleged that he was an innocent purchaser of the note for value, and further that he was induced to purchase it by the assurance of the appellants given him, before and at the time of its purchase, that they had no defense to the note and that it would be paid at maturity. The appellants, by rejoinder, denied that they gave any such assurance, or that the appellee was induced thereby to purchase the note, or that he was an innocent purchaser thereof. Proof was taken upon the issues formed by the pleadings, and upon the trial of the case in the lower court judgment was rendered by the chancellor in appellee's favor for the amount of the note, and the enforcement of the mortgage given to secure its payment, and by this appeal the reversal of that judgment is now asked.

Section 4216, Kentucky Statutes, declares that "all itinerant persons vending lightning rods, patent rights or territory for the sale, use or manufacture of patent rights * * * shall be deemed peddlers."

Section 4223 provides that "all notes given for articles or rights by a peddler shall have written or printed across the face the word 'peddlers' note.' To such notes all defenses may be made as against the original holder, whether the same be placed upon the footing of a bill of exchange or not; and all contracts for articles or rights by a peddler without license, and all notes for such articles or rights not having the endorsement across the face as hereinbefore provided, shall be null and void."

This court has held that section 4223 is constitutional in the following cases: *Bohon v. Brown*, 101 Ky., 354; *Nunn v. Citizens Bank*, 107 Ky., 268; *Rumbly v. Hall*, 107 Ky., 349. In *Rumbly v. Hall*, *supra*, and also in *Bohon v. Brown*, 20 Ky. Law Rep., 496, it was held that a note executed for a patent right can not be collected unless it has written on it "peddler's note."

The note in this case, though given for a patent right, does not contain upon its face the written words "peddler's note." It is insisted, however, for appellee that it was not executed for a patent right, but for borrowed money; that the patent right purchased by appellant was owned and sold to them by Oldfield, attorney in fact of Scott, and that Gregory owned no interest in the patent sold, but loaned appellants the money with which to pay for it, and that in any event, though this were not true, and the note was in fact given for the patent right, it is nevertheless collectable in the hands of appellee, who is an innocent purchaser, and was induced to take the note upon the assurance of appellant, M. L. Hayes, that it was all right, and would be paid at maturity. Our examination of the record satisfies us that Gregory either secretly owned an interest in the patent sold the appellants, or was to receive some part of the sum paid for it by them. He was mainly instrumental in effecting the sale to them. He began the negotiations by

telling the appellant, M. L. Hayes, of his exploits in the patent right business, and of the large sums of money he had made in that way. By repeated interviews and conversations he "talked up" the merits of the window screen to him, introduced him to Oldfield, and in every way possible assisted the latter in selling the patent to appellants and others. In addition he informed the appellant, M. L. Hayes, that he was trying to sell to one Dossett the right to the patent window screen for the county of Graves, and invited him to go with him to see Dossett, telling him that if he would help him to trade with Dossett he would pay him a commission for his services. The appellant went with him to see Dossett, and heard the conversation between them about the window screen, but took no part in the negotiations. Some days later Gregory walked into his shop and handed him \$9, telling him that it was his part of the commission on the sale to Dossett which had been consummated. Hayes objected to taking the money, telling Gregory that he had done nothing to earn it, but the latter compelled him to take it. Indeed, in and out of season, Gregory was assiduous in pushing the sale of the patent upon appellants, and it is not a matter of surprise that his efforts were finally crowned with success. It is reasonably apparent, too, from all of the facts and circumstances surrounding the transaction, that his pretense of lending the money to appellants with which to pay for the patent right, and of taking to himself the note and mortgage, was a scheme planned by himself and Oldfield to evade the requirement of the statute as to the placing across the face thereof the words "peddler's note," hoping and intending by that means to conceal from any would-be purchaser of the note its true character, and at the same time shut out any defense that might be attempted by the makers.

It also appears from the evidence that the patent sold the appellants was worthless, and that it was known to the vendors—Gregory, Oldfield and Scott—to be worthless at the time of its sale. In other words, they imposed upon the ignorance and credulity of the appellants, and thus obtained not only the note, but also the mortgage upon their home, which was the only property the wife owned, the husband being without any, and thereby defrauded them, or attempted to do so. The subsequent conduct of Gregory in disposing of the note is what would have been expected to follow the main transaction. Before appellants were afforded an opportunity to ascertain the worthlessness of the patent screen, the right to sell, which in certain counties they had bought, the note was sold by Gregory to the appellee, C. C. Walker, who took it at a discount of 12½ per cent., but Gregory and appellee were shrewd enough to know that in order to prevent any resistance to the payment of the note, it would be necessary to get some assurance from its makers of its genuineness and correctness. So, before the sale of the note to appellee, he and Gregory got the appellant, M. L. Hayes, to meet them at the office of their lawyer and they there obtained from him some such assurance as was sought by them. While there were circumstances connected with the sale of the note to appellee—such as his acquaintance with Gregory and knowledge of his being in the patent business—that with proper inquiry would doubtless have apprised him of the true consideration of the note, we are not prepared to say that he did in fact know for what it was really given, and are of opinion that he was authorized to believe from

the statements of appellant M. L. Hayes that the note was all right, and would be paid, yet it is a significant fact that neither he nor Gregory went to see, or talked with the appellant, Sarah E. Hayes, about the note, and nowhere in the record is it shown that she was consulted by anybody about the sale of the note to appellee, or that she knew anything about that transaction. There were, therefore, no statements or representations made by her about the note whereby the appellee was induced to become the purchaser of it.

It is not contended that in what her husband said to appellee about the note, he claimed to be acting for the wife. It can not be presumed that he was at the time her agent. While it is true that she had never been seen by the vendors of the patent right pending the negotiations looking to the sale thereof, and that the sale was made to the husband for the wife as well as himself, and was acquiesced in by her when she signed the note and executed the mortgage. As a matter of law the husband had no right thereafter to extend her liability, or in any way bind her by any assurance given by him with respect to the note that would have the effect to convert it from a void note into a live obligation without authority from her to so bind her, and no evidence has been introduced which tends to show that the husband had any authority from her, express or implied, to bind her to the payment of the note in the hands of an innocent purchaser.

No presumption of such authority should be indulged either because his acts in making her a joint purchaser with himself of the patent right was ratified by her subsequent execution of the note and mortgage. Upon the contrary, the presumption ought rather to be indulged that his agency in the matter ceased with the delivery of the note and mortgage. In this view of the law it follows that the conversation between appellee and M. L. Hayes, whereby the former claims he was induced to buy the note of Gregory, was incompetent as evidence against Sarah E. Hayes. We are of opinion that though M. L. Hayes is estopped by his assurances to appellee as to the correctness of the note, and that it would be paid at maturity, from denying his liability thereon, such estoppel does not exist as to Sarah E. Hayes, and can not be relied on as against her, and the chancellor erred, therefore, in rendering a personal judgment against her, and likewise erred in subjecting her real property to the payment of the note sued on.

Wherefore, the judgment as to M. L. Hayes is affirmed, but to the extent that it affects Sarah E. Hayes or her property it is reversed and the cause remanded, with directions to the lower court to set aside the judgment and dismiss the petition as to her, and for further necessary proceedings consistent with the opinion herein.

CARMAN v. COMMONWEALTH.

(Filed November 24, 1903—Not to be reported.)

Former jeopardy—A conviction in a magistrate's court for the offense of shooting at random on the public highway is a bar to a subsequent prosecution in the police court, and, on appeal, in the circuit court, for flourishing and using a deadly weapon in a threatening and bolsterous manner, where the two offenses were a part of the same transaction.

Murphy & Evers and L. E. Weatherford for appellant.

C. J. Pratt and M. R. Todd for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, Charley Carman, prosecutes this appeal from a verdict and judgment rendered in the Graves Circuit Court, which imposed upon him a fine of \$87 for the offense "of flourishing and using a deadly weapon, to wit, a pistol, in a threatening and bolsterous manner." It appears from the bill of evidence that on the 25th day of December, 1903, the appellant, Carman, whilst under the influence of liquor, began a quarrel with one Shorty Howard in front of the store of Ben F. Pyle in the city of Mayfield, and that during the quarrel he twice discharged his pistol; that Howard ran into the store of Pyle, and appellant followed him, where he came in contact with Pyle, the owner of the store, to whom he used offensive language. Pyle immediately telephoned for a policeman, and Howard about this time ran out of the store pursued by appellant, pistol in hand, threatening to shoot, but Howard knocked him down, and made his escape. Carman then got in his buggy, left the county, and was absent some five or six months. The police judge of Mayfield issued three warrants for his arrest, one for "being drunk and disorderly," another for carrying concealed weapons, and a third for "flourishing a deadly weapon, to wit, a pistol, etc." Shortly thereafter a justice of the peace residing in Mayfield, at the suggestion of the county attorney, issued three warrants for the arrest of Carman, one for drunkenness, one for carrying concealed weapons, and one for shooting at random on the public highway. Carman surrendered to the justice of the peace, and was permitted by the county attorney to enter a plea of guilty to the charge of shooting at random, for which offense a fine of \$50 was imposed by the magistrate, and the other two warrants were dismissed. Several days after the trial before the magistrate, he was arrested upon the warrants issued by the police judge, and placed on trial for the offense of flourishing and using a deadly weapon in a threatening manner. To this charge appellant entered a plea in writing of former conviction for the same offense. The police judge refused to instruct the jury on the plea of former conviction, and appellant was convicted and fined \$50. From this judgment Carman appealed to the Graves Circuit Court, and upon the trial in that court appellant again relied upon the plea of former conviction, and offered to prove by Garnett, the magistrate who tried him, and the county attorney, that the trial before the magistrate was for identically the same offense for which he was then being tried. The trial court refused to hear this testimony, and also refused to instruct the jury upon the law of former conviction. The trial in the circuit court resulted in a verdict and judgment for \$87. Section 1308 of the Kentucky Statutes provides: "If any person shall draw a deadly weapon upon another, or shall point any deadly weapon at another, or shall hold or flourish, or use in a threatening or bolsterous manner, or shall, on a public highway, or at any school assembly, place of public worship, or business, or in going to or from any place of public worship, fire or discharge at random any deadly weapon, he shall be deemed guilty of a misdemeanor, whether said weapon be loaded or unloaded, and, upon con-

viction, shall be fined not less than \$50 nor more than \$100, or imprisoned not less than ten nor more than fifty days, or both."

Section 18 of the Bill of Rights provides that "no person shall for the same offense be twice put in jeopardy of his life or limb."

And the courts have liberally construed this constitutional provision as applicable to misdemeanors as well as to felonies.

"And the Commonwealth, by giving different names to the same thing, or by prosecuting under different statutes, can not multiply offenses out of one or the same series of acts committed by the accused. The rule seems to be that where the acts done have been selected by the Commonwealth and given in evidence to support any prosecution she may chose to make, even for a smaller offense than she might have charged, yet on these same facts she can not thereafter successfully maintain other prosecution for the higher offense." (Kentucky Criminal Law and Procedure, section 49.)

In *Reddy, & Co. v. Commonwealth*, 17 Ky. Law Rep., 536, it was held that a conviction in the police court of the city of Falmouth for a breach of the peace by shooting and firing off pistols, etc., in the street was a bar to an indictment for willfully and maliciously injuring the courthouse of Pendleton county, the evidence showing that the same acts were complained of in both police court and on indictment. In 1 Bishop's New Criminal Law, section 1056, the author says: "If the indictment covers one of the larger crimes, and there is a conviction of a smaller included in it, there can be no new prosecution for the larger."

And in section 1057 the same author says: "We come now to questions inherently difficult, and made more so by contradictory and confused decisions from many of the courts. In reason, in these cases of offenses, included within one another, where if, as we have seen, a man has been put in jeopardy for the offe which includes all the rest he has been so also for each one of the others, it can not be competent for the government to indict him first for the lowest, then for the one next above it, then for the next, and so on through all the gradations to the highest. When he has been put in jeopardy for the lowest, then, for example, is prosecuted for the highest, our constitutional guaranty stands in the way of his being convicted a second time for the lowest."

And in section 1060, says: "While the legislature may pronounce as many combinations of things criminal as it pleases, resulting not unfrequently in a plurality of crimes in one transaction, or even in one act, for any of which there may be a conviction without regard to the others, 'It is,' in the language of Cockburn, C. J., 'a fundamental rule of law that out of the same facts a series of charges shall not be preferred.' To give our constitutional provision the force evidently meant, and to render it effectual, 'the same offense' must be interpreted as equivalent to the same criminal act. And judicial utterances have even gone apparently to the extent that there can be only one punishment for one criminal transaction."

The testimony shows that the acts for which defendant was convicted by the magistrate were continuous, and did not occupy a greater stretch of time than ten minutes. The shooting at random and flourishing the pistol all occurred during the same transaction. We, therefore, conclude that the trial court erred in refusing to allow testimony to establish this fact, and also in

refusing to instruct the jury upon the defendant's plea of a former conviction.

For reasons indicated the judgment is reversed and cause remanded for proceedings consistent with this opinion.

THOMAS v. FRANKFORT AND CINCINNATI RY. CO., &c.

(Filed November 24, 1903.)

1. Carriers—Connecting lines—Where the bill of lading is silent as to the charges at which a shipment of stock is to be transported, and a connecting carrier has no information of an alleged special parol contract between the shipper and the preceding carrier, the law implies an undertaking to carry at the usual and ordinary rate for which such services are performed.

2. Lien for charges—A carrier has a lien on the freight transported by it for the usual and customary charges of such transportation; and such lien extends to charges which it has advanced to a connecting carrier from which it had received and forwarded the freight.

3. Liability of carrier beyond its lines—In the absence of a special contract by a carrier to deliver a shipment of freight at a point beyond its lines, it is not liable for negligence after its delivery to a connecting carrier; and an action can not be maintained against the delivering carrier for damages for delay in delivering freight based upon an alleged parol contract with the receiving carrier to deliver it at its destination within a given time where the bill of lading contained no such stipulation.

McMillan & Talbott for appellant.

D. W. Lindsey, John B. Lindsey and John S. Smith for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Chief Justice Burnam.

This action was instituted by the appellant, Claude M. Thomas, against the appellee, the Frankfort & Cincinnati Railway Co., under section 181 of the Civil Code, for the possession of 116 head of feeding cattle, which he alleged were wrongfully detained from him, and for \$100 in damages. The defendant answered on December 6, 1897, that at 8:30 a. m. the plaintiff, through his agent, the Cincinnati, New Orleans & Texas Pacific Railway Co., delivered to them at Georgetown, Ky., in the usual course of business, three cars of cattle to be shipped over their line to Paris, Ky.; that they paid the agent of the plaintiff \$201 freight reported to be due thereon; that they transported the three cars over its line from Georgetown to Paris, their destination, and that its charges were \$12, which had never been paid, and that it had a lien for the \$201 paid to the Cincinnati, New Orleans & Texas Pacific Railway Co., and for their own charges, amounting in the aggregate to \$213; and that it had refused to surrender the possession of the cattle until this amount was paid, and asked that they be adjudged a lien upon the cattle, and for a sale of a sufficient number to satisfy their bill. The plaintiff replied that on the 2d day of December, 1897, he had contracted with the Memphis & Charlestown R. R. Co. to transport from Decatur, Ala., to Paris, Ky., over its own and connecting lines, 116 head of cattle, which were to be shipped in three cars at the agreed price of \$60 per car load, or

\$180 for all; that the cattle were to be delivered at Paris, Ky., on Friday, December 3, 1897; that either the Memphis & Charlestown R. R. Co. was authorized to make this contract for a through shipment by its connecting lines, or that the connecting lines by acceptance of the freight ratified the contract made with him by the Memphis & Charlestown R. R. Co., that the delivery of the cattle to him at Paris, Ky., had been delayed between fifty and sixty hours in excess of the time agreed upon, and that during this interval they had suffered from want of food and water to such an extent as to damage them at least \$250, which he plead by way of set-off and counterclaim. Plaintiff filed with his reply, and as a part thereof, a bill of lading, which was delivered to him by the Memphis & Charlestown R. R. Co. on the delivery of the cattle to them, and which contains the following stipulation: "I agree that the said Memphis & Charlestown R. R. Co. is only bound to carry said live stock to its freight station at -----, and there have the same ready to be delivered and unloaded by the consignee or upon his orders, or to such company or carrier (if the same is to be forwarded beyond said station), whose lines may be considered as forming a part of the route to the destination to which said stock is consigned; and I expressly agree that the responsibility and liability of said Memphis & Charlestown R. R. Co., and any and all connecting lines or companies as common carriers shall cease at the end of their respective roads or routes * * * I further agree that I will load, unload or transfer said stock at my own risk and expenses, and that in the event of accidents or delays from any cause whatever, I will, at my own expense, feed, water and take care of said stock, or cause the same to be done for me."

The bill of lading does not set out the alleged or any agreement as to the price for which the cattle were to be transported. The defendant filed a general demurrer to the reply, which was sustained, and plaintiff declining to plead further, judgment was entered for the defendant, and plaintiff has appealed.

The reply contains no allegation that the Frankfort & Cincinnati R. R. Co. ever authorized the Memphis & Charleston R. R. Co. to contract for it for a through rate on the stock at \$60 a car from Decatur to Paris, or that it had any knowledge of such alleged contract when it received these cars from the C., N. O. & T. P. Ry. Co., at Georgetown, Ky. And there is certainly nothing in the mere acceptance by them of these cars to authorize the inference that it ratified the alleged parol contract for a through rate of \$180, as they had no right under the law to refuse to receive from a connecting line cars of such line loaded with freight, which is ordinarily transported between railroad companies according to the proper and usual course of business. (5 Encyl. of Law, 2 Ed., 160, and authorities there cited.) As the bill of lading is silent as to the charges at which the stock was to be transported, and appellees had no information of the alleged special parol contract, the law implies an undertaking to carry at the usual and ordinary rate for which such services are performed, and there is no allegation in the reply that the charge of \$213 was in excess of the usual and ordinary rate. (Georgia R. R. Co. v. Murray, 11 S. E., 279.) And a carrier has a lien on freight transported by it for the usual and customary charges of such transportation. And this lien covers charges which a connecting carrier has advanced to the preceding

carrier. (6 Cyc., 502; *Cayo v. Pool*, 21 Ky. Law Rep., 1600.) Nor will the lien be affected by the fact that the previous carrier has been in default by reason of damage to the goods. (*Bowman v. Hilton*, 11 Ohio, 308, and *Ray on Negligence of Imposed Duties*, 864.) There is no allegation of negligence on the part of appellee after the receipt by them of the cars from either connecting carrier at Georgetown, Ky. Besides, the claim for damages in this case is based upon the alleged contract of the Memphis & Charlestown R. Co. to deliver the cattle in Paris, Ky., on Friday, December 3, 1897. Whilst the bill of lading which is made a part of the reply contains no such stipulation, but only undertakes to carry the cars to the end of their line and deliver them to the connecting carrier. The law is well settled that in the absence of a special contract by the carrier to deliver stock at a point beyond its line, it is not liable for negligence after its delivery to the connecting carrier. (*L. & N. R. R. Co. v. Cooper*, 19 Ky. Law Rep., 1152; *Bryan v. M. & P. R. R. Co.*, 74 Ky., 597; *L. & N. R. R. Co. v. Tarter*, 19 Ky. Law Rep., 229; *Elliott on Railroads*, section 433; *Ireland v. Mobile & Ohio R. R. Co.*, 105 Ky., 400.) In the case of *Boogs, &c. v. Martin*, 52 Ky., 239, the entire shipment was by one vessel from New Orleans to Louisville, there was no question of the payment by the delivering carrier of charges to the preceding carrier, and, therefore, has no application to the facts of this case. But it was there held that a carrier has a lien on goods carried, which, he might detain until the freight was paid.

For reasons indicated the judgment is affirmed.

WEISIGER, &c. v. McDONALD, &c.

(Filed November 24, 1903.)

Descent—Real estate of infant—Under the provision of section 1401 of the Kentucky Statutes that "if an infant dies without issue, having title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred as hereinbefore directed, if there is any," and of subsection 6 of section 494 of the Civil Code that "the person who would have been entitled to the property if it had not been sold, shall be entitled to the proceeds, or to the property in which they have been invested," the brothers and sisters of the father are entitled to the proceeds of real estate descended from him to his infant daughter, who had died during infancy without issue, as against her mother, where the real estate so descended had been sold pursuant to an order of court, as authorized by chapter 14 of the Civil Code, and pending a re-investment of the proceeds the infant had died.

Robert Harding for appellants.

R. P. Jacobs and Wm. Herndon for appellees.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Settle.

Joe Weisiger died in Garrard county, this State, December, 1893, intestate, but was survived by his wife, Mary Kinnalrd Weisiger, and an infant daughter, Lucile Weisiger. His widow afterwards intermarried with one ———

McDonald, with whom she is still living, their place of residence being in Boyle county.

Soon after the death of the intestate, his brother, John G. Weisiger, was, by an order of the Garrard County Court, appointed and at once gave bond and duly qualified as the statutory guardian of the infant, Lucile Weisiger, who was then under fourteen years of age. Subsequently Lucile Weisiger, while yet an infant under twenty-one years of age, died in Garrard county, intestate, unmarried and without issue, and thereafter W. H. Kinnaird by an order of the Garrard County Court was appointed and duly qualified as administrator of her estate.

At the time of his death Joe Weisiger owned in fee and was in the possession of the following parcels of real estate, lying in and near the city of Lancaster, Garrard county: First, the undivided half of a house and lot fronting on Lexington street, the other half being owned by his then wife, now Mary McDonald; secondly, a lot adjoining the one last mentioned containing a half acre; thirdly, a lot adjoining the half acre last named and containing about three acres; fourth, a lot adjoining the last one containing three roods and one pole; fifthly, a storehouse and lot known as lot No. 3 on the plat of the city of Lancaster; sixthly, two other adjoining tracts, one containing twenty, and the other forty acres, less one and three-quarter acres conveyed by a former owner to H. M. Naylor. The two parcels last mentioned were owned jointly by the intestate and John E. Stormes.

At the death of the intestate the real estate, and all interest therein owned by him, descended to his infant daughter, Lucile Weisiger, as his only heir at law, subject to the dower of the widow, now Mary McDonald. After the death of Joe Weisiger, and before the death of his infant daughter, her statutory guardian, John G. Weisiger, instituted an action in the Garrard Circuit Court, in which she, her mother, W. H. Kinnaird, administrator of the estate of Joe Weisiger, deceased, and J. E. Stormes, joint owner of a part of the real estate mentioned, were made defendants. The object of the action being to obtain a decree for the sale of all the real estate and interest therein owned by Joe Weisiger at the time of his death.

It was averred in substance in the petition in that case that the lots could not be divided without materially impairing their value, and that it would be impossible, in view of the character and location of them, to allot dower to the widow so as to make the same remunerative to her, or what would be left to the infant, after the allotment of dower, remunerative to her, but that it would be beneficial to all the parties in interest to sell the lots separately, or in connected parcels, and pay to the widow her half of the proceeds of the residence lot and the value of her dower in the remainder; to Stormes his half of the proceeds of the two parcels owned by him jointly with the infant daughter of the intestate, which would leave to the latter the remainder as her share of the proceeds of sale.

After all the parties to the action were brought before the court a decree was entered by the chancellor directing the sale in one body of the residence lot on Lexington street on the usual terms, and after the customary advertisement. The decree further directed that one-half the proceeds realized from the sale of the residence lot be paid to the widow, and that she also be paid the money value of her dower out of the other half, and that the re-

mainder which would be going to the infant, should not be paid by the purchaser, but remain a lien on the realty until she became twenty-one years of age, or until the execution by her guardian of the proper bond as required by section 493 of the Civil Code. The decree further directed that the residue of the realty be not sold until ordered by the court. At the succeeding term of the court a further decree was entered wherein it was adjudged that the residue of the realty be sold, for the reason that it could not be divided without materially impairing its value and the value of each share, and that the best interest of the infant required that it be sold for a re-investment of her share of the proceeds as provided by law.

At the same term of court John G. Weisiger, guardian of the infant, Lucile Weisiger, executed bond with good security, as provided by section 493 of the Code in the case of sales of the real estate of infants, which was duly accepted and approved by the court. The sales ordered by both decrees of the court were duly made by the master commissioner as therein directed, and his reports thereof, upon being filed, were approved by the court, and from his report of the first sale it appears that Mary McDonald, widow of the intestate, became the purchaser of the dwelling house and lot sold under the first decree at the price of \$3,500; for this sum she executed bond, with good security, which she, upon its maturity, paid in full, and \$1,386.63 thereof went into the hands of the guardian of the infant, which sum was her share of the proceeds arising from the sale of the dwelling house and lot after the widow was paid her half of the entire proceeds and the value of her dower in the infant's half.

From the report of the second sale made by the commissioner it appears that the residue of the intestate's real estate brought the sum of \$5,002, and that after paying Stormes his half of what was realized from the sale of the two parcels of which he was a joint owner with the intestate, and paying to the widow the value of her dower in the remainder, there was left to the infant \$3,983.68, which sum was also paid to her guardian. It further appears that after the sums realized from the sales of the real estate of the infant, Lucile Weisiger, had been paid to her guardian and before any steps had been or could be taken by him or by the court to reinvest the same, her death occurred, following which her administrator, W. H. Kinnaird, whose appointment and qualification as such has already been recited, demanded of her guardian the sums of money which he had received for his ward from the sales of the real estate, and the latter thereupon paid the administrator the sums so received and held by him amounting in the aggregate to \$5,820.88.

Thereafter suit was brought in the Boyle Circuit Court by the appellants, John G. Weisiger, M. C. Weisiger, Emma Weisiger, Lucy W. Harding (formerly Lucy Weisiger), and her husband, Samuel Harding, against the appellees, Mary McDonald, W. H. Kinnaird, administrator of the estate of Lucile Weisiger, deceased, to recover of them the amount paid by J. C. Weisiger, as guardian of Lucile Weisiger, to the administrator of the latter's estate. It is alleged in the petition that the father and mother of Joe Weisiger, deceased, are both long since dead, and that the appellants, J. C. and M. C. Weisiger, are brothers, and the appellants, Emma M. Weisiger and Lucy Harding, sisters of Joe Weisiger, deceased, and that the four-named are his only surviving brothers and sisters, and were the only uncles and

aunts and heirs at law of his daughter, Lucile Weisiger, deceased, and that by reason of her death in infancy, and the fact that all the real estate owned by her descended to her from her father, the proceeds thereof that were paid to the administrator by her guardian descended to them under and by virtue of section 1401, Kentucky Statutes. It is further averred in the petition that the administrator after collecting the proceeds of the infant's real estate from the guardian, unlawfully paid it all over to Mary McDonald, mother of the infant; that the latter has wrongfully converted it to her own use, and now holds it without right, and refuses to pay it to the appellants, and they prayed judgment against her and the administrator for the amount thus converted by them.

The appellee filed a demurrer to the petition, which was sustained by the lower court, and the petition dismissed, and from that judgment this appeal was taken.

Section 1401, Kentucky Statutes, provides that "if an infant dies without issue, having the title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred as hereinbefore directed, if there is any; and if none, then in like manner to the other parent and his or her kindred; but the kindred of one shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts of the intestate and their descendants."

It is conceded by the appellees that if the real estate that descended to the infant, Lucile Weisiger, upon the death of her father had remained unsold it would, under the statute, *supra*, have gone at her death to the appellants, but they contend that inasmuch as it was converted into money before her death, it became and must be treated as personalty, and that as subsection 1 of section 1403, Kentucky Statutes, directs that "the personal estate of an infant shall be distributed as if he had died after full age," the same went to the mother at the death of the infant, and is consequently rightfully held by her.

In construing section 1401 of the statute, *supra*, this court in *Talbott v. Talbott*, 17 B. Mon., 1, held that "the purpose of the legislature (in enacting it), was to limit the descent of the real estate of an infant dying without issue to that side of the house from which it came," and in *Powers v. Daugherty*, 83 Ky., 187, it was also held that "if an infant dies without issue, having title to real estate derived from one of his parents, the whole descends to the kindred of that parent, provided such kindred are not more remote than the grandparents, uncles and aunts of the infant." Indeed, in the absence of any authoritative statement from this court, the language of the statute itself clearly manifests that such is the disposition to be made of the real estate of an infant dying without issue.

Subsection 6, section 491, chapter 14, Civil Code, relating to the sale of the real estate of persons under disability, expressly provides that "If the owner of real estate which has been sold under the provisions of this chapter die during infancy, or being of unsound mind die intestate, or being an adult married woman die without having received the proceeds of sale, upon her written request, and upon privy examination as is authorized by this chapter, or without disposing in the manner authorized by law of the property

in which the proceeds may have been invested, the person who would have been entitled to the property if it had not been sold, shall be entitled to the proceeds, or to the property in which they have been invested."

This provision of the Code is in our opinion conclusive of the question in issue in the case at bar. The real estate of the infant was sold under chapter 14, Civil Code, according to the terms of the judgment for a re-investment of the proceeds for the infant's benefit, but before the re-investment was made, the infant died. In contemplation of law the proceeds of her real estate were still under the control of the chancellor at the time of her death, though in the hands of her guardian, and under the provision of the Code, *supra*, they must go to the appellants, as they are the persons who would have been entitled to the property if it had not been sold.

In Pomeroy's Equity Jurisprudence, section 1187, 2 edition, under the head "Compulsory sales of land under statute, or by order of court," it is said: "Where land is purchased or taken under compulsory powers conferred by statute and the owner is *sui juris* a conversion is effected; the purchase money, although not yet paid, becomes to all intents personalty; but if the owner is an infant or lunatic, or the land is in settlement, the purchase money remains land; there is no conversion."

The payment by the commissioner of the proceeds of the infant's real estate to her guardian was without an order from the lower court, and without authority of law, as was the payment of the same by the infant's guardian to the administrator of her estate, and manifestly the latter was equally without authority to pay such proceeds to the mother of the infant.

Wherefore, the judgment is reversed, and cause remanded to the lower court, with directions to overrule the demurrer and for further proceedings consistent with the opinion herein.

COX, &c. v. HIGGINBOTHAM'S ADM'R, &c.

(Filed November 25, 1903—Not to be reported.)

1. Jurisdiction of appeal—Amount in controversy—This court has no jurisdiction of an appeal from a judgment allowing certain claims against a decedent's estate by one whose claim amounted to only \$125, where there was no order of distribution of any of the funds in the hands of the court.

2. Decedent's estate—Verification of claims—Where the president of a bank was the administrator of the decedent's estate it was proper for a claim of the bank against the estate to be verified by the cashier instead of the president.

3. Lost claim—Presumption—Where a claim and the accompanying affidavits were lost from the record after the death of the claimant, it will be presumed, on appeal from a judgment allowing the claim, that the affidavits sustained the claim.

4. Interest on claims against decedent's estate—Waiver of demand—A creditor of a decedent is entitled to recover interest on his claim accruing after the death of the debtor, notwithstanding he failed to verify it and make demand of payment of the administrator within one year after his appointment where the administrator waived such demand by advising the creditor not to prove up his claim and promising to notify him when he received any assets from the estate to be distributed to the creditors.

5. Funeral expenses—Mortgages—The lien of a mortgagee upon the personal property of a decedent is superior to funeral expenses; the provisions of section 3868 of the Kentucky Statutes preferring funeral expenses has application alone to assets in the hands of the personal representative for distribution.

John T. Hays, J. M. Rothwell and Wm. Herndon for appellants.

Lewis T. Walker and J. W. Alcorn for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Hobson.

This action was instituted for the settlement of the estate of M. W. Johnson, who died a resident of Garrard county on December 14, 1896. The appeal questions the propriety of the judgment of the circuit court in the allowance of certain claims against the estate.

1st. W. R. Jennings presented an account for \$125.80, which was allowed, and it is insisted the proof was insufficient to sustain the claim. This court has no jurisdiction of an appeal from a judgment where the matter in controversy is less than \$200; but it is urged that the judgment is for the settlement of the estate, and involves much more than \$200. This is true, but Jennings was interested in nothing but his claim. If the allowance of his claim were the only thing complained of, it could not be maintained that the court has jurisdiction. The fact that other claims were allowed to other creditors, of which complaint is also made, in no wise affects the status of appellee Jennings, for he has no interest in these claims. So far as he is concerned, it is simply an appeal from the judgment allowing his claim of \$125 and interest. The appeal as to Jennings is, therefore, dismissed, for there was no distribution ordered of any funds in the hands of the court, and there is nothing more than a judgment in favor of Jennings for his claim.

2d. The Citizens National Bank presented a claim, which was properly proven up by the affidavit of its cashier, and also the affidavit of its teller. Objection is made to this claim because it was not sworn to by the president of the bank. The president of the bank was the administrator of M. W. Johnson. The cashier was the managing agent of the bank, and was familiar with its books and accounts, and for this reason it was sworn to by him, and not by the president. The purpose of the statute requiring verification of claims is to reach the conscience of the creditor, and this is best done when that agent of the corporation who is most familiar with the facts makes the verification. The president of the bank, being the administrator, thought that the verification should be made by the cashier and not by him. The circuit court concurred in this view, and we see no substantial error to the prejudice of the estate. The record shows the justice of the claim, and we see no reason, under all the circumstances, for disturbing its allowance. The costs incurred by the bank in the suit on the forged checks was properly allowed against the estate.

3d. John M. Higginbotham, who was also the administrator, presented a claim, and in some way the claim and the accompanying affidavits were lost out of the record after his death. It must be presumed that the affidavits sustained the claim in the absence of the record.

4th. Exception is also taken to the allowance of interest on the claim of the Edwards Bernard Co., on the ground that it was not demanded of the administrator, properly verified, within one year after his appointment, and, therefore, no interest should have been allowed on it. The proof shows that the administrator said to the company that, as he had no assets on hand for the payment of the claim, it was unnecessary for the company to make out, verify or prove its claim, and that when he was ready to make a payment he would notify it, and it could then prove up its claim. This statement was made to other creditors, and grew out of the following state of facts: The intestate left no real estate; his personal estate was all covered by mortgages for more than its value, and the only thing in the hands of the administrator for the payment of the debts was a policy of life insurance, which was disputed by the insurance company, and on which the administrator was prosecuting a suit against it. The amount of the policy was \$50,000. If he won the suit there would be plenty to pay the debts. If he lost the suit, there would be nothing to pay on them. So he told the creditors referred to not to prove up their claims until it could be ascertained whether there would be any assets for their payment. The purpose of the statute in requiring demand of the administrator is to give him knowledge of the claims against the estate, and to afford him an opportunity to pay them or provide for their payment. The personal representative may waive the demand either before or after suit by the creditor. (Thomas v. Thomas, 54 Ky., 184; Howard v. Leavill, 73 Ky., 432; Croninger v. Marthen, 83 Ky., 62.) The facts in this case bring it within the rule laid down in the cases cited, for no harm has come to the estate from the course followed by the administrator. The suit against the insurance company is still pending and undetermined. The officers of the corporation were competent witnesses for it to establish the waiver of demand.

5th. John A. Todd's claim, No. 1 and 1½, were sufficiently proven up by his affidavit, the judgment of the court filed therewith, and the affidavit of R. H. Tomlinson afterwards filed. Complaint is also made of the allowance of Todd's claim marked "O." This claim is properly proven, and we fail to find any exception to it, or any plea of limitation in the record. It was discretionary with the court to hear the proof on the exceptions to the claims orally, none of the parties objecting.

6th. The widow complains that the entire proceeds of the mortgaged personal property was paid over to the mortgagees, and thus the funeral expenses and cost of administration were left to fall on another fund. In Milard v. Shields, 19 Ky. Law Rep., 1076, it was held that the lien of a mortgagee upon personal property is superior to funeral expenses, and that section 3868, Kentucky Statutes, applies entirely to assets for distribution in the hands of the personal representative. The court followed the rule laid down in that case.

After a careful investigation of the record we find nothing to the prejudice of appellants' substantial rights. The claims allowed were just. The amounts allowed were no more than what was due, and there was nothing in the hands of the personal representative to pay on them.

Judgment affirmed.

RICE'S EX'ORS, &c. v. WYATT.

(Filed November 25, 1903—Not to be reported.)

1. New trial—Misconduct of juror—The misconduct of a juror in a will contest in expressing his opinion pending the trial that "the will would have to go" does not sustain the contestant's motion for a new trial, the expression of opinion being in her favor.

2. Same—Misconduct of prevailing party—An allegation of misconduct on the part of the prevailing party in a will contest, unsupported by evidence, when put in issue does not authorize a new trial.

3. Relationship between juror and party—A new trial will not be granted on the ground of the relationship between a juror and one of the successful parties where the relationship was very remote and the juror was not acquainted with the successful party and the latter was not present at the trial and knew nothing about the juror being on the jury.

4. Newly-discovered evidence—Newly discovered evidence which is merely cumulative does not furnish grounds for granting a new trial.

5. Same—Where the record in an original proceeding is not made a part of the petition or proceedings for a new trial on the ground of newly discovered evidence the court is unable on appeal to understand the relevancy or competency of the newly-discovered evidence, and an order granting a new trial must be reversed.

C. W. Goodpaster, Hazelrigg & Chenault and J. J. Nesbit for appellants.

C. W. Nesbit and John D. Atkinson for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Barker.

Jeff Rice, an aged citizen of Bath county, Kentucky, died, testate, in the county of his residence. His will was admitted to probate by order of the Bath County Court, from which an appeal was prosecuted by his granddaughter, Willie Hodge Wyatt, to the Bath Circuit Court, where a trial was had by jury, which resulted in a verdict and judgment sustaining the will.

After the expiration of the term at which this trial was had, the contestant filed a petition in the Bath Circuit Court, alleging as grounds for a new trial, first, that one of the jurors was of kin to one of the successful litigants; second, for misconduct on the part of one of the jurors; third, the misconduct of one of the prevailing parties; and, fourth, because of newly discovered testimony, which could not have been produced upon the former trial by any diligence on the part of the petitioner. All of these allegations were placed in issue by responsive pleading, and, upon a trial of the issues thus raised, a judgment was rendered awarding a new trial, from which this appeal is prosecuted; of these, in their order: The misconduct of the juror, James Boyd, consisted in talking about the case, pending its trial: it being alleged that he expressed the opinion to Charles Harper, that "the will would have to go." As appellee was the contestant, the expression of opinion, on the part of the juror, was manifestly in her favor. This, as said in the case of *Evans v. McKinsey*, *Littell's Selected Cases*, 262, might have been a ground for the opposing party obtaining a new trial, but not for the contestant. In the case cited, the juror said that "he had made up his opinion who ought to recover, and that he wished to be upon the jury, and if he should be, he would hang the jury forever, or find for McKinsey." The

court said: "It was on making this discovery that McKinsey applied for and obtained a new trial." This court is unable to perceive any reason for disturbing the verdict on the ground of the discovery made by McKinsey. If the verdict had been against Evans, the evidence introduced by McKinsey might have formed very satisfactory evidence of the partiality of the jury against him; but it is difficult to imagine how the declarations of one of the jury, that he would find for McKinsey can be construed into evidence of partiality against him, so as to warrant the court in setting aside the verdict found contrary to those declarations. The circumstances of the verdict being contrary to the juror's declarations, is conclusive to show that if those declarations were in fact made, they must have been either the effusions of mirth or levity, and that, when called on to decide the contest, the juror, under the more solemn and controlling influence of his duty and oath, gave a decision free from that bias which he might otherwise have been supposed to entertain." (Drake v. Drake, 21 Ky. Law Rep., 683, and Pettibone v. Phelps, 35 Am. Dec., 88.)

The misconduct of the prevailing party is alleged to have been that William Rice talked to one of the jurors, David Ratliff, about the issues involved in the case, pending the trial. This allegation was placed in issue by the answer, and there was a total failure to establish it in the evidence.

One of the jurors, John B. Jones, was shown to have been of kin to Overton Jones, the husband of Fannie Jones, one of the contestees; this relationship by marriage was shown to be, that the grandfather of John B. Jones, the juror, and the grandfather of Overton Jones, were first or second cousins. Neither Overton Jones nor his wife were present at the trial, or knew anything about John B. Jones being on the jury. The juror was not acquainted with Fannie Jones, and we think this relationship too distant to constitute a ground for a new trial. In the case of Rhodes v. Crook, 11 Ky. Law Rep., 952, the Superior Court said: "A new trial will not be granted because of the relationship of one of the jurors to the successful party, where the relationship is so remote as to require the skill of a genealogist to determine what it is, unless it is made to appear that the selection of the juror was by procurement of the successful party, or the juror intentionally concealed his relationship, that he might serve on the jury, or if it is shown his relationship influenced him to render the verdict."

In the case of Northcutt v. Jouett, 18 Ky. Law Rep., 327, on this subject, the court said: "A number of grounds for a new trial were filed, but the only one insisted on in the brief filed is that Geo. P. Martin, one of the jury, was a relative of appellees, being a relative in the eighth degree. It also appears that he is also of kin to the appellants in the same degree.

"It seems to us that the relationship was too distant to prejudice appellants or to entitle them to a new trial. It seems that the juror was not aware of the relationship at the time he was examined and accepted."

The newly discovered evidence was entirely cumulative. On this subject the petition for a new trial contains the following: "She says that while in one sense said newly discovered evidence is cumulative, it is such, and of such extent, as will reasonably have a controlling influence with another trial." And again: "That while cumulative in nature, said testimony, by its volume, can and will, be of such extent as to change the verdict and pre-

ponderance of the evidence in said case on that subject." In the case of Finley v. Curd, 23 Ky. Law Rep., 1912, this court said: "No rule is better established, than that a new trial will never be granted because of newly discovered, cumulative parol testimony, on a point that was directly in issue and passed upon on the first trial." (Allen v. Perry, 6 Bush, 91; Bell v. Offutt, 10 Bush, 48.)

The original record in the will case is not made a part of the petition, or proceedings in the suit for a new trial, and is not brought up on this appeal; and even if the petition did not affirmatively show that the newly-discovered evidence was cumulative, the judgment would have to be reversed for the failure to bring up the original record, as it would be impossible for this court to understand the relevancy or competency of the newly-discovered evidence, without having the original evidence before us. In the case of Weir v. Weir, 19 Ky. Law Rep., 2005, it is said: "We are of opinion that the petition, as amended, was fatally defective. It utterly fails to show what were the issues on the trial wherein the judgment was had, or that either the appellee or Clifford Weir testified on that trial to any fact, or, if they did testify, that their testimony was not what these new witnesses will testify. It may be, so far as this petition shows, that appellant in the former trial admitted his liability to some extent and the jury was only called to fix the amount of recovery, or it may be that all this matter proposed to be shown by this new evidence was directly in issue in the other trial. The petition is silent as to all of these things, and according to the rules of pleading, all the facts necessary to show a plaintiff entitled to affirmative relief must be shown in his pleading.

"Conceding all appellant's allegations to be true, still this court can not say that he is entitled to a new trial. This being an original action, as held by this court in Reinicke v. Morse, 10 Ky. Law Rep., 767, there is nothing before the court in this case except as brought by the pleadings. The proceedings of the old case and the trial and evidence heard thereon should have been plead in this case in full, or should have been made a part of the petition in some way by reference as exhibits, so as to necessarily bring that old case and the proceedings had therein before the court in this case. As that was not done, we can not know whether this newly-discovered evidence was such as to authorize a new trial in the other case." To the same effect is Johnson v. Carter, 23 Ky. Law Rep., 591, and Overstreet v. Brown, *idem*, 817.

For the reasons above indicated the judgment is reversed for proceedings consistent with this opinion.

MAYDWELL, &c. v. CITY OF LOUISVILLE.

(Filed November 25, 1903.)

Taxation—Sprinkling streets—The sprinkling of the public streets of a city is a public purpose within the meaning of section 171 of the Constitution which provides for taxation for "public purposes only," and it is lawful for the city to provide by ordinance for the levy and collection of tax for that purpose.

Lane & Harrison for appellants.

H. L. Stone for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Barker.

The appellants, who are citizens and taxpayers of Louisville, Ky., (a city of the first class), instituted this action for the purpose of enjoining the collection and disbursement of a tax of 3 cents on each \$100 worth of taxable property, for the purpose of sprinkling the streets of the city. They claim the sprinkling of the streets is not a public purpose, and that, therefore, so much of the ordinance as provides for the tax is unconstitutional and void. This is the question involved in this litigation.

Section 171 of the Constitution provides: "The general assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"Section 181. The general assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes." * * *

These two sections comprise the constitutional provisions regulating the subject in hand. The charter provisions, applicable to the question, are as follows:

"Section 2980. Each city shall raise a revenue from ad valorem taxes, and a poll tax and license fees, and to that end the common council of each city is hereby authorized and empowered to provide each year, by ordinance, for the assessment of all real and personal estate within the corporate limits thereof subject to taxation for State purposes, and shall levy an ad valorem tax on same, not exceeding the rate and limits prescribed in the Constitution, and for school purposes not exceeding 50 cents on each \$100 of taxable property therein, or such portion of poll tax or license fees as the council may designate; to levy a poll tax not exceeding \$1.50 on each adult male inhabitant thereof. * * *

"Section 2981. In the ordinance fixing for any year the tax rate, the general council shall subdivide its levy as follows: A levy for schools, a levy for the sinking fund, a levy for police purposes, a levy for the fire department, a levy for street and sewer cleaning, a levy for sprinkling streets, a levy for reconstruction of streets, a levy for street repairs, a levy for construction and repairs of sewers, a levy for the house of reform, a levy for charitable institutions, a levy for parks, a levy for library purposes, and a levy for general purposes and a deficit tax. The council shall cause the foregoing levies to be made for the purpose stated by an ordinance fixing the tax rate each year.

"Section 2985. The board of public works shall have exclusive control over the construction, reconstruction, cleaning, repaving, platting, grading, improving, sprinkling, lighting and using of all streets, alleys, avenues, lanes,

market houses, bridges, sewers, drains, wells, cisterns, ditches, culverts, canals, streams and water courses, sidewalks, curbing and the lighting of public places."

It will thus be seen that there is ample statutory authority to uphold the sprinkling of the municipal highways at the public expense.

The Constitution forbids the collection of any tax, except for a public purpose. Is the sprinkling of the streets a public purpose? If so, the city has a right to collect the tax; if not, the ordinance, to the extent to which it authorizes a levy for this purpose, is void. Cooley, in his work on *Taxation*, 3d edition, volume 1, page 211, says: "It is not doubted that the preservation of the public health is a public purpose of prime importance. Sanitary regulations are indispensable in large towns, but they may be made for every locality. The right to provide for draining low lands for the purpose is well settled, and the right to protect low lands from overflow may also be justified on the same reason."

It can not be doubted, at this day, that whatever is necessary for the preservation of the public health and safety, is a public purpose, within the meaning of section 171 of the Constitution. For the purpose of furnishing the citizens with pure water, waterworks may be established, and public wells dug and maintained; that the public highways may, without peril, be traveled at night, they may be lighted at the public expense; that the people may have convenient and wholesome places for resort, public parks may be established and kept. For the education of the young, public schools are conducted. For the support of the indigent aged, alms houses are provided. For the reformation of vicious young, reformatories are maintained. For the relief of the sick, hospitals are provided. For the protection of the public health, nuisances are abated, streets and sewers are flushed and cleaned. As a protection against conflagration, fire departments are established, and, as a safeguard for life and property, police departments are organized.

It can not be successfully denied, that the dust upon the streets of large cities is a fruitful source of disease, as well as of annoyance to the citizens. The same principle which authorizes the streets to be cleaned for the purpose of preventing noisome odors and epidemics of disease authorizes them to be sprinkled. The cases cited by counsel for appellants are not pertinent to the question in issue. *Clark v. Louisville Water Co.* establishes the principle, that the property of that corporation is subject to State taxation; but it does not thereby follow, that the city may not contract with the corporation, for the furnishing to its citizens pure water. This reasoning, on the part of counsel, confounds the public service with the instrumentalities by which that service is effectuated. Whatever public service the municipal corporation may, itself, perform it may hire others to perform for it if it appears that the latter method is the cheapest, and the best, unless there be some constitutional or statutory inhibition. In the case of the *City of Louisville v. Commonwealth*, 1 Duvall, 295, it was held that the fire engines of the city of Louisville were not exempt from State taxation; but no one has ever doubted that the maintenance of a fire department, for the purpose of preventing conflagrations, is a public service, or that the levy of taxes, for its maintenance, is authorized. It is the duty of cities to clean its public highways, that they may not become a nuisance. If, in their wisdom,

they see fit to hire others to perform this service, it does not follow that the carts used by the contractors are exempt from taxation; nor can it be deduced therefrom that, because they are not exempt, the cleaning of the streets is not a public service. And yet, this is the sole contention of appellants; logic could not be more faulty, or inconsequential. The Louisville Tramway Co is a corporation organized for the purpose of sprinkling the public streets more rapidly, and cheaply, by utilizing the street car tracks than could otherwise be done. We are able to perceive no reason why the municipality may not contract with it to perform this service so essential to the health, happiness and convenience of all its citizens.

The owners of property abutting upon the highways sprinkled may get some local advantage distinguishable from that of the traveling public; but this always happens in the performance of public duties. If a park is established, those who own property near by, enjoy an increased value thereof by reason of its proximity to the public pleasure ground; but it does not follow that the establishing of parks is any less a public purpose for this reason. The establishing of a State college in a given city affords that city a local advantage not enjoyed by other cities of the Commonwealth; but no one would question that education is a public purpose, because of this fact. All the citizens have a right to travel the public streets, and, in order that their health and convenience may be conserved, the city may provide that they are reasonable safe, clean and free from substances deleterious to the public health.

As sprinkling the public ways clearly comes within the constitutional requirement of a public purpose the judgment of the lower court dismissing the petition seeking to enjoin the levy and collection of the tax for that purpose is affirmed.

WILSON'S ASS'ES v. LOUISVILLE NATIONAL BANKING CO.

FIDELITY AND DEPOSIT CO. OF MARYLAND v. SAME.

(Filed November 25, 1903—Not to be reported.)

Trustee—Liability of surety—This court having on a former appeal set aside a settlement and held that certain assignees for the benefit of creditors should pay such part of the trust funds adjudged to them for attorneys' fees, then remaining in their hands, to a bank which they had misled into believing that an attorney, who had assigned to it his fee in the case, was entitled to receive a fee, whereas he was not entitled to a fee, the lower court properly entered a judgment against the assignees as such in accordance therewith upon the return of the case; and it was proper, in a separate action instituted against the surety of the assignees to recover the judgment so entered, to hold the surety liable therefor, it being liable because the judgment affected merely the distribution of the trust funds and was not against the assignees personally.

W. G. Deering for Wilson's assignees.

L. F. Yeaman and Boyle & Yeaman for appellant Surety Co.

Barnett & Barnett, H. H. Herr, Leopold & Pennebaker and H. L. Stone for appellees.

Appeals from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Hobson.

Some years ago David Wilson made an assignment for the benefit of his creditors. The assignees filed a suit in the Fleming Circuit Court to settle their trust. A large amount of litigation ensued. Finally Stone & Sudduth, who had been attorneys for the assignees, presented their petition asking an allowance for their services in the action. The court sustained a demurrer to the petition, and on appeal this judgment was reversed. (*Stone, &c. v. Wilson's Ass'ees*, 23 Ky. Law Rep., 190.) On the return of the case to the circuit court issues were joined upon the petition, and defence was made to the claim on the ground that the services of Stone & Sudduth were rendered under an agreement between Sudduth and the assignees that no charge was to be made therefor. The Louisville National Banking Co. held an assignment of Sudduth's part of the fee, and it in substance pleaded and showed that the trustees had accepted notice of its assignment, agreeing to pay it whatever sum as fees might be allowed to Sudduth, and in writing assured it that its fee should be a large one, as he had done very valuable services. On final hearing in the circuit court again dismissed the petition of Stone & Sudduth and the Louisville National Banking Co. On appeal to this court the judgment was affirmed as to Stone & Sudduth, the evidence showing that the services had been rendered by Sudduth under an agreement by him that he would make no charge therefor. But the evidence also showed that without the knowledge of the bank, the trustees had procured the court in the action to make them an allowance of \$9,500 as counsel fees in addition to the allowances for their own services, and that of this sum they still had in their hands \$1,850, after settling with their other attorneys, which, by the agreement of these attorneys, they had been allowed to retain because of some loss they were alleged to have sustained, although they had received credit for the entire \$9,500 in their settlement with the court, none of the creditors complaining of the allowance to the trustees for counsel fees. It was held that as between them and the bank, they must pay the bank the \$1,850, or so much of it as was necessary to satisfy its debt. The court said: "When Stone & Sudduth and the Louisville National Banking Co., as the assignee of Sudduth's fee, filed their intervening petitions, asking to have a reasonable fee allowed and paid on account of Sudduth's services to the estate, it was resisted, and successfully so by the assignees, Hart & Soursley, on the ground that Sudduth was not to be paid anything for his services. However that might have been in fact, it does not lie in the mouths of these assignees to say so to the bank, whom they have deluded by their agreements and correspondence into nonaction till Sudduth is dead, and his estate found to be insolvent. To do so would be to sanction a great wrong against which the conscience must revolt.

"The record shows that the \$1,850, assets of the trust estate, have been set apart to the trustees with which to pay their attorneys' fees in that matter. No one else is claiming it. Properly it does not belong to the trustees. It was trust estate, especially dedicated by order of court to pay the fees of their attorneys, not named, but presumably such as they should be obliged to pay. Sudduth's services are shown to have been worth much more than \$1,850. As between these two trustees and the banking company, we hold that they will not be heard to say that their claim to this sum lies on an easier con-

science than does the bank's. They will be required to turn it over to the appellant, Louisville National Banking Co.

"In this action the surety of the trustees on their bonds under the deed of assignment were made party defendant. The bond was declared on the breach alleged being in the failure of the trustees to pay over to the banking company Sudduth's fee. The demurrer of the surety to this petition was overruled. The surety then answered jointly with the principals, Hart & Sousley, raising no question in its pleading that the action against it was premature, other than the traverse denying that Hart & Sousley had failed to keep and perform the covenants of their bond, or to faithfully and in proper time discharge their duties as assignees. Argument is made for the surety that its undertaking was to the assignor only. The terms of the bond executed were not prescribed by statute. The bond was for the benefit of all who might be entitled to participate in the distribution of the assets of the trust estate. It is as follows: 'Now we, R. H. Sousley and R. K. Hart, as principals, and Fidelity and Deposit Co. of Maryland, their sureties, do hereby covenant to and with said David Wilson, the grantor in said conveyance, that said R. K. Hart and R. H. Sousley will well and faithfully, and in proper time, discharge all the duties imposed on them by said conveyance, or by the laws of the land.' A failure by the trustees to pay these assets to any one as required by law and directed by a court of competent jurisdiction we are of opinion is a breach of this bond, for which the surety would then be liable.' We are of the further opinion, though, that a cause of action on this bond does not accrue to the distributee till the trustee has been adjudged or ordered to pay him a definite sum, and has failed to do it." (Stone, &c. v. Hart, &c., 23 Ky. Law Rep., 1777.)

The mandate of this court was in these words: "The court being advised, it seems to them the judgment herein is erroneous in part. It is, therefore, considered that said judgment be reversed and cause remanded, with directions to set aside the order of final settlement with the trustees, and to enter a judgment in favor of Louisville National Banking Co. against Hart & Sousley, assignees of David Wilson, for such sum as will pay the balance on its debt by W. A. Sudduth's estate, but not to exceed \$1,850. Demurrer of the surety, the Fidelity and Deposit Co. of Maryland, to the petition should be sustained, and the petition of the banking company as to it dismissed without prejudice to a future action, and for further proceedings as may be necessary not inconsistent with the opinion herein, and said judgment is affirmed as to Stone, surviving partner of the firm of Stone & Sudduth."

On the return of the case to the circuit court, it appearing that the debt of the bank was more than \$1,850, judgment was entered in its favor against R. K. Hart and R. H. Sousley, assignees of David Wilson, for the sum of \$1,850, to be paid out of assets in the hands of assignees. From this judgment they appeal, insisting that no judgment should have been rendered against them as assignees. Execution was issued on the judgment, and returned "no property found." The bank then instituted a new action in the Jefferson Circuit Court against their surety in their bond as assignees, the Fidelity and Deposit Co. of Maryland, to recover of it the amount of the judgment. The surety defended on the ground that it is not responsible under the bond for the personal torts of the trustees, and that the words

"assignees of David Wilson," in the mandate of this court, were merely a description of the persons, and did not warrant a judgment against them as assignees. The circuit court gave judgment against the surety, and from this judgment it also appeals.

The propriety of the opinion and judgment rendered by this court on the former appeal can not be reargued here. The parties have had their day in court. The judgment then rendered is conclusive of their rights, and the only question to be determined is what was determined. Words added after the name of a party may sometimes be treated as description of the person; but a judgment of a court, like any other document, must be read as a whole, and its obvious meaning must be enforced. In construing a judgment, the court must look to the entire record in which the judgment was rendered, if necessary to give it proper effect, for the judgment must be read in connection with the record before the court on which it was rendered. The suit brought by the assignees was to settle their trust. The purpose of the action was to have the court determine to whom the trust funds in their hands should be distributed. Stone & Sudduth and the bank intervened in the action, claiming a part of the trust fund. This court held that the \$1,850 was a part of the trust fund. The trustees had made a final settlement of their accounts, of which no one was complaining except Stone & Sudduth and the bank. The question presented was, should the trustees be allowed in equity to keep this \$1,850 themselves, or be required to pay it over to the bank whom they had misled. On the appeal of the bank, the court set aside their final settlement as trustees as to this \$1,850, and directed a judgment to be entered in favor of the bank against the trustees therefor. The fund being trust funds, and their final settlement as trustees being set aside as to the fund, the judgment against them was necessarily a judgment against them as trustees; for otherwise there would be no necessity for setting aside their final settlement, or the determination of the question that the \$1,850 were trust funds in their hands not administered. The surety is liable for the judgment, because it undertook that the trustees would properly discharge their duty and pay out the trust funds as ordered, which they have failed to do. There was no question of the personal liability of Hart & Sousley in the action. The only question was whether they had disbursed properly the trust funds in their hands as assignees. As the judgments complained of follow the mandate of this court and the opinion rendered on the former appeal, it is unnecessary now to enter upon a discussion of the reasons sustaining the conclusion then reached by the court.

The judgment appealed from in each is, therefore, affirmed.

COMMONWEALTH, BY, &c. v. AYER & LORD TIE CO.

(Filed December 17, 1903.)

1. Steamboats—Situs for taxation—The owner of a steamboat has the right under the Federal Statutes, requiring the name and the home port of the vessel to be painted upon its stern, to select as the home port the place of its registry or enrollment; and where the place of registry is painted upon the stern of the vessel it will be deemed the home port and the situs of the ves-

sel for purposes of taxation, notwithstanding the residence of the owner elsewhere and the payment of taxes at the place of his residence.

2. Removal of causes—The Commonwealth of Kentucky is not a citizen within the meaning of the statutes authorizing the removal of causes from the State to the Federal court, on the ground of diversity of citizenship.

Frank A. Lucas for appellants.

Campbell & Campbell for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Barker.

This is a proceeding instituted by the auditor's agent, Frank A. Lucas, against appellee, under the provisions of section 4241, Kentucky Statutes, to enforce the listing for taxation of certain steamboats owned by it, engaged in interests commerce on the Ohio, Cumberland, Tennessee and Mississippi rivers.

The appellee is a corporation organized under the laws of the State of Illinois, having its principal office in Chicago; it also has offices at Paducah and other cities along the rivers upon which it engages in navigation. The steamboats in question are the Russell Lord, Pavonia and Inverness. The years for which these vessels are sought to be listed for taxation, are 1899, 1900 and 1901. They are registered in Paducah, Ky., and each of them has painted on its stern, in compliance with the statutes of the United States, the words "of Paducah, Ky."

To the petition, appellee filed an answer, admitting that the vessels sought to be taxed are registered at Paducah, Ky., and that they have the words "of Paducah, Ky.," painted on their stern. Their values, as alleged in the petition, are denied, as is also the allegation that Paducah is their home port; and it is alleged, affirmatively, that appellee is an Illinois corporation, having its chief office and place of business in Chicago; that its vessels are engaged in interstate commerce upon the rivers before mentioned; that they are taxed in Chicago, the domicile of their owner, and are not taxable by the State of Kentucky, in Paducah, or elsewhere. The answer concludes with the following allegations: "Defendant further answering, says that H. Baker, upon whom notice in this case was served, was, during the said years, 1899, 1900, the general manager of the transportation department of said Ayer & Lord Tie Co., of its said steamboats, Russell Lord, Pavonia, and in 1901 of steamer and its barges Inverness, and for convenience sake, and under the act of congress, said steamers wer) enrolled or registered at the port of Paducah, Ky., and said Baker, being a resident of the State of Kentucky, and in which ports it is proper to register or enroll-said boats."

To this pleading a general demurrer was interposed by appellant, which was overruled, and it declining to plead further, its petition was dismissed; from which judgment this appeal is prayed. The allegations of the petition, which are admitted by the answer, and the allegations of the answer, which are admitted to be true by the demurrer, aptly raise the question as to whether or not the steamboats of appellee are taxable by the Commonwealth of Kentucky. Ordinarily, the residence of the owner is the situs for taxation of personal property; but this rule is, by no means, without exceptions, and it often happens that personal property obtains a situs for taxation

In a jurisdiction foreign to the residence of its owner. Vessels engaged in navigation upon the high seas, and upon the great lakes and rivers of the United States, are often separated by long distances from the residences of their owners; such vessels, in so far as they are the property of citizens of the United States, are governed by its laws.

It has been deemed wise by the general government, from the earliest period of its existence, that all vessels engaged in interstate, or international commerce, should have a home port, where they are registered and enrolled; enjoy certain privileges, and are subject to certain burdens and duties; and that all who have business transactions with them may know beyond question their home port, it is required, by statute, that its name shall be painted in a certain way upon the stern of each vessel. By an act of congress, which became a law December 31, 1792 (section 4114, Revised Statutes), it is provided: "Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection-district, which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

"Section 4178. The name of every registered vessel, and of the port to which she shall belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length. If any vessel of the United States shall be found without having her name and the name of the port to which she belongs so painted, the owner or owners shall be liable to a penalty of \$50." * * *

"Section 4334. Every licensed vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting, the owner thereof shall be liable to a penalty of \$20."

It will be observed that by the foregoing statutes, the home port of vessels belonging to citizens of the United States was the residence of the owner, if there was but one, or that of the residence of the vessel's husband, if there were more than one owner, and the name of this home port was to be painted on the stern of the vessel. Thus stood the law regulating this subject, until the year 1884, when, by an act of congress, entitled "An act to remove certain burdens on the American Merchant Marine, and to encourage the American foreign carrying trade, and for other purposes," it was provided that "the word 'port,' as used in sections 4178 and 4334 of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of said vessels, shall be construed to mean, either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built; or where one or more of the owners reside."

Thus changing the requirement that the home port should be the residence of the owner, and granting the option of selecting one of three places as a home port, to wit, the port of registry, the place in the same district where the vessel was built, or where one or more of the owners reside. In 1891 and 1897, section 4178 was amended, so as to read as follows: "The name of every documented vessel of the United States shall be marked upon each bow and

Roman letters, in light color on a dark ground, or in a dark color on a light ground, secured in place, and to be distinctly visible. The smallest letters used shall not be less in size than four inches. If any such vessel shall be found without these names being so marked, the owner or owners shall be liable to a penalty of \$10 for each name omitted." * * *

Appellee had a right to cause its boats to be registered at Paducah, although that was not the place nearest to the port where it resided, and it fully complied with the law regulating the subject, by painting the words "of Paducah, Ky.," on the stern thereof; and by the amendment of 1884, Paducah became the home port of the vessels so registered and marked.

The question, then, for adjudication, is, whether or not the home port of a vessel is the situs for its taxation, although its owner may reside in a foreign country or State, as in the case under consideration. Judson in his work on Taxation (section 186), says: "Steamboats and vessels navigating the public or navigable waters of the United States are taxable as property, irrespective of the residence of the owner, in the home port of the vessels, which is said to be their situs for taxation."

And in Cooley on Taxation, 3 edition, volume 1, page 651: "Vessels are commonly taxable only at the port of registry, although the place of enrollment or registration does not necessarily fix the situs for taxation, which may be at the owner's domicile, or in a State where the owner does not reside, if the vessel's business is wholly in such State for an indefinite period."

In the case of *Hays v. Pacific Mail Steamship Co.*, 17 How., 596, the Supreme Court of the United States said: "The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State is familiar in the admiralty law. She is subjected, in many cases, to the application of a different set of principles. (7 Pet., 324; 4 Wheat., 438.)

"We are satisfied that the State of California had no jurisdiction over three vessels for the purpose of taxation, they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

In the case of *Moran v. New Orleans*, 112 U. S., 653, it was said: "And it is undoubtedly true, as it has often been judicially declared, that vessels engaged in foreign or interstate commerce and duly enrolled and licensed under the acts of congress, may be taxed by State authority as property; provided, the tax be not a tonnage duty, is levied only at the port of registry, and is valued as other property in the State, without unfavorable discrimination on account of its employment." (*Transportation Co. v. Wheeling*, 99 U. S., 273; *Morgan v. Parham*, 16 Wall., 471; *Hays v. Steamship Co.*, 17 How., 596; *Ferry Co. v. East St. Louis*, 107 U. S., 365; also *Battle v. Mobile*, 9 Ala., 234; *Irvin v. St. Louis & C. R. R. Co.*, 94 Ill., 105; *People v. Pacific Mail Steamship Co.*, 58 N. Y. Rep., 242; *City of Newport v. Berry*, 14 Ky. Law Rep., 29.)

The steamboats involved in this litigation are separated from the residence

of their owner by a long distance, in both geography and time; in fact, they can never visit the port at which their owner resides; they are, so far as their actual situs is concerned, permanently confined to the rivers over which they float; if their home port had to be Chicago, because that is the residence of their owner, as under the law prior to 1884, then, they would have a home port from which they could derive no advantage or protection, because they could never reach it. It was to obviate this hardship, with others, that the act of 1884 was passed by congress, permitting their owners to select for them a home port in the field of their operations, which is for them a home port in fact, as well as in law and name. Property, such as that under consideration, ought, logically, to be taxed at its home port there it can be seen and properly valued for assessment by the fiscal officers; whereas, at the residence of its owner (Chicago), the officers, of necessity, must rely on the statements of the latter for both its existence and its value.

At its home port, it enjoys the protection of the laws of the jurisdiction in which it is located, and both justice and reason would seem to require that property, thus permanently located, both in legal contemplation and in fact, within a jurisdiction foreign to that of its owner, should contribute its fair share to the support of that government whose protection it enjoys.

We conclude, therefore, that as Paducah, Ky., is the home port of the vessels in question, that place is their situs for taxation, and the demurrer to the answer should have been sustained. There is no pretense in this case that appellee's property is sought to be taxed in a manner different from that in which all other property in Kentucky is taxed, or that there is any unjust or invidious discrimination between it and property of the citizens of Kentucky. There was a petition and bond tendered in the county court where this proceeding originated, and a motion to remove it to the Federal court on the ground of diversity of citizenship between appellee and the Commonwealth of Kentucky. This motion was overruled, and correctly so; the Commonwealth of Kentucky is not a citizen within the meaning of the statute authorizing the removal of causes from the State to the Federal court on the ground of diversity of citizenship. (Chicago, St. Louis and New Orleans R. R. Co. v. Commonwealth, 24 Ky. Law Rep., 2124.)

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

SHEPHERD, &c. v. TRUSTEES COMMON SCHOOL DISTRICT NO. 2, WHITLEY COUNTY, &c.

(Filed November 25, 1903—Not to be reported.)

1. School trustee—Verbal appointment—Section 4436 of the Kentucky Statutes, which provides for the appointment of a school trustee to fill a vacancy in the board, requires the appointment to be in writing, and a verbal appointment is void.

2. Validity of election—Notwithstanding grave irregularities in an election of school trustee for which the election might have been set aside if contested, where there was no contest and the person elected was duly sworn in the irregularity of the election can not be shown for the purpose of defeating his official acts.

W. R. Henry and Sharp & Siler for appellants.

On October 5, 1901, an election was held in school district No. 2, in Whiteley county, to choose a school trustee for the district for the term of three years, beginning July 1, 1902. There were about twenty votes in the district and only four were cast at the election. These were cast for J. M. Smith. The returns of the election were duly made to A. P. Siler, the county superintendent, who placed them in a box in his office in which the poll sheets were kept. Siler being informed that the election was void, in December, 1901, verbally appointed J. F. Pruitt to fill the vacancy. Siler's term expired in January, 1902, and he was succeeded by C. S. Wilson, who finding the poll sheets regularly filed, swore in Smith as trustee, there being nothing in the office to show the appointment of Pruitt. When July 1st came, and the trustees were about to employ a teacher, this controversy arose as to whether Smith or Pruitt was legally the trustee. The circuit court adjudged in favor of Smith, and from this order Pruitt and Shepherd, the other trustee who sided with him, have appealed.

By section 4436, Kentucky Statutes, it is provided that if there be a vacancy in the office of trustee "the county superintendent of the county shall within ten days, or as soon thereafter as practicable, supply the same by his appointment in writing, and the trustee so appointed shall hold his office until the end of that term, and until his successor is elected or appointed and qualified."

Pruitt was not appointed in writing. The facts of the case well illustrate the wisdom of the statute in requiring the appointment to be in writing, for Siler had forgotten all about appointing Pruitt, or taking any steps in the matter, until reminded of it by Pruitt after this controversy arose. The appointment is for the remainder of the term, and there are weighty reasons requiring it to be in writing. The statute expressly so provides, and a verbal appointment is invalid. (*Graham v. Jackson*, 23 Ky. Law Rep., 2285.)

In *Hopkins v. Swift*, 100 Ky., 14, it was held that the county superintendent has no power to declare an election for trustee void unless the election is contested; and that the proper method of contesting the election is as provided by the statute governing election contests.

The election of Smith as trustee was not contested, and he was regularly sworn into office by the county superintendent. There were grave irregularities in the election, for which it might have been set aside if a proceeding for that purpose had been instituted before the proper tribunal. But when the returns of the election were made to the county superintendent, and the person elected was sworn in by him, the irregularity of the election can not be shown for the purpose of invalidating his official acts.

Judgment affirmed.

STAGGENBORG, &c. v. STAGGENBORG.

(Filed November 25, 1903—Not to be reported.)

Will contest—Error not prejudicial—Evidence—Where the jury reached a verdict invalidating the will solely upon the ground of the unsoundness of
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the testator's mind, error of the court in permitting evidence to be introduced to show that the will had not been read to the attesting witnesses nor to one of the devisees was not prejudicial.

Sam C. Bailey for appellants.

Phil J. Ryan and Thos. Michie for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Barker.

Mrs. Bridget Kelly, a widow, died testate, domiciled in Campbell county, Kentucky, in September, 1901. Appellee, Annie Staggenborg, is the only child of the decedent. The appellants, Alice Staggenborg, Helen Staggenborg and Dorothy Staggenborg, are the infant children of appellee. The will was admitted to probate by order of the Campbell County Court, from which judgment an appeal was prosecuted by appellee to the Campbell Circuit Court, where, upon trial by jury, the verdict was adverse to the will, and a judgment was rendered invalidating that instrument. From this judgment the three grandchildren, who were reversionary devisees, have prosecuted this appeal by their guardian ad litem.

By the instrument in question the decedent devised all of her property to her brother, Frank Fox, in trust for the use and benefit of her daughter, Annie Staggenborg, during her life, with remainder over to her three infant granddaughters. The will was written a few days before the death of the decedent, who was in her sixty-ninth year at the time. Her death was caused by catarrhal pneumonia, a disease which produces at times high fever, accompanied by delirium. The evidence shows that when the fever rises to 104 degrees, and above, delirium invariably occurs; when it diminishes below that point the patient's mind may be, and usually is, lucid. In this case the patient's fever was usually low in the morning, rising toward midday to a point producing delirium. The will was written and acknowledged about 9 o'clock in the morning; but the evidence is conflicting as to the state of the testator's mind at the time her signature and acknowledgment took place.

The appellants urge two grounds for a reversal of the judgment: First, because, upon the trial, the lower court permitted witnesses for the contestant to testify that the will was not read to the subscribing witnesses, or to Annie Staggenborg; and, second, "because the verdict of the jury is flagrantly against the evidence."

We are of opinion that it was error to admit evidence that the will was not read to the subscribing witnesses or to the appellee, Annie Staggenborg, as it was not necessary for the witnesses to know the contents of the instrument they were attesting, nor for the appellee to know its provisions in advance of publication. The tendency of this evidence, under the circumstances, was to produce a suspicion in the minds of the jury that there was an unnatural secrecy, or mystery, surrounding the execution of the will, which might have influenced them on the issue of the undue influence of the trustee over the decedent; but as the jury reached a verdict invalidating the will, alone, upon the ground of the unsoundness of the testator's mind, it is clear that the evidence complained of was not prejudicial to the appellants.

issue peculiarly within the province of the jury to determine, and we are not able, or willing, to say that their verdict was flagrantly contrary to the weight of the evidence.

Perceiving no error in the record the judgment is affirmed.

FRANKLIN, &c. v. EMBRY, BY, &c.

(Filed November 25, 1903—Not to be reported.)

Guardian and ward—Disbursement of principal of estate—Where the only estate belonging to the ward was a pension paid from time to time by the United States government for his maintenance and education as a child of a deceased soldier prior to his sixteenth birthday, the guardian was authorized to expend the principal of same for his board and education, he being capable of profiting by the opportunity to acquire an education, and the court should have allowed credit for such disbursements under section 2084, subsection 2 of the Kentucky Statutes, which authorizes the use of the principal "when it is best for the ward."

J. W. Compton for appellants.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, T. C. Franklin, was appointed statutory guardian of W. S. Embry in the year 1896, and served in that capacity for four years. At the date of his qualification W. S. Embry was thirteen years old, but small, and inclined to be delicate. The ward had at this time no estate, but lived with his mother on a tract of seventy-five acres of poor land which had belonged to his father. The mother had four children, and was in very straightened circumstances, and managed to live with great difficulty upon the income derived from the farm and a small pension which she drew as the widow of her deceased husband from the United States government. During the four years that appellant acted as guardian he drew from the United States government \$517.90, which was allowed for appellee's maintenance and education under the act of congress. On the 3d of March, 1898, appellant made a settlement of his accounts as guardian with the judge of the Metcalfe County Court, and was allowed credits for moneys disbursed for the support and education of the ward, amounting to \$150.35. The principal item of credit was \$124.68, paid to the mother of his ward for his board at the rate of \$2 per month, and for clothing, medicine, tuition and school books furnished by her to her infant son. Up to the date of this settlement he had received from the United States government \$174.66, and there was found due to his ward \$24.31. On the 17th of May, 1900, he made another settlement with the county court, in which he was charged with \$343.30, additional sums collected from the government, and was credited with \$342.05; \$135 of this amount was for board paid to his mother, and \$171.30 was for clothing, books, tuition, etc., paid for the ward. On the 26th of June, 1902, appellees instituted this suit to surcharge both of the settlements, on the ground that the expenditures for his ward exceeded the income of his

estate. There is no proof in the record that the money was not actually expended for the benefit of the ward, or that he did not receive the benefit thereof. The circuit judge decided that appellant should be allowed as credits only \$60 a year for the first two years of his term as guardian, and \$50 a year for the remaining years, and entered a judgment for the balance, less charges for services, etc., and defendant has appealed.

Section 2034 of the Kentucky Statutes provides: "No disbursements shall be allowed the guardian for the maintenance and education of the ward beyond the income of the estate, except in the following cases, unless authorized by the deed or will under which the estate is derived: First, when the ward is of such tender years or infirm health that he can not be bound out as an apprentice, or no suitable person will take him as such; second, when it is best for the ward that the principal of his personal estate shall be applied for his board and tuition, and the court, upon settlement of the accounts, shall deem such application to have been judicious and properly made. But neither the ward nor his real estate shall be liable for any such disbursement."

It is shown that during the four years in which appellant acted as guardian for appellee that he was sent to school for five months in each year, and that he was capable of profiting by the opportunities afforded him to acquire at least a limited education, as it appears that he has already obtained a certificate as teacher of a public school. The funds which came to appellant's hands as guardian were not received in a lump, but along at intervals, and were given by the government to appellee as the child of a deceased soldier for his maintenance and education prior to his sixteenth birthday. It was not the purpose of the government that an estate should be accumulated for the use of the ward after he arrived at mature years, but to take care of him and educate him when he was presumably unable to take care of himself. It seems to us from the testimony in this case that the disbursements made by appellant come within the purview of subsection 2 of section 2034, and authorized the expenditure of the principal of his personal estate for board and tuition, etc. We, therefore, conclude that the trial court erred in refusing to give appellant the same credits which had been allowed to him in his settlements made with the county court.

For reasons indicated the judgment is reversed and cause remanded, with instruction to dismiss plaintiff's petition.

ESTRIDGE, &c. v. ESTRIDGE, BY, &c.

(Filed November 25, 1903—Not to be reported.)

1. Appointment of guardian—Jurisdiction—A change of residence by a guardian and her ward to a county other than that in which the appointment as guardian had been made did not oust the county court which had made the appointment of the jurisdiction to remove the guardian and appoint another, where the change of residence was made after the institution of proceedings for her removal.

2. Same—The appointment of a guardian by the county court of the county to which the minor had removed, without first having removed the former guardian, would have been void, even if the court had had jurisdiction of the subject-matter.

R. H. Tomlinson for appellants.

W. McC. Johnston for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Barker.

John Estridge died in Garrard, the county of his residence, leaving surviving him his widow, Jane Estridge, and one child, Flora Estridge, under the age of fourteen years. In 1898 Jane Estridge, the mother, was appointed guardian of her infant daughter, Flora, by order of the Garrard County Court.

On the — day of October, 1900, the county judge of Garrard county issued a rule against Jane Estridge to show cause why she should not be removed from the office of guardian to her daughter, because of certain immoral practices with which she stood charged. Appellant appeared in response, and on her motion the proceedings were continued from time to time, until December 20, 1900, when she was removed, and on the same day appellee, Eli Estridge, the paternal grandfather of the infant, was appointed guardian in her stead.

On December 31st, 1900, appellant claiming to reside with her father, James Angel, at his home in Laurel county, Kentucky, went before the county judge of that county and procured the appointment of her brother, G. B. Angel, as guardian of her daughter. On January 4, 1901, she entered a motion for a new trial of the proceedings in the Garrard County Court, by which she had been removed, which was overruled; whereupon she appealed from this judgment to the Garrard Circuit Court, which, in April, 1901, dismissed her appeal.

Afterwards appellee, Eli Estridge, brought this suit, as guardian of Flora, against appellant and her bondsman, G. B. Angel, for a settlement of her accounts, and a judgment for whatever balance remained in her hands belonging to his ward. To this appellant filed an answer, denying that appellee was guardian of her daughter; impeaching the jurisdiction of the judge of the Garrard County Court to appoint him, and pleading that her brother, G. B. Angel, was the true and lawful guardian of her daughter under the appointment of the judge of the Laurel County Court, and that she had fully settled her accounts as guardian with him, and had turned over all the property which had been in her possession as guardian.

The issues having been duly made up and the case submitted, the chancellor rendered a decree holding that the Garrard County Court had jurisdiction to remove appellant, and appoint a guardian for the infant, Flora Estridge; that Eli Estridge was her true and lawful guardian, and gave a judgment against appellant for \$636.31, being the balance adjudged to be due from her to her daughter. From this judgment she has appealed. The only question raised by counsel is whether Eli Estridge or G. B. Angel is the lawful guardian of Flora Estridge, and this depends upon the respective jurisdictions of the county courts of Garrard and Laurel counties in the premises.

Section 2015, Kentucky Statutes, is as follows: "The several county courts shall have jurisdiction for the appointment and removal of guardians to minors, and the settlement of their accounts. The court of the county in

which the minor resides at the time of the appointment shall have the jurisdiction." * * *

Section 2024 provides that "when a guardian shall become insane, move out of the State, become incapable of discharging the duties of his trust, or evidently unsuited therefor, the court being satisfied that either of the causes aforementioned exists, shall remove him." * * *

Appellant, Jane Estridge, undertook to show that she and her daughter at the time of the appointment of Eli Estridge as guardian had removed from Garrard county, and had become residents of Laurel county, and she claims that, by reason of this, the Garrard County Court had lost jurisdiction in the matter of appointing or removing a guardian for the infant. The testimony on the subject of residence is conflicting, and as the chancellor found this fact against appellant, we are neither able nor willing to say that his judgment on this issue was against the weight of the evidence. Appellant did not claim to have removed her residence from Garrard county until the proceedings to remove her had been continued from time to time, and when the judge of the Garrard County Court had refused to entertain her proposition, that she would resign, provided he would appoint her brother, G. B. Angel, as guardian in her stead. We think her leaving Garrard after the proceedings to remove her as guardian had begun was too late to oust the county court of that county of jurisdiction to remove her, and to appoint a new guardian. The jurisdiction of courts does not depend on so frail a tenure as the removal of litigants after service of process.

The appointment of G. B. Angel as guardian by the judge of the Laurel County Court, without having first removed the former guardian, would have been void, even if he had had jurisdiction of the subject-matter. (Cotton, Guardian v. Wolfe, 14 Bush, 238.)

For the reasons indicated the judgment is affirmed.

SOUTHERN RY CO. IN KENTUCKY v. COMMONWEALTH.

(Filed December 1, 1903.)

Carriers—Discrimination in freight rates—A common carrier has the right to charge less for part of a through haul of freight than the local rate to that point, and where a railroad company in good faith billed a shipment of freight through a particular point to one beyond at a less rate to that point than the local rate, the fact that the haul from that point to the destination was made by a wagon line whose owner received payment for that part of the haul, whether under contract with the company or not, did not affect the transaction so as to make it violative of the provision of section 215 of the Constitution which forbids discrimination in rates between shippers of the same class of freight between the same points.

Humphrey, Burnett & Humphrey and E. H. Gaither for appellant.

Hazelrigg & Chenault and J. S. Owsley, Jr., for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hobson.

The grand jury of Mercer county returned an indictment on February 6, 1902, charging that appellant, within twelve months before the finding of

and contemporaneously therewith transported between the same points a barrel of gasoline of the same class and kind of freight for Wallace Green for the price of 21 cents per hundred pounds; that this was done willfully and knowingly, with intent to discriminate in favor of Green and against Samuels, in violation of section 215 of the Constitution of Kentucky: "All railway, transfer, belt lines, or railway bridge companies shall receive, load, unload, transport, haul, deliver and handle freight of the same class for all persons, associations, or corporations, from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment."

Section 217 of the Constitution, which fixes the penalty for a violation of section 215, is as follows: "Any person, association or corporation willfully or knowingly violating any of the provisions of sections 213, 214, 215 or 216 shall, upon conviction by a court of competent jurisdiction, for the first offense be fined \$2,000; for the second offense \$5,000, and for the third offense shall thereupon, ipso facto, forfeit its franchises, privileges or charter rights; and if such delinquent be a foreign corporation, it shall, ipso facto, forfeit its rights to do business in this State; and the attorney general of the Commonwealth shall forthwith, upon notice of the violation of any of said provisions, institute proceedings to enforce the provisions of the aforesaid sections."

The proof on the trial showed that Samuels lived at Harrodsburg, a point on appellant's line of railroad, but that Green lived at Perryville, which was ten miles away from appellant's road. Twenty six cents per hundred pounds were charged Samuels for the barrel of gasoline shipped to him, which was billed to him at Harrodsburg. The barrel of gasoline shipped to Green was billed to him at Perryville, and was shipped at the rate of 36 cents per hundred pounds from Louisville to Perryville. When the gasoline reached Harrodsburg it was delivered to a man named Erwin, who ran a wagon daily from Harrodsburg through Perryville to Mitchellsburg, carrying the U. S. mail, also persons and property. He took the gasoline to Green, collecting the charges going to the railroad, which was 21 cents per hundred pounds, and paid the amount to the company. Green paid Erwin 50 cents for bringing the barrel over, which was 10 cents less than was coming to Erwin on the basis of 15 cents per hundred pounds. There was an arrangement between Green and Erwin that Erwin would haul gasoline over at 50 cents a barrel. This arrangement seems to have grown out of the fact that there is a station on the Louisville & Nashville R. R. four miles from Perryville from which also goods were hauled to Perryville, and Erwin was underbidding to get the hauling on his route. The railroad had for a number of years a published tariff on this class of goods, by which the rate was fixed to Harrodsburg at 26 cents and to Perryville at 36 cents. When the rate was first made, about the year 1889, a man named James was running the wagon line, and the rate of 15 cents for the wagon line was then agreed on between him and the railroad company. After three years he sold out to a man named Tatum, and subsequently Erwin came in under Tatum; but the railroad company had no agreement with Erwin, it simply billed

the goods to Perryville as before. Erwin received them at Harrodsburg and delivered them at Perryville. The railroad company did not know that Erwin was making any reduction on the 15 cents per hundred pounds allowed for his part of the haul. The goods were not delivered to the consignees at Harrodsburg, but were required to be carried over by the wagon line and delivered at Perryville. The wagon line hauled for everybody that applied, and also carried for a time the express matter, each owner as he came in succeeding to all the rights and privileges of his predecessors.

The proof leaves no doubt that the operator of the wagon line was a common carrier. (*Robertson v. Kennedy*, 2 Dana, 431; *Cayo v. Pool*, 21 Ky. Law Rep., 1600; *Chevallier v. Strahan*, 52 Am. Dec., 639.) If there had been a railroad operated by another company running from Harrodsburg through Perryville to Mitchellsburg, and the barrel of gasoline has been taken by appellant to Harrodsburg, and by the other company to Perryville, appellant receiving 21 cents per hundred pounds for carrying it and the other company 12½ cents, it could not be maintained that this would have been a violation of section 215 of the Constitution, for it is well settled that a through rate can be made less than the sum of the local rates between the two points. Were it otherwise, all through freight would have to be hauled at the local rates. (*Railroad Co. v. Osborne*, 52 Fed., 912; *Tozer v. U. S.*, 52 Fed., 918; *Interstate Commerce Commission v. B. & O. R. R. Co.*, 145 U. S., 276; *Parsons v. Chicago, &c., R. R. Co.*, 167 U. S., 447.) The fact that the connecting carrier took the goods on a vehicle pulled by horses and not by steam is not relied on as changing the principle; but it is urged that Erwin had no contract with the railroad company, and that, therefore, he took the goods simply as the agent of the consignee, Green. Without considering whether a contract should be implied from the fact that he came in under James, who made the contract with the railroad company, we rest our judgment on the ground that appellant had received the goods consigned to Perryville, and had by its bill of lading agreed for 36 cents per hundred pounds to transport them to Perryville. This was not a shipment to Harrodsburg. There was in such a shipment and the shipment to Samuels at Harrodsburg no discrimination between shippers of the same class of freight between the same points. Appellant had the right to charge less for part of the through haul than the local rate to that point. When it received the goods and undertook to carry them to Perryville it was its duty to see that they got to Perryville. Its obligations under such a contract were different from those under a contract to carry goods to Harrodsburg. It was a through shipment from Louisville to Perryville. Erwin came in under it, and whether there was any contract, express or implied, between it and Erwin there was an express contract between it and the shipper that it would transport the goods from Louisville to Perryville.

We are, therefore, of opinion that the facts shown establish no violation of the constitutional provision quoted. If there were anything in the evidence indicating an evasion of the Constitutional provision by the billing of the goods to Perryville and the delivery of them at Harrodsburg to the consignee in order to discriminate between shippers, a different question would be presented. But the facts show perfect good faith and also show that only in this way can appellant carry goods to Perryville.

Judgment reversed and cause remanded, with directions to dismiss the indictment.

1. Supervisor of roads—Power to appoint county judge—The fiscal court of a county has no authority under the statutes to appoint the county judge of the county to the office of supervisor of roads, and, being a court of limited authority, its action in doing so is void.

2. Same—Action by taxpayer—A taxpayer of the county, suing for himself and all other taxpayers, may maintain an action to prevent the payment to the county judge of the salary of supervisor of roads.

C. S. Walker and La Vega Cements for appellants.

W. Scott Morrison for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hobson.

Appellant, H. M. Haskins, was elected county judge of Daviess county at the regular election in November, 1901, and at the January term, 1902, of the fiscal court his salary was fixed at \$1,000 per year. At its April term, 1903, the fiscal court made an order appointing him also county supervisor of the public roads and bridges of Daviess county, and fixed his salary as supervisor at the sum of \$900 per year. Appellee, William Goodwin, a citizen and taxpayer of Daviess county, thereupon filed this suit to enjoin the treasurer from paying Haskins the \$900 per year as supervisor, and the circuit court having granted the relief prayed, the county judge appeals.

The ground of the judgment of the circuit court is that under the statute the county judge can not fill the office of road supervisor, and that the fiscal court is without authority to appoint the county judge to the office. It is earnestly insisted that the circuit court erred.

By section 4306, Kentucky Statutes, the public roads shall be maintained either by taxation or by hands allotted to work thereon (or both) in the discretion of the fiscal court. By section 4312, in counties where the roads are worked by taxation, it is the duty of the overseer to report promptly to the supervisor all obstructions to travel, and to report to the county judge all failures of the contractors to comply with their contracts, and all violations or neglect of duty of the supervisor with regard to the road. By section 4313 the supervisor is to be appointed by the fiscal court, and in case of a vacancy in the office it is the duty of the county judge to fill it till the next regular term of the fiscal court. By section 4314 the supervisor must execute bond at the next regular term of the county court after his appointment, with sureties to be approved by it. By section 4315 it is the duty of the supervisor to report in writing to the county judge all failures of contractors to comply with their contracts; with the consent of the county judge he may designate certain roads not to be let out, but kept in repair by special contract, made privately or by hands and teams hired by him, or by delinquent taxpayers, or by persons sentenced to labor: "Provided, however, That the fiscal court of any county wherein roads are worked by taxation may, instead of appointing a supervisor, authorize the county judge to so let out the working of the roads and the building or repairing of bridges and to take and approve the bonds hereinbefore required. In such cases the other power

herein conferred and the duties imposed upon the supervisor shall be exercised and discharged by the road overseers in their respective precincts."

By section 4317, for any violation of duty by the supervisor, a warrant in the name of the Commonwealth may be issued by and returned before the county judge, and it is the duty of the judge to issue the warrant upon his own knowledge or upon information of another upon oath. By section 4318 the supervisor may, on the order of the county judge entered of record, hire wagons, scrapers and teams and procure forage for them, and either hire or purchase such tools and implements as may be necessary. By section 4335 penalties are provided for injury to the roads, tools or implements, and it is the duty of the supervisor to report promptly to the county judge or some justice of the peace all violations of the act. By section 4339 no money shall be paid out, "except upon the order of the supervisor, specifying what for), with the endorsement thereon of the county judge of his approval, or when no supervisor, upon order of the overseer or commissioner having charge so endorsed." By section 4339 the supervisor, upon the order of the county judge entered on the order book of his court, may let out by written contract the grading or cutting down of hills upon the public road, and give an order for the money, which order is to be endorsed "approved" by the judge.

These provisions do not contemplate that the supervisor and the county judge may be the same person. On the contrary, they contemplate that the county judge is to hold the supervisor to a strict responsibility, and that to protect the interests of the county there must be the concurrent judgment of both the county judge and the supervisor in important matters. It is true that under section 4315 the fiscal court, instead of appointing a supervisor, may authorize the county judge to let out the working of the roads, but in that event he acts as county judge, and not as supervisor, and is entitled to no additional compensation for his services, the other duties imposed upon the supervisor being in that event discharged by the road overseers in their respective precincts. If the county judge may act as supervisor, the purpose of the statute in providing for both a supervisor and a county judge to protect the interests of the county would be entirely defeated.

The fiscal court is a body of limited authority. It is without power under the statute to appoint the county judge as supervisor. Its action was, therefore, nugatory. The authorities relied on for appellant as to the acceptance of an incompatible office have no application, as the order of the fiscal court appointing the county judge as supervisor was void, and vested in him no right to the office. The appellee, Goodwin, is a citizen and taxpayer of the county, suing for himself and all other taxpayers, and may as such maintain the action to prevent a misappropriation of the county's funds, for if the money of the county is wrongfully expended, taxes must be levied to supply its place in the treasury, and thus an additional burden will be cast on the taxpayer.

Judgment affirmed.

Principal and agent—Notice—The fact that a third person had agreed, as a friend of one employed to sell musical instruments, to vouch for the genuineness of signatures which the employe should procure to be signed to certain notes which he was to execute to cover an indebtedness to his employer did not constitute such third person an agent of the employer so that his knowledge of the fact that the employe had perpetrated a fraud on the person whom he had induced to sign as surety would be imputed to the employer, who had acted in entire good faith. Neither did the fact that such third person had been authorized by the employer to receive from the employe and forward to the employer such moneys as should be thereafter received from the sale of instruments on hand create an agency with regard to the execution of the notes.

J. A. Sullivan for appellants.

R. H. Crooks for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hobson.

H. G. Kent was agent for Hardin & Riehm at Richmond, Ky., for the sale of pianos and organs. In November, 1899, he sent them a check for \$550, the proceeds of goods which he had sold. The check was protested by the bank on which it was given, and then, at the request of Hardin & Riehm, Kent went to Louisville to see them. L. E. Lane, who was a jeweler, occupying the front part of the storeroom used by Kent, went with him. When they got together Hardin & Riehm complained bitterly of Kent's spending their money. He admitted having wasted it, but finally said that he would give security for it. Hardin & Riehm were in a bad humor with Kent, and Lane said that he had come along simply as Kent's friend, and that he would sign the note if Kent could get no one else. Lane then agreed that when Kent got his surety on the note he would send it in to Hardin & Riehm, and that they need have no doubt of the genuineness of the signatures. Some talk was also had about Kent's continuing the agency and selling the piano and organs he still had at Richmond. Lane agreed that he would collect the money as the instruments were sold and remit it to the house, so that no further loss would fall on Hardin & Riehm. Lane and Kent then returned to Richmond, and Kent procured D. M. Chenault to sign his notes for the \$550 due Hardin & Riehm, assuring Chenault that the amount was the price of the instruments then in the house which he would sell and pay the notes. This was in the presence of Lane, and Chenault then said to Kent, in the presence of Lane, that Lane would have to keep track of the sales, and whenever a sale was made the money would have to be turned over to Lane or to him, and Lane was to send it in to the house to be applied on the notes. After Chenault had signed the notes, and before Lane sent them into the house, Lane told Kent, after Chenault went out, that he would not send the notes in to the house unless Kent told Chenault the truth. Kent went up to see Chenault, and came back and said that he had told him about it, and everything was all right. Lane then sent the notes into the house. Kent did not in fact tell Chenault, and when Che-

nault found out the truth he refused to pay the notes, and defended the suit brought upon them upon the ground that his signature to the notes had been obtained by fraud on the part of Kent, with the knowledge of Lane, and that Lane was the plaintiff's agent in the transaction. The circuit court sustained the defense, and the plaintiffs appeal.

Hardin & Riehm acted in entire good faith. They had no knowledge of any fraud in the obtaining of Chenault's signature to the notes, and accepted them on the idea that they were all right. The proof leaves no doubt that Kent practiced a fraud on Chenault, and if the plaintiffs are affected by the knowledge of Lane the judgment of the circuit court is right. But if Lane was not their agent, then the loss must fall on Chenault, who trusted Kent, and signed the notes for him as his surety.

The proof is clear that Lane went to Louisville with Kent simply as his friend to help him out of the trouble he was in, from sympathy he had for him. He was not agent in any sense for Hardin & Riehm in the interview in Louisville, but was simply there as Kent's friend. He told Hardin & Riehm that he would send the notes in so that they would know the signatures were genuine, in order to get them to agree to Kent's proposition, they being unwilling to trust Kent. He was not their agent to accept the notes or to do anything for them. He was simply a third person agreed on between them and Kent to vouch for the genuineness of the signatures to the notes, which would be executed at Richmond and forwarded to Louisville, so that when the notes reached Louisville Hardin & Riehm might rely on the authenticity of the signatures. The fact that Lane was to send in the money for sales which Kent thereafter made would constitute him an agent for Hardin & Riehm as to any money paid over to him, so that if he failed to pay it over the loss would fall on them, and not on Kent. But this was a different matter from the execution of the notes. He had no power to act in any way on behalf of Hardin & Riehm in regard to the notes. In undertaking to send in the money collected by Kent, Lane simply acted for accommodation. The rule is that one who deals with an agent must know the extent of his authority. In the case of a special agent the principal is not bound beyond the scope of the authority conferred. Lane, not being an agent for Hardin & Riehm in the obtaining of the notes, but only agreed witness to show the validity of the signatures, Hardin & Riehm are not affected by his knowledge that Kent was perpetrating a fraud on Chenault, or by his failure to know himself that Kent had undeceived Chenault before sending the notes in to the house.

Judgment reversed and cause remanded for a judgment in favor of the plaintiffs.

PEAL, &c. v. CITIZENS BUILDING AND LOAN ASS'N'S ASS'EE.

(Filed December 1, 1903—Not to be reported.)

Hendrick & Miller for appellants.

Bloomfield & Crice for appellee.

Appeal from McCracken Circuit Court.

Judge Hobson delivered the following response to petition for rehearing:

What appellants' rights may be as stockholders on final settlement of the association can not be determined here, and nothing in the judgment affects their right to come in as stockholders in the distribution of the surplus assets of the concern among the stockholders.

Peal was simply a stockholder, holding his stock for investment from the time he took it until he made the loan in August afterwards. He then hypothecated his stock to secure the loan. When he subsequently surrendered his stock and was credited by \$569.40, this was simply a sale of the stock to the corporation, and it must be presumed that the credit was then the book value of the stock or else he would not have taken it. The value of the stock in the corporation is not determined by the amount he paid for it, but by the amount of its assets and liabilities at the time; for while he had paid in a good deal of money, the association may have sustained heavy losses in other transactions. There is not enough in the record to warrant the court in disturbing the settlement then made by the parties, and the case does not, therefore, fall within the principle laid down in the Frisby case.

Petition overruled.

WILLIAMS v. WILLIAMS, EX'OR.

(Filed December 1, 1908—Not to be reported.)

Waddill & Pratt and Bourland & Henson for appellant.

F. M. Baker for appellee.

Appeal from Webster Circuit Court.

Judge Hobson delivered the following response to petition for modification of opinion:

As the facts in regard to the sale of the sixty-two acre tract of land are not clearly shown in the record, on the return of the case to the circuit court a reasonable opportunity will be given the parties to offer further proof on this matter, and if it shall appear that the sale and conveyance of this land was made more than fifteen years before the filing of appellant's answer and cross petition herein, the judgment of the circuit court as to the said sixty-two acres will not be disturbed.

The opinion heretofore delivered is, to this extent, modified.

WILSON v. COMMONWEALTH.

(Filed December 1, 1908—Not to be reported.)

Liquor selling—Local option—Where several persons contributed to a fund with which five gallons of liquor were purchased and each received thereof in proportion to his contribution, one of them who was instrumental in raising the fund is not guilty of selling liquor in violation of the local option law in force at the place of distribution.

John H. Wilson for appellant.

Clifton J. Pratt for appellee.

Opinion of the court by Judge Paynter.

The indictment charges that the appellant did "unlawfully sell, give, procure and furnish spirituous, vinous and malt liquors and intoxicating beverages" in less quantity than five gallons. The court overruled a motion for a peremptory instruction for the appellant, and among other instructions gave the following: "If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, Harlan Wilson, in this county, and within twelve months before the finding of the indictment herein, did unlawfully and willfully procure the witness, W. E. Callihan, to engage in a divide by signing a paper with defendant and others, and paying in his part of a fund sufficient to buy a five gallon keg of whisky, and that the defendant within five miles of Union College, by himself or another, delivered to the witness whisky in proportion to the amount of money paid in by the witness, and that the witness thereby received less than five gallons of such whisky, then you ought to find the defendant guilty, as charged in the indictment, and fix his punishment under instruction No. 1, above."

The facts are: The appellant and others contributed \$12 to buy a five gallon keg of liquor; the money was raised by appellant circulating a paper for the signatures of those desiring to purchase it; each party gave money to pay for a certain quantity of the liquor according to the price they were to pay for the whole; when the money was made up it was given to the dealer's driver, who delivered it to the place agreed upon; the subscribers assembled at that place; the appellant called out the name of each subscriber and the amount which he had paid, and another member of the subscribing party measured each subscriber's pro rata of the liquor.

It appears that the appellant did not own the liquor; did not sell it; and did not procure it for sale by himself or any one else. He was simply the purchaser, together with others. By the authority of the cases of *Creasy v. Commonwealth*, ante, 893, and *Miller v. Commonwealth*, ante, 848, the defendant's motion for a peremptory instruction should have been sustained.

The judgment is reversed for proceedings consistent with this opinion.

GOODMAN'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed December 1, 1903.)

1. Railroads—Duty to trespassers—Negligence—It being the well-settled rule that a railroad company owes no duty to trespassers upon its tracks at places not frequented by the public by right or permission until their peril has been discovered, negligence can not be attributed to a railroad company because the engineer in charge of a train which ran over and killed a boy lying between the tracks at a secluded place not frequented by the public failed to discover the perilous position of the boy at the very first moment at which it might have been discovered by one who went there for the express purpose of ascertaining whether such discovery was possible.

2. Same—The mere occasional use of the railroad's roadbed as a footway by unauthorized pedestrians at a point where the right of way was fenced on both sides, even with the knowledge of the company, was not sufficient

McCandless & James for appellant.

J. A. Mitchell, Edward W. Hines and B. D. Warfield for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Chief Justice Burnam.

The appellant, J. M. Craddock, as administrator of Isaac Godman, deceased, brought this suit to recover damages for the death of his intestate. The petition alleges that "on the 27th day of August, 1901, the defendant its agents and servants, negligently and carelessly ran one of its freight trains over the body of the said Isaac Goodman, inflicting upon him injuries which instantly resulted in his death." Defendant, the Louisville & Nashville R. R. Co., denied the alleged negligence, and in a second paragraph plead that the death of plaintiff's intestate was the direct result of his own contributory negligence. The reply was a traverse of the plea of contributory negligence. The trial in the circuit court resulted in a peremptory instruction to find for the defendant and a judgment dismissing the action from which this appeal is prosecuted.

It is complained that the trial court erred in the peremptory instruction and also in rejecting competent evidence which was offered by the defendant.

It appears from the bill of evidence that the decedent was run over and instantly killed by one of appellee's southbound freight trains two miles north of Horse Cave Station, and two hundred and thirty yards south of a public road crossing, and about the same distance from a private crossing on the north, in a cut seven or eight feet deep. It is further shown that the deceased was an ordinarily intelligent boy, eleven years of age, and that he went upon the railroad right of way with a bag for the purpose of picking up pieces of coal which had fallen from the tender of passing engines, and that he had been in the habit of doing this, and had been cautioned, both by his father and older brother, about the danger of passing trains. Robert Wilkerson, a brakeman in the employ of the railroad company, was the only witness to the accident who testified. He was called by plaintiff, and testified that he was sitting in the cab of the engine on the opposite side from the engineer, and gave the usual signals of the approach of the train to the public crossing; that the train was traveling at between thirty-two and thirty-five miles an hour, and consisted of twenty-eight loaded freight cars; that after he had passed the public road crossing he saw an object on the track about one hundred and fifty yards ahead, which looked like a piece of paper, but that when the engine had approached within about thirty feet of the object he discovered the deceased lying on the track between the rails; that the engineer immediately applied the brakes, and stopped the train after it had run about two car lengths further than the length of the train; or, in other words, that the body of the boy was about two car lengths behind the caboose; and that it could not have been stopped any sooner, or in time to have avoided running over the deceased after it was discovered that the object upon the track was the deceased. The plaintiff introduced testimony tending to show that it was possible for the deceased to have been discovered by the engineer at the public crossing, which was about two hun-

the jury in believing that decedent was seen by the defendant's agents in charge of the train in time to have avoided the accident; or that, in any event, it was sufficient evidence to have authorized the submission of the case to the jury. In response to this contention it may be said that this court has repeatedly held that a railroad company owes no duty to trespassers upon its track at places not frequented by the public by right, or permission, until their peril has been discovered. And we do not understand that this well-grounded rule was changed by the decision in *Becker v. L. & N. R. R. Co.*, 22 Ky. Law Rep., 1893. That case was decided upon the ground that the testimony was sufficient to have authorized the belief that defendant's agents saw the children upon the bridge in ample time to have avoided injuring them, but negligently failed to take the necessary steps to do so, under the belief that the children upon the bridge had time to have crossed over before the arrival of the train. The appellant also cites the case of the *C., N. O. & T. P. R. R. Co. v. Dickerson's Adm'r*, 19 Ky. Law Rep., 1817, as authority for the contention that a higher degree of care is required for railroad companies where the trespassers upon their tracks are infants of tender years than where such trespassers are adults. In that case, a little girl, two years of age, was playing upon the railroad track. And while the engineer testified that he did not see her until he was within twenty feet of her, and too late to avoid the injury, he admitted that he saw the mother of the child running towards the track, waving her hands, her hair streaming in the air, apparently greatly excited. It also appeared that there was a straight track, and nothing to obstruct the view for about eight hundred yards from where the accident occurred. It was decided in that case that the motions and action of the infant's mother were sufficient to have apprised the engineer in charge of the train of the presence of some obstruction upon the track, and to have authorized the jury to believe that he actually became aware of the danger of the infant in time to have stopped the train before striking her. The facts in this case are not analogous to those in the *Dickerson* case. Here, deceased was entirely familiar with the danger of going upon the track of the railroad. He had been sent there frequently upon the same mission as that he was on when killed. He was old enough to appreciate the danger of the situation, and his view was unobstructed in both directions; he would have had ample time to have gotten off the track if he had been using ordinary care after he might have discovered an approaching train. In broad daylight he laid down between the rails, and it certainly can not be said that it was negligence in the engineer in charge of the train not to have discovered his position of peril at the very first moment when it might have been discovered by one who went there for the express purpose of ascertaining whether such discovery was possible. Trains must be run on schedule time, and no duty is imposed upon those in charge to stop or slow up at the appearance upon the track of objects the nature of which is only discernable upon near approach. If the object seen by Robert Wilkerson had been at a highway crossing, or in the street of a town or city, where the presence of small children might be suspected, a different case would be presented, and a different standard of diligence could have been required.

adult, and owed no higher degree of diligence to them than to an adult. (Paducah & Memphis R. R. Co. v. Hoehl, 75 Ky., 49; L. & N. R. R. Co. v. Hunt, 11 Ky. Law Rep., 825; L. & N. R. R. Co. v. Webb, 18 Ky. Law Rep., 259; McDermott v. K. C. Ry. Co., 93 Ky., 408; 2 Shearman & Redfield on Neg., section 481a; Roseberry's Adm'r v. N. N. & M. V. v. R. R. Co., 19 Ky. Law Rep., 194.)

It is also complained that the trial court erred in refusing to permit the plaintiff to prove that the railroad at the point where deceased was killed had been, with the knowledge of the company, used as a footway by pedestrians for many years; and that for this reason deceased could not be regarded as a trespasser. The testimony shows that the railroad is fenced on both sides, and is enclosed by iron cattleguards at the two crossings. Besides, the point where the accident occurred was in a deep cut. There was no claim that the company had ever authorized the use of their roadbed at this point as a footway, and the mere occasional passage of unauthorized pedestrians at this point with the knowledge of the company was not sufficient to convert a trespasser into a licensee, or to change the degree of care due by the railroad company. Upon the whole case we have reached the conclusion that there was no evidence of negligence on the part of those in charge of the train, and that the trial court did not err in its peremptory instruction.

Judgment affirmed.

HOSKINS v. MORTON.

(Filed December 2, 1903—Not to be reported.)

Principal and agent—Fraud—Where an agent for the receiving and investment of the principal's money indorsed certain purchase-money notes belonging to the principal and instituted action thereon without her knowledge or consent and obtained a conveyance to himself of the real estate for the purchase price of which they were given, the chancellor properly required a conveyance of the property by the agent to the principal without regard to the question of a lien upon the same in favor of the agent by reason of certain alleged sums due to him by his principal, the case being retained for a settlement of accounts and adjudication as to liens.

Lane & Harrison for appellant.

George L. Burton for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Nunn.

Appellee, in the month of March, 1901, sued appellant, and alleged that for more than twenty years last past the appellant, R. H. Hoskins, had been acting as her agent in receiving money, holding same at interest, collecting rents from her real estate, etc., and that during all of this time she had placed entire confidence in his integrity and ability, and believed him to be an honest man, and trusted him implicitly in the management of her

the city of Louisville, Ky., and that her agent, under and by virtue of a power of attorney from her, sold and conveyed this land to one Dominic Kruiger at the price of \$4,936.25; \$500 of this sum was paid in cash and Kruiger executed eight notes of \$500 each, and one note for \$436.25, due yearly thereafter. It appears from the petition that in a trade between her and appellant Hoskins he became the owner of the last one of the series of \$500 notes (about this matter appellee complains in her petition, but it is not necessary to consider it on this appeal). When the last note against Kruiger became due the appellant, Hoskins, brought a suit in his own name on all the unpaid notes, there being six of them. Hoskins endorsed appellee's name without her knowledge or consent upon the back of each of said notes, and alleged in the petition which he filed against Kruiger that he was the owner of all of the notes. He obtained judgment thereon, and soon after obtaining the judgment made some arrangement by which Kruiger conveyed to him this twenty-four acres of land, all of which was without the knowledge or consent of appellee. She claims that this was in violation of his duty as her agent, and that the title to this property should have been conveyed to her, and asked the court to compel the conveyance thereof by him to her. Appellant answered, and denied that this action against Kruiger, and the conveyance to himself of this land, was without the knowledge or consent of appellee, and says that a part of the consideration for which the Kruiger land was sold, was this \$500 note that had been assigned to him by appellee, and that he was entitled to the deed therefor. He filed with his answer a statement of account of the transactions between himself as agent and the appellee from the beginning of his agency to the time of the filing of this action, and in that account he charges appellee with this \$500 note and its interest, amounting to \$452.50, and in the prayer of his answer he asked that the action be referred to the commissioner to settle his accounts as such agent, and that he have judgment against the plaintiff for the sum that may be found to be due him by the commissioner's report, and that he be adjudged to have a lien upon this tract of 24 acres of land to secure same. He also alleged in his answer that in the arrangement with Kruiger, by which he obtained the deed, that in addition to the amount of all the unpaid notes of Kruiger, with their interest, he paid to Kruiger \$541 in money, for which he has a lien.

Appellee replied to this answer, and alleged that at the time appellant caused this deed to be executed to himself he then had in his hands of her means more than enough to satisfy this \$500 with its interest, and that by reason of said note he had no interest in the land, nor has he any lien thereon. Upon affidavits filed, and upon the state of the pleadings, the court, on the 23d day of December, 1902, made an order, which is in part as follows: "This action having been further heard upon the motion made herein on December 20, 1902, to require defendants to execute to the plaintiff a deed, and both plaintiff and defendants being represented and being heard by counsel, and the action having been submitted upon the motion and the record herein, and the court being advised, the defendants, R. M. Hoskins and Mary F. Hoskins, his wife, are hereby ordered to execute and deliver to

deed conveying to the plaintiff a fee-simple title to the property on the Popular Level road, in Jefferson county, Kentucky, owned by said plaintiff, as is admitted by defendants in the pleadings herein, and which said R. H. Hoskins caused to be conveyed to himself by deed from Dominic Kruijer, etc., in the year 1895. * * * Said conveyance to be free from all interest or lien in favor of defendants, or either of them, except in so far as this court may hereafter adjudge in this action an interest or lien, if any, in favor of the defendants, or either of them, in or against said property, and this action is retained for the purpose of determining the accounts between plaintiff and defendant, R. H. Hoskins, and the lien, if any, in favor of said defendants against said property."

Appellant appeals from this judgment. The only question to be determined now is whether or not the court erred in directing this conveyance to be made. We are of opinion the court did not err. From the pleadings in this case it is evident that appellant perpetrated a wrong upon appellee in having the title to this land conveyed to him, and it is evident from his answer that he concedes appellee's right to the title, and only asked that a lien be declared in his favor for the sums set forth in his answer, and charges appellee in his accounts with this identical \$500 note, and asks judgment against her for that sum. The court by its order retained the matter of settlement of accounts between the parties and the question of liens for future adjudication. As many questions involved between these parties are unsettled, we refrain from discussing on this appeal the conduct of the parties in these various transactions.

Perceiving no error in the circuit court on the question involved the judgment is affirmed.

BESS v. COMMONWEALTH.

(Filed December 2, 1903.)

1. Criminal law—Prosecution for murder—Evidence—In a prosecution for willful murder it was competent to admit evidence showing the illicit relations existing between the accused and the deceased at the time of the killing and for two years previous, for the purpose of showing a motive on the part of accused for the killing; but the failure of the court to clearly and explicitly admonish the jury as to the purpose for which it was admitted was error prejudicial to the rights of the accused.

2. Same—It was likewise proper to admit evidence which conducted to show that the accused and the deceased had been guilty of the crime of burning a house belonging to the deceased for the purpose of defrauding an insurance company of the amount for which it was insured in order to show a motive for the killing of deceased by accused, but a failure of the court to clearly admonish the jury with reference to that purpose was error.

3. Same—A conversation had between the deceased and a policeman, in which she stated that the accused had her insurance money, which he refused to pay her, and in which she spoke of getting out a warrant for him, and which was reported to the accused before the killing, was competent to show motive; and such evidence being competent, statements made by the accused relative to alleged declarations of the deceased as to her purpose in placing the insurance money in his hands made at the time the money was given to

the money and to continue the sentence of the court, and the action of the court in excluding them from the jury was prejudicial to his rights.

H. G. Snyder and J. N. Elliott for appellant.

Clifton J. Pratt and M. R. Todd for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Settle.

The appellant, J. W. Bess, having been tried, convicted and given the death penalty in the Fayette Circuit Court, under an indictment charging him with the murder of Martha McQuin Martin, by this appeal seeks a reversal of the judgment of conviction.

His motion for a new trial, which was overruled by the lower court, contains four grounds, viz.: First, that the court misinstructed and refused to properly instruct the jury; second, that the court admitted incompetent evidence and rejected competent evidence; third, that the verdict is against the law and the evidence; fourth, that the Commonwealth's attorney, in his closing argument to the jury, stated facts not in the record; by all of which the appellant's cause is alleged to have been prejudiced to such an extent that he did not have a fair or impartial trial. As to the first ground it is only necessary to say that no error in the instructions has been pointed out in the elaborate briefs filed by counsel for appellant, and we are of opinion that none could be suggested, for they present, with exceptional clearness and brevity, all the law applicable to the facts brought out by the evidence. By them the jury were told in what state of case they would be authorized to find the appellant guilty of murder, voluntary or involuntary manslaughter, and what punishment appertained to each; also what would authorize a verdict of acquittal, and what would justify the application of the law of self-defense. While in and through them, separately and as a whole, ran the admonition to the jury to allow appellant the benefit of every reasonable doubt, in the matter of determining his guilt or innocence; or if they found him guilty, in determining the degree of his offense.

As the evidence in the case was in the main circumstantial, in order that we may satisfactorily pass upon the second alleged error complained of it will be necessary to briefly review the facts upon which appellant's conviction was secured.

On Tuesday, March 10, 1903, the body of Martha McQuin Martin was found in the reservoir on Eddy street, in or near the city of Lexington, and was identified by persons who knew her well. When the body was removed from the water it was discovered that it contained several scratches on the forehead, and finger prints on the neck. According to the evidence of medical experts the bruises on her neck were caused by violent pressure of her flesh, and the neck was limber, showing that it had been wrenched or strained. There was an abrasion of the skin over the left eye, sand or earth between the eye lids, and the eye ball was bloodshot. The body was not bloated, and the post mortem examination made by the surgeons showed that there was no water in either lungs or stomach. They were in fact practically normal, and, therefore, in a healthy condition at the time of the woman's death.

According to the testimony of the surgeons the bruises on the neck and face, the absence of water in the stomach and lungs, and the fact that the body was shriveled, instead of bloated, all went to prove beyond question that the woman's death did not result from drowning, but was caused by violent external means, such as suffocation from choking, or by the wrenching or straining of the neck, and if her death was thus produced it would seem to follow that her body was thrown into the reservoir by her slayer to make it appear that she had committed suicide. It appears from the evidence that an illicit intimacy had existed for two years between the appellant and the deceased, during which time he had often spent his nights with her at her house, and she had frequently staid at night with him in the room which he occupied away from his wife and children.

On Friday before the finding of the body of the Martin woman the appellant, about the hour of noon, procured a horse and buggy at the livery stable of B. O. Horene, saying he was going out about the reservoir. There was a woman in the buggy with him when he left the stable, she was testified to by the stable men, unknown to them, but answered well in personal appearance and dress the description of the woman whose dead body was found in the reservoir. Others who saw appellant and the woman in the buggy that day after they left the stable testified to her resemblance to the body of the woman found in the reservoir. These witnesses seem to have given special attention to the hat and cape worn by the woman riding with appellant, and expressed the opinion that these articles of apparel were the same found on the body of the dead woman. One witness, J. H. Marshall, a letter carrier who knew Mrs. Martin, met appellant on the Friday in question, as he and the woman who left the stable in the buggy with him were driving in a suburb of the city, and recognized her as Mrs. Martin.

When appellant returned the horse and buggy to the stable, about 7 o'clock in the evening, the woman who had accompanied him when he drove from the stable was not with him when he returned. The buggy in which he took the afternoon ride had red wheels and body and a black top; when he returned it the top was down, and about ten inches of the back torn out. He called the attention of the owner to the rent, but did not explain to him how it had been made. The same buggy was hired to one Ed. Murray soon afterwards, who found in it, in the rear of the seat, two hair pins and a hat pin, and also a strand of lady's hair. The hair was the color of Mrs. Martin's, and the hair pins and hat pin were afterwards identified by two of her acquaintances as like some that were owned by her. According to the evidence no other woman besides the one with appellant rode in the buggy between the time of its return by him and the hiring of it to Murray, and it was not used by a woman while in Murray's possession. After returning the buggy mentioned the appellant, about 10 o'clock of the same night, hired at Horene's stable another horse and buggy, for the purpose, as he then stated, of going to a dance in the country after his son, whom he wished to have return home that night. He did not go that night for his son, but returned the horse and buggy to the stable at 11 o'clock, after an hour's use of it.

led no knowledge of light, and was of opinion that he saw her pass on the opposite side of the street on Saturday, the day following the buggy ride, but his statement was indefinite, and by no means convincing. Three other witnesses, two of them dentists, and the third a lawyer, testified that they saw in their respective offices at 5 o'clock Friday afternoon a woman whom they took to be Mrs. Martin, and one of the dentists said she told him her name was Martin; but the Commonwealth introduced in rebuttal Georgia Driscoll, who it was proved strongly resembled Mrs. Martin, and she testified that she was the woman who went to the offices of the dentists and lawyer on Friday afternoon; the latter were recalled, and all three of them, upon seeing Georgia Driscoll, positively identified her as the woman they took to be Mrs. Martin, the dentists being able to identify her by a decayed tooth of peculiar shape, which they found in her mouth, and which had been examined by them on the Friday afternoon in question.

Further evidence that the death of Mrs. Martin occurred on Friday afternoon, or night, was furnished by the testimony of a witness living near the reservoir that he saw the clothing of the dead body floating on the surface of the water on Saturday morning, the day following the buggy ride with appellant, but without knowing or taking the trouble to ascertain what it was. What was supposed to be a bundle of old clothes was also seen in the reservoir by others on Sunday, Monday and Tuesday, but they, too, were ignorant as to what the object was until the body was removed from the water.

The medical experts, and others informed on the subject, testified that in case of death by drowning the body invariably sinks, and will not arise to the surface earlier than three days, but that a dead body thrown into the water will not sink, and the physicians further testified, that in their opinion, the woman whose body was found in the reservoir had been dead from twenty-four to seventy-two hours when the body was removed from the water. There was much testimony to the effect that appellant, after the death and before the finding of the body of the deceased, informed a number of his acquaintances that she had gone from Lexington to Seattle, Cincinnati or Indianapolis, in company with another man, and that he (appellant) had quarreled with her, and they had agreed to have nothing more to do with each other. He also informed one or more persons that the deceased had, on one occasion, tried to shoot him, and that she was a "morphine dope," and was liable to commit suicide.

One George Bradley testified that he had a conversation with appellant on Wednesday or Thursday before the finding of the body of the deceased, in which he (appellant), in speaking of the deceased who was then in his room over the barber shop, said he wanted to get rid of this woman up there, and upon being asked "what for," he said he was "afraid she might kill herself up these stairs, and it might be pretty bad."

There was also other evidence that after the death and before the finding of the body of the deceased he took some of her personal effects that were in his room, such as a sewing machine and wearing apparel, and distributed them among the colored female residents of the neighborhood. It was also

trial a note was introduced in evidence which he had written while in jail to a Mrs. Porter, in which he tried to induce her to testify in his behalf that she was the woman with whom he drove in the buggy from the livery stable on the Friday afternoon before the finding of the dead body of Mrs. Martin, and that it was on her account and to carry her home through the rain that he again procured of the same stable the buggy at 10 o'clock that night, but she refused to make the desired statements, and on the witness stand denied their truth.

The trial court permitted the Commonwealth to prove that the deceased on December 23, 1902, obtained a policy of fire insurance of \$350 on her house and its contents; that the house and what was in it was destroyed by fire on January 20, 1903, and that the loss was compromised on February 28th by the payment to the deceased of \$225 by the insurance company. The Commonwealth was also allowed to prove that the appellant only a few days before the house was burned procured a wagon and driver and at night hauled away from the house various articles of furniture and other property, including the sewing machine that he gave away after the death of Mrs. Martin, which he had caused to be taken to the room occupied by him as a sleeping apartment, and for the services then rendered him by the driver and team he paid the driver \$1, and shortly thereafter, and after the burning of the house, without any request from the driver to do so, he offered to, and did, pay for him to the city government \$6 for a license to carry on the business of hauling with his express wagon in the city of Lexington.

The Commonwealth was further allowed to prove that the appellant attempted to collect of the agent of the insurance company the \$225, which it had agreed with the deceased would be paid her for the loss of her house and contents. The agent testified that appellant informed him that he had an order from the deceased for the sum due her, and that the policy had been transferred to him, but the agent refused to pay the money to him, and shortly thereafter paid it to the deceased, who then surrendered to the agent the policy, which had not been assigned to appellant, as claimed by him. The payment was made to her on February 28, 1903. Her dead body was found on March 10th following. So if, as the evidence strongly conduces to prove, her death occurred on Friday of the previous week, which was March 6th, it is apparent that the insurance money was received by the deceased only eight days before her death. If there was fraud or crime in the burning of Mrs. Martin's house, the evidence referred to conduces to show that the appellant had some guilty connection therewith.

The agent of the insurance company testified that the sum due the deceased on her loss was paid in two \$100 bills, a \$20 and a \$5 dollar bills, and it was stated by the appellant on the witness stand that he informed the deceased that he wished to borrow the \$20 bill which she received of the insurance agent, but she made him a present of it, and gave him the \$100 bills to keep, and that when he went to his room that night he found her there, and at her request returned her the two \$100 bills.

Luke Doyle, a policeman, testified that the deceased, about a week before her death, complained to him that appellant had her money, and she could

an angry altercation took place between them. On the afternoon of that day appellant went to the witness and asked him what Mrs. Martin had said to him, and was told by the witness of his conversation with Mrs. Martin, and that she had said he had \$200 of her money. Appellant did not deny that he had her money, but said it was merely a breach of trust, and that she could not do anything unless he wanted to give it back to her. On several days in succession the witness said he was talked to by appellant about the matter, and at one time was told by him that he had not given her back the money, but thought he would, and later told him that he had given her \$100 of it. On Thursday appellant again met the witness on the street, and asked him if he had seen deceased, and said he was afraid she would shoot him, and on Friday morning, which was the day on the afternoon of which the deceased, according to the evidence, lost her life, appellant inquired of witness whether he had seen deceased, and informed him of her having tried to commit suicide, and was told by the witness that she had probably done so, and nobody knew anything about it. To one or two others appellant said he had returned to the deceased \$100 of her money, but no money was found on her body when removed from the water, though one of her stockings was found to be released from the suspender, and pulled down, and one of her female acquaintances testified on the trial that she had known deceased to carry money in her stockings.

The appellant, in testifying before the jury, made a general denial of nearly all of the facts brought out by the witnesses for the Commonwealth, but seemed to have but little support from other witnesses introduced in his behalf. It is insisted for appellant that it was error to allow the introduction of evidence in regard to the insurance upon the house and household effects of the deceased, and of the conduct of the appellant in removing the furniture and other property from the house to which the driver of the express wagon testified, or to allow the introduction of evidence as to what passed between the appellant and the driver in regard to the payment by the former of the latter's license, and likewise error to permit the introduction of evidence in regard to the burning of the house, or as to the payment to the deceased of the insurance money, or the attempt on the part of the appellant to collect it.

We are of the opinion that all of the evidence mentioned was competent to show a motive for the homicide. If the appellant took the life of the deceased, the crime was not committed without motive; there are, indeed, few motiveless crimes, and among the motives impelling men to crime is gain.

In Burwell on Cir. Ev., section 285, it is said: "The motive of gain in a stricter sense of the term may exist by two different classes of objects: First, by something visible and tangible, which the party meditating the crime desires to possess; and, secondly, by some substantial benefit which is expected to accrue as a result of the contemplated act."

In *O'Bryan v. Commonwealth*, 89 Ky., 54, this court said: "Necessarily where the commission of crime can be shown only by proof of circumstances, the evidence should be allowed to take a wide range, otherwise the guilty would often go unpunished."

introduce or explain another, or which afforded an opportunity for any transaction which is in issue, or shows facilities or motives for the commission of the crime, may be proved. Even evidence tending to prove a distinct offense is, therefore, admissible if it shows facilities or motives for the commission of the one in question." * * *

In a more recent case decided by this court, the style of which is also *O'Bryan v. Commonwealth*, 24 Ky. Law Rep., Part II, 2511, the authorities bearing on the question under consideration are elaborately reviewed, and no better statement of the principle involved can be found than is contained in Bishop's New Crim. Proc., volume 1, section 1126, quoted with approval in the opinion in that case: "The intent, knowledge or motive under which the defendant did the act charged against him not generally admitting of other than circumstantial evidence, may often be aided in the proof by showing another crime actual or attempted, then it is permissible."

We find, therefore, that the true doctrine deducible from the foregoing authorities is that all the evidence admitted must be pertinent to the point in issue, and if it be pertinent to the point, and tends to prove the crime alleged, it is not to be rejected, though it also tends to prove the commission of other crimes, or to establish collateral facts. If there was a conspiracy between the deceased and the defendant to insure her property and then destroy it to secure the insurance, and by that means the insurance money, or some part of it, went into appellant's hands; when it became apparent to him that deceased would compel its return to her even by his arrest, who can say whether the murder, if committed by him, resulted as a means of preventing his arrest for some connection with the burning of her house, or to enable him to keep the money; in either event the motive would be manifest. At any rate, it was for the jury to determine from all the evidence whether or not either motive existed, and we think for this reason that the evidence complained of was competent. We are, however, of opinion that the trial court erred to the appellant's prejudice in not explaining to the jury the full purpose and effect of this evidence. The admonition of the trial judge to the jury on this point, as found in the bill of evidence before us, is as follows:

"Gentlemen of the jury: There have been certain witnesses who have testified in this case about statements purporting to have been made by Mrs. Martin. As to that evidence, and whatever evidence has been given to you as to any statements made by Mrs. Martin, that evidence ought to be altogether disregarded by the jury, as if it had not been heard. Her statements, if made as detailed by any witnesses, are not competent testimony, and the jury should disregard it entirely. There may have been evidence in this case tending, or not, as the jury may think, to show that the defendant has been guilty of some other crime or offense than the one charged in the indictment. In so far as any evidence of that kind has been admitted, it should not bias the mind of the jury, nor your belief, if any you have, that this defendant committed some other offense than the one charged in the indictment, lead you to find a verdict against him upon this charge, except in so far as the fact itself, whatever it may be, throws light upon the charge in

against the defendant, you ought not to allow that fact, whatever it may be, is competent evidence for you to consider in so far as it bears upon this charge, but it should not bias your mind and make you find this defendant guilty in this indictment any more than if it had, not been admitted, except in so far as the fact itself, whatever it may be, conduces to prove the defendant guilty of this charge; and it is my duty that I should tell you as to the rejection of certain testimony, and the purpose for which certain other testimony is admitted, and you owe it to yourselves as jurors to maintain your solemn oath, and be governed by the injunction of the court."

By this charge the jury were directed to disregard all statements detailed by the witnesses as emanating from Mrs. Martin. The greater part of her statements were incompetent for any purpose, but some of them were manifestly competent, such as her conversation with the policeman, Luke Doyle, but a few days before her death, in which she complained to that officer that appellant had \$220 of her money which he refused to pay her, and to recover which she spoke of getting out a warrant against him, for that conversation was reported by Doyle to appellant before the death of Mrs. Martin. The ruling of the court likewise excluded from the consideration of the jury the statements of the appellant relative to the alleged declarations of Mrs. Martin as to her purpose in placing in his hands the money received by her of the insurance company, made to him at the time the money was given him. We think these declarations were competent for the purpose of explaining the circumstances under which appellant received the money, and also to contradict the statement made by Mrs. Martin in her conversation with Doyle which the latter subsequently reported to appellant. It is true that the exclusion of the testimony of Doyle, as to the statements made to him by Mrs. Martin, was not prejudicial to the appellant, but we are unable to say that the exclusion of the latter's testimony as to the declarations of Mrs. Martin, accompanying the placing of the money in his hands, was not so.

We are of the opinion that the admonition of the circuit judge was so indefinite and ambiguous that it was, on the whole, more calculated to confuse than to enlighten the jury. It was an attempt by the court to instruct the jury as to the consideration to be given evidence that "may have been" admitted in the case which, in their opinion, might or might not tend to prove the appellant guilty of some crime or offense other than that charged in the indictment, without indicating what evidence had been introduced that was likely to superinduce such an opinion, or what crime or offense other than that named in the indictment was referred to. The jury were also told in effect that if the evidence thus vaguely referred to proved the appellant guilty of some other offense "against the law or against the morals," they ought not to "allow that fact, whatever it may be," to bias their minds or make them find the appellant guilty under the indictment, any more than if it had not been admitted, except in so far "as the fact itself, whatever it may be," conduces to prove him guilty of the crime with which he was charged. This part of the charge is but a repetition of what went before and is well calculated to further obscure the meaning of the court and mislead the jury.

and the purpose for which certain other testimony was admitted," but neither in that connection, nor elsewhere in the admonition except as to the statements of Mrs. Martin already referred to, was it stated what evidence was rejected, although there was other evidence rejected by the court. The trial judge should have admonished the jury in explicit language what evidence was excluded from their consideration, specifying it in detail, and if its rejection was not ordered until after it had gone to the jury, it would have been proper for the court in excluding it to name the witnesses from whom it had been elicited, in order that the jury might the better understand what evidence, and how much of it, was not to be considered by them. But when evidence, otherwise incompetent, is admitted for a specific purpose, a somewhat different rule should obtain. In that event the trial judge in apt language, and without quoting it in detail or giving undue prominence to particular facts, should inform the jury for what purpose alone the evidence is to be considered by them.

Pursuant to this rule the jury in the case at bar should have been told by the court that though they might believe from the evidence, beyond a reasonable doubt, that the burning of the house of Mrs. Martin was done, or procured to be done, by her, with the felonious intent to thereby defraud the insurance company of the amount for which the same, or its contents, was insured; and further believe from the evidence, beyond a reasonable doubt, that the appellant, with like intent and purpose, did aid, assist and advise her in such burning, if any, such of the evidence, if any, as tended to prove that fact might be considered by the jury, in connection with all other evidence in the case, only in determining whether or not the appellant had, or was thereby furnished, a motive for the murder of Mrs. Martin. As a further safeguard to the rights of the appellant, and by way of putting the admonition in another form, the court might also have told the jury that none of the evidence in regard to the burning of the house, the removal of its contents, or any part thereof, by the appellant before the fire, or as to the payment by the insurance company of the loss thereon—though they might believe from such evidence, beyond a reasonable doubt, that appellant was a guilty participant in the crime, if any, of burning the house, or the fraud if any, thereby practiced upon the insurance company—should be considered by them except for the sole purpose of determining whether or not it concluded to prove a motive on the part of appellant for the murder of Mrs. Martin.

In the same manner, and with equal circumspection, the court should have admonished the jury as to the purpose for which they might consider the evidence in regard to the illicit relations that existed between the appellant and Mrs. Martin at the time of her death, and for the previous two years. We find but little merit in the objection urged by the appellant to the statements of the Commonwealth's attorney set forth in the bill of exceptions. The language complained of was severe in its arraignment of the appellant, but not abusive, and we are unable to say that it was not warranted by the evidence. The conduct of the appellant, as shown by the evidence, his admissions while upon the witness stand of moral turpitude, much of which

jury as to the effect and purpose of the evidence that was competent only to show motive, and of its further error in rejecting evidence of certain of the statements of Mrs. Martin, the judgment is reversed and cause remanded, with directions to the lower court to set aside the verdict and judgment and grant appellant a new trial and for further proceedings consistent with the opinion herein.

Whole court sitting.

THE ALBIN CO. v. KUTTNER.

(Filed December 2, 1903—Not to be reported.)

1. Defective petition—Cured by answer—It is proper to overrule a demurrer interposed to a pleading as a whole where one of the two paragraphs states a good cause of action, although the other paragraph is defective; and where the allegations of the defective paragraph are specifically denied by answer and proof is heard upon the issues so raised without objection to its competency and judgment is rendered, it is too late on appeal to raise the question of the insufficiency of the pleading.

2. Judgment sustained by evidence—In this action by one employed as a salesman of merchandise against his employer to recover commissions alleged to be due him under the contract of employment on sales made by him the finding of the chancellor awarding to the plaintiff the commissions prayed for is sustained by the evidence.

Matt O'Doherty for appellant.

B. H. Young and W. C. Owen for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, First Division.

Opinion of the court by Judge Settle.

This action was instituted by appellee in the Jefferson Circuit Court, First Chancery Division, to recover certain commissions claimed to be due him from appellant under an alleged contract for services rendered it as a salesman of its merchandise, in the cities of Louisville, New Albany and Jeffersonville, and for sales of such merchandise made by other employes of appellant under appellee's control in the same territory.

The petition contains two paragraphs. The first sets out an alleged contract between appellee and appellant, whereby the former undertook to sell for the latter its goods in the cities mentioned, and for his services he was to be paid by appellant a salary of \$12.50 per week and a commission of 3 per cent. on all sales made by him. It is averred that appellee under this contract served the appellant as a salesman of its goods from April 1, 1898, to November 11, 1899; that the salary of \$12.50 per week which he was to receive under said contract has been paid in full by the appellant, but that there is due him commission of 3 per cent. on sales made by him in person, and between April 1 and November 11, 1898, the sum of \$337.84, which the appellant refused to pay him.

In the second paragraph it is averred that appellee is entitled to the further

during the period mentioned, it being further averred that by the terms of the contract between appellee and appellant the latter agreed to pay him 2 per cent. on all sales made by such employes, they being under the supervision of appellee in the territory mentioned. The appellant filed answer and counterclaim, in which it is admitted that it was to pay appellee \$12.50 per week and a commission of 3 per cent. on goods sold by appellee, but denied that there was \$337.84, or any other sum, yet due him as commissions under the contract, and also denied that there was \$——, or any sum, due the appellee as commissions on sales of its goods made by other of its employes, or that appellee was given supervision of such employes, or that appellant agreed to pay him 2 per cent. commission, or any sum, on sales made by such employes.

It is further alleged in the answer and counterclaim that the appellee, while in the appellant's employment as salesman of its goods, entered into a fraudulent agreement of copartnership with one Green, a competitor in business of the appellant's, to divert to Green appellant's trade, and that in pursuance of such agreement appellee while in appellant's employment did carry and divert to Green much of the trade and business of appellant, and upon quitting appellant's service did enter the store of and into business with Green, and that by his fraudulent agreement and business connection with Green, and his conduct in diverting the trade of appellant to the store of Green, appellant was damaged in the sum of \$——, for which it prayed judgment.

After the filing of appellee's reply controverting the material averments of the answer and counterclaim the case was referred to a commissioner for an auditing and settlement of the accounts between the parties, with directions to that officer to take proof, and to ascertain and report what amount, if any, was due from the appellant to the appellee. After taking proof as required by the order mentioned the commissioner filed his report, which, after an elaborate review of the evidence, finds that the contract between appellee and appellant was made as claimed by the former, and that by it appellant agreed to pay appellee \$12.50 per week, and 3 per cent. commission upon sales made by him, and to give appellee charge of all the outside men and pay him 2 per cent. commission upon all sales that they might make, except the sales made by a Mr. Dorsey. This contract was made in March, 1898, was to go into effect the 1st day of April, 1898, at which time it did go into effect, and appellee remained in appellant's service in the discharge of the duties of his employment under the contract mentioned from that time until November 11, 1898.

Under this contract the other, or outside, salesmen in appellant's employ were to report to the appellee all sales made by them every evening after the day's work was completed, and it was the duty of appellee to direct and instruct them in the business of the appellant. The commissioner further found that there was due appellee as commissions, at the rate of 2 per cent. on the sales of goods made by the other employes of appellee, \$582.98, and commissions of 3 per cent. on sales made by appellee himself, amounting to \$337.84, making a total of \$920.77, but from this sum the commissioner de-

what he calls "refunds" (meaning, we suppose, sums repaid to customers for errors in sales), thereby leaving due the appellee, \$662.44.

The commissioner also found that there was no proof to sustain the appellant's charge that appellee had entered into a fraudulent arrangement with Green for the purpose of diverting to him the trade of appellant, consequently he refused to allow appellant any part of the damages sought to be recovered on his counterclaim.

Appellee excepted to the report of the commissioner because it failed to allow him interest upon the several items going to make up the sum total of appellant's indebtedness to him as shown by report, and appellant filed exceptions to the report upon the following grounds: First, that the commissioner erred in allowing appellee \$662.44, or any sum; second, in failing to sustain appellant's counterclaim; third, in finding that the appellee was entitled to 2 per cent. commission, or any commission, on sales made by other salesmen in appellant's service; fourth, in failing to deduct from the amount of commissions allowed appellee on sales made by other employees of appellant the amount of "refunds" on forfeited and cancelled sales; fifth, in failing to find that the appellee violated his trust in appellant's service by diverting trade to Green, appellant's competitor in business; sixth, in allowing himself \$100 for his services as commissioner in this case.

Upon the submission of the cause on the exceptions filed to the commissioner's report the court overruled the one exception filed by appellee, and exceptions 1st, 2d, 3d and 5th filed by appellant, but sustained exception No. 4 filed by appellant to the extent that it complained that appellant was not credited with "refunds" on forfeited or cancelled sales, and also sustained appellant's exception No. 6, by which objection was made to the allowance of \$100 to the commissioner. But later, by permission of the court, proof was taken as to the allowance to the commissioner, which showed the amount thereof to be reasonable and proper, and it was thereupon allowed by the court. In passing upon the exceptions to the commissioner's report the court discovered an error in the computation of the commissioner, that is to say, it appears that the commission of 2 per cent. allowed appellee on sales made by other employees of appellant amounted to \$639.05, instead of \$582.93, as stated by the commissioner, which, added to the \$337.84 found to be due appellee as commission on sales made by him, makes a total of \$970.89, instead of \$920.77, as reported by the commissioner, and deducting from that sum the several amounts allowed as credits to the appellant by the commissioner, aggregating \$309.65, there was left due the appellee \$661.24, instead of \$662.44, as shown by the report.

It appears from the record that appellant was given credit by the rebate claimed by it in exception No. 4, which was sustained by the court as before stated, and for the sum remaining, viz., \$579.10, and the costs of the action, appellee was given judgment, of which the appellant now complains. We find no difficulty in reaching the conclusion that the judgment is sustained by the weight of the evidence. It appears that appellee had been in appellant's service for some time. He seemed to be thoroughly conversant with

with his assistance. Shortly before April 1 appellee received an offer for his services of \$12 per week and 5 per cent. on sales, of which he informed Albin, the principal member of the appellant company, and the same time telling him that he did not wish to leave his service, but would do so unless he received an increase of salary. After some further negotiations with Albin he accepted the offer of the latter to pay him \$12.50 per week, 3 per cent. on his own sales and 2 per cent. on those made by appellant's other salesmen. Only he and Albin were present when this contract was made, but appellee's version of the contract is supported by the fact that from that time his work was enlarged; that he was made superintendent of all appellant's salesmen there can be no doubt; that fact was shown not only by the enlarged scope of his work and duties, but also by the testimony of Mc-Gruder, Bohannon, Wells and Nall, present or former employes of appellant, all of whom stated that the other salesmen of appellant reported to and were supervised by appellee after April 1, and as long as he was in appellant's service. Even Ward and Purdy, members of the appellant company, in some measure corroborate appellee as to much of the service that was performed by him in directing the other salesmen and in assisting them in making sales.

The fact that the books of appellant fail to credit appellee with 2 per cent. commissions on sales made by the other salesmen does not, in our opinion, militate against his right thereto, as he could get, and, in fact, did get, from the statements made out at different times by the other salesmen the amount of the sales made by them, from which it was easy to arrive at the commission due him.

It is, however, insisted for the appellant that the averments of the petition do not authorize a judgment in appellee's behalf for the 2 per cent. commission claimed on sales made by other employes of appellant, and that the demurrer to the petition should have been sustained. The claim of appellee to the commission on sales made by other employes of appellant is found in the second paragraph of the petition, and the cause of action in regard thereto is, it is true, defectively stated, and would doubtless have been held by the lower court insufficient on a demurrer to that paragraph alone, but the demurrer interposed by appellant went to the petition as a whole, and as there was certainly a good cause of action stated in the first paragraph, the demurrer was properly overruled.

It is shown by the record that the averments of the second paragraph, insufficient though they were, were specifically denied by the answer, and upon the issues thus formed evidence was introduced by the parties without objection to its competency, in view of all which it is now too late to raise any question in this court as to the insufficiency of the petition. We entirely agree with the chancellor and his commissioner in the conclusion that the counterclaim of the appellant is without support from the evidence. The contention of appellant that appellee entered into an arrangement with Green to divert to him appellant's trade is, it seems to us, based upon suspicion, rather than fact, and the slight evidence that was introduced on that point shows

Finding no cause for disagreeing with the conclusions of law or fact reached by the chancellor, or his commissioner, the judgment is hereby affirmed.

JONES v. COMER, &c.

(Filed December 2, 1903—Not to be reported.)

3 / Original opinion, ante, 778

Max Harlin and Sherman Spear for appellant.

Baird & Richardson for appellees.

Appeal from Monroe Circuit Court.

Judge O'Rear delivered the following response to petition for rehearing: 3

If appellant voluntarily left Comer's home, and absented himself therefrom permanently, that is a matter of defense. On the other hand, if, as is alleged in the petition, Comer drove appellant away, after he and his mother had performed their part of the contract to the extent as alleged, these facts take the contract out of the operation of the statute of frauds; and that appellant did not reside in and render service to Comer's family thereafter would be because of Comer's fault (if the petition is true), which Comer and his estate will not be permitted to take advantage of.

Petition overruled.

HOGAN, &c. v. TUCKER, &c.

(Filed December 2, 1903.)

Rescission of contract—A contract for the sale of a flour mill and site will not be rescinded for the fraud and deception of the vendor where the purchaser kept and used the property for nearly a year after discovering the fraud, accepting in the meantime a written promise from the vendor to repair certain defective machinery, and after the vendor had disposed of certain property which he had accepted in exchange at a less price than it had been valued at in the trade; under such a state of case the vendor is only entitled to pecuniary compensation by way of damages.

Denton & Robinson for appellants.

Wood & Rice, Jeff Henry and S. A. Russell for appellees.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Nunn.

It appears that appellants, Wayne Hogan and J. P. Gaddie, were the owners of a flour mill and site in the town of Wickliffe, Ballard county, Ky.; that they sold this property to appellees on or about the 8th day of April, 1901, for the sum of \$6,300. Appellees, by their contract, agreed to pay \$2,500 in cash, or its equivalent, and executed their four notes of \$1,000 each, due in one, two, three and four years.

\$2,300, a small tract of land at the price of \$700, a traction engine, a boiler, a saw rig and threshing machine, at the price of \$1,200, for the balance of the \$2,300, to wit, \$400, the appellants accepted appellees' note.

Appellees took possession of the mill at Wickliffe and commenced to operate it and found the mill in bad condition, the boiler and engine almost worthless, and the sifters and bran dusters worn and in bad condition. Within a few weeks they notified Wayne Hogan of the condition of the mill, and he promised to repair it. Nothing was done in the way of repairs until the 10th day of August, 1901, when Wayne Hogan, one of the appellants, made and executed the following writing:

"This is to show that I will, and do hereby and herein promise and agree, immediately to repair and make good as new the engine and boiler of the mill sold to B. W. Tucker & Son, this year, in Ballard county, Kentucky, and when repaired and fully tested by said Tucker and Hogan, if said boiler or engine fail to do as good work as if they were new, then in that event I will at once purchase new ones and put in the said mill instead of the old ones, and do this at my own expense and cost.

"This August 10, 1901.

(Signed) "W. HOGAN."

Appellant Hogan sent George Stephenson, a millwright, from Taylor county to Ballard to repair the engine and boiler. Stephenson arrived there about the 15th of August, 1901, and worked on the boiler about thirteen days, but did not succeed in making it a good one; he found the engine in such bad condition he did not attempt to repair it. C. W. Tucker, after consultation with Stephenson, exchanged the engines for another one, and changed the position of the boiler, and made other changes of minor consequence, and in this condition appellees attempted to run the mill until about the 1st of March, 1902, when they abandoned or ceased to operate it, and tendered it to appellants, and demanded the return of the amount they had paid on the mill.

Appellants refused to rescind. Appellees on the 13th day of March, 1902, brought this action in the Taylor Circuit Court. In their petition they made two paragraphs: First, they alleged fraud on the part of appellants, and made the necessary allegations with reference thereto; second, they alleged that appellants warranted the mill in all particulars to be as good as new, and that it was worthless, and that they had been damaged in the sum of \$4,000, and other sums. In their prayer they asked for a rescission, and if that could not be had, then a judgment for damages upon the warranty. The court, on motion of appellants, compelled appellees to elect which paragraph they would prosecute, the first for rescission on the grounds of fraud, or on the warranty, and appellees elected to prosecute the action under the first paragraph. The case was prepared and tried, and the lower court adjudged that the contract be rescinded, and that appellees recover of the appellants the sum of \$1,900, with interest from the date of the trade, to wit, 8th of April, 1901.

Appellants complain of this judgment, and say that they did not deceive or

reasonable time after the discovery of the fraud, and that appellees had used the property for ten or eleven months, had exchanged the engine for another, had changed the situation of the boiler, and had made other minor changes in the property; that before the appellees asked for a rescission they (appellants) had sold the land and machinery which they had received in part pay for a much less sum than they had allowed appellees in the trade, to wit, the land at \$650, for which they had allowed appellees \$700, and the machinery at \$600, for which they had allowed appellees \$1,200.

We are of the opinion from the facts as shown by the record that appellees were deceived in the trade, and that they were and are entitled to relief. It is shown that appellants represented the mill and machinery to be all right in every respect, and as good as new, and that at the time the engine and boiler and other minor parts were damaged and almost worthless. J. P. Gaddie must have known these facts, as he was at the mill and in charge at the time the damage occurred. But it is not made clear that Hogan, the partner, and the other appellant, on whose statement appellees alleged they relied, was acquainted with the injured condition of the mill, as he resides in Taylor county, and did not visit the mill often. But in view of all the facts and circumstances proven, this court would not feel inclined to disturb the finding of the lower court in rescinding the trade on the ground of fraud and deception practiced by appellants, provided the rescission would have placed the parties in statu quo, or nearly so. The question then to be determined is, did appellants elect to rescind within a reasonable time after the discovery of the fraud practiced upon them? If so, the judgment should be affirmed; otherwise, reversed.

In the case of *Haggins v. Becraft*, 1 Dana, 81, the court said: "The law has not defined 'reasonable time.' It can not be defined by any prescribed rule. What is reasonable in one case may be unreasonable in another case. What is reasonable in any case must be ascertained by the application of reason to the facts which characterize the particular case. Delay for one week after full discovery may be unreasonable in some cases; a much longer delay may in other cases be reasonable. The injured party should observe ordinary vigilance and good faith. He should not by culpable negligence, or by design, subject the other party to unnecessary inconvenience, loss or hazard; and whenever he offers to return the property it should be in as good condition as it was when he might have first returned it after full discovery of its defectiveness, so as to place both parties as nearly as possible in statu quo. All this may appear in a supposable or possible case, even though months may have interlapsed; it may not appear in another possible case in which one week had evolved. Time, in the abstract, is not essential. It is material so far only as when, associated with other circumstances, it may produce injurious or unjust consequences.

"The great object of the rule of law on this subject is to prevent injury or wrong to the vendor; and the main question in every such case should be, has he any just cause to object to the rescission of the contract? Has he been trifled with? Will he have suffered by unnecessary and improper delay?"

In the case of *Colyer v. Thompson & Johnson*, 2 Mon., 18, the court said:

or fraud. Where the injured party, within a reasonable time after he has discovered the fraud, makes his election to disaffirm the contract, and offers to restore the property, a court of equity will at his instance interpose and set it aside. But if, after discovering the fraud, he still retains the property and uses it as his own, and makes no offer to restore it, or does not otherwise evince a determination to avoid the contract, a court of equity will not set it aside." And in such case he must get relief in damages.

The case of *Ruffner, &c. v. Ridley, &c.*, 81 Ky., 169, was where a party sought relief from a contract obtained by fraud, and the court said: "A court of equity will rescind if the circumstances are such that the parties can be put in the condition they were in at the time of the execution of the contract; but if these elements do not concur the chancellor will decree compensation if the fraud is proved, and a substantial injury has resulted therefrom. Whenever there is fraud, with a resulting injury of a substantial character, a court of equity will give relief, either by rescission or pecuniary compensation."

In the case of *Bernard Leas Mfg. Co. v. Waller*, 18 Ky. Law Rep., 347, the court said: "He might have, within a reasonable time after discovering the breach of warranty or worthlessness of the machine, have offered to return the machine, and if his cause of action was well founded he would have been relieved from any liability for the price or value of the same, and might have had such other relief as he showed himself entitled to; but not having done so, the judgment, etc., should not be allowed to stand."

In *Bigelow on the Law of Fraud*, volume 1, 1888 edition, 436, the author says: "The defrauded party to a contract has but one election to rescind the same. If he once determine his election, it is determined forever. Hence, if it be shown that he has at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, his election is irrevocable. Nor has the injured party power to keep the question of election open so long as he will. The rule of law upon this point is this, so long as the defrauded person has made no election he retains the right to determine it either way, provided that in the interval while he is deliberating an innocent third party has not acquired an interest in the property, or that in consequence of his delay the position of the wrongdoer himself has not been substantially affected."

The appellees prove that they discovered the fraud in a few days after May 1, 1901; they kept and used the property; accepted a written promise from appellant Hogan to repair boiler and engine or furnish new ones; the repairs were attempted to be made, the engine was exchanged for another, and other changes made in the mill, and then appellees continued to run the mill until about the 1st of March, 1902. In the meantime appellants disposed of the property which they took from appellees at the price of \$650 less than they had allowed appellees for same. Under these circumstances the court should not have rescinded the contract, but should have granted appellees relief by giving them pecuniary compensation.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

1, J. T. Griffith, clerk of the Daviess County Court, do certify that the foregoing certificate of land sold for assessment, assessed in the name of Thomas S. Pettit, in proceedings of J. B. Bryan, &c., on petition for a ditch, was this day lodged in my office, and admitted to record. Witness my hand this 10th of November, 1902.

"J. T. GRIFFITH, Clerk."

The plaintiff further alleges that at the time of the levy and sale Thomas S. Pettit had a sufficient personal property out of which the taxes could have been made; that the land levied on and sold by the sheriff to satisfy the ditch assessment had been assessed as the property of Thomas S. Pettit, but that he was not in fact the owner thereof at the time of such assessment or liable for the assessment against such land, and prayed that the levy and sale made by the sheriff should be set aside. The defendant, Short, interposed a general demurrer to plaintiff's petition, which was sustained, and the petition as to him dismissed. Plaintiff asks a reversal of the judgment upon the ground that it was the duty of the sheriff to have collected the assessment by a sale of the personal property of Thomas S. Pettit, the alleged owner against whom the assessment was made. Section 21 of the act of March 23, 1900, provides: "It shall be the duty of the county surveyor or engineer on being notified by any land owner that his allotment or by any contractor that his job is completed, to inspect the same, and if he find that it is completed according to the specifications of the report on which the ditch was established, he shall accept it and give the land owner, or in case the job has been sold to the contractor, a certificate of acceptance, stating that said allotment or job is completed according to such specifications. And if any share or allotment has been sold to a person not the owner of the land assessed therefor, he shall in addition state the amount due the contractor for constructing the same from the owner of the land, which certificate shall be a lien on the land assessed for such share or allotment, and shall be due and payable immediately by the owner of the land, and if the allotment sold belongs to a nonresident of the county, the clerk shall state such fact when he offers it for sale. And when the county surveyor or engineer heretofore provided accepts it and issues his certificate of acceptance, he shall file with the county clerk a copy thereof, whereupon the clerk shall charge the amount mentioned in said certificate on the tax book against the land assessed with such allotment, to be collected as other taxes are collected, together with 6 per cent. for the holder of the certificate after the same becomes delinquent, and when collected it shall be paid to the person holding the certificate by the tax collector, and said tax collector shall receive 4 per cent. for collecting the same, to be paid by the certificate holder."

It will be observed that the assessment is against the land, and a lien is given by the statute on the land to secure the payment of such assessment. There is a marked distinction between local assessment of this character and taxes levied for general revenue purposes. They are not levied for the purpose of sustaining the government, but are charges against specific property, because the property itself is supposed to receive a special benefit therefrom different from the general one which the owner enjoys in common with

within the meaning of sections 157, 171, 172 and 174 of the Constitution, limiting the tax rate of cities, and requiring equality and uniformity of taxation. A very full discussion of the question is found in Elliott on Streets and Roads, chapter 25. The assessment for the construction of the ditch under the statute was not a claim against the owner of the land in his individual capacity, but an assessment against the land itself. And the statute provides that if any land against which such an assessment has been made shall have changed hands, the sheriff shall give the new owner notice, of the amount due and assessed against the property, and in the event of his failure to pay, that the land shall be sold to satisfy the tax. It follows, therefore, that the demurrer was properly sustained.

Judgment affirmed.

WILSON v. SULLIVAN, &c.

(Filed December 2, 1893—Not to be reported.)

1. Pleading—Sufficiency of petition—Trespass—In an action by the owner of a ferry privilege alleging trespass upon the lands condemned for use in the exercise of that privilege and to enjoin the same the failure of the petition to allege that the plaintiff had the exclusive privilege did not render that pleading defective on demurrer, there being no complaint of an attempt by any one to run a rival ferry.

2. Same—The failure of the petition to allege that the lease of the ferry privilege by the original grantee to another was, by leave of court and that the lessee had executed covenant with surety in lieu of the former covenant, as required by the statutes, did not make it defective as against a trespasser, who had no right to raise the question as to compliance with the statute.

3. Trespass—Defense to action—Alleged violations of certain statutes with reference to unlawful pools and combinations for the purpose of raising the price of ferriage by the owner of a ferry privilege do not constitute a defense to an action to enjoin another from committing trespass upon lands used in connection with the ferry.

A. D. Cole for appellant.

W. H. Wadsworth and E. L. Worthington for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Nunn.

The appellee, John Sullivan, for the benefit of the Maysville & Big Sandy R. R. Co., instituted proceedings in the Lewis County Court, and succeeded in condemning for ferry purposes two acres of land belonging to the appellant on the Kentucky shore opposite Manchester, in the State of Ohio, and the court also granted them a right or franchise to operate a ferry from this land on the Kentucky shore to Manchester, O., for the term of twenty years from the date of condemnation, to wit, November 11, 1897. On the 14th day of March, 1898, the appellees, George and H. C. Brown, took possession of this ferry right and franchise under a lease duly executed and delivered to

The jury on the trial of the writ of ad quod damnum awarded appellant \$3,000 for the use of this two acres of land for twenty years, which sum was paid to him in the year 1898. Some time after this appellant conceived the idea that appellees were using more than two acres of his land, upon or against which they landed their ferry boat, and he set posts in the ground, as he claimed, on his own land, outside of the two acres condemned, to prevent their landing against and injuring it. Appellees, contending that the posts were placed on the two acres condemned, took them up. Appellant replaced the posts and soon after that high water washed them away, and appellant was about to replace them when appellees brought this action to enjoin him, claiming that they were on their land for which they had paid appellant, and that the point where the posts were set was the only place they could land their ferry boat when the water was high in the river.

There were many depositions, deeds and other evidence introduced on the trial, and the lower court adjudged that the posts set by appellant were within the boundary of the two acres for which appellant had been paid, and enjoined him from resetting the posts, or otherwise interfering with appellees' free use and occupancy of these two acres for ferry privileges. Appellant contends that the court decided the case against the evidence, and also erred in not sustaining his demurrer to the petition; that appellees failed to allege in their petition that they ever acquired or had an exclusive ferry privilege, and refers to the case of *Owens Bros. v. Lockwood*, 83 Ky., 267, to sustain his contention.

In that case *Owens Bros.* sued *Lockwood* for damages, alleging that they were in possession and the owners of a ferry privilege from the city of Paducah to the Illinois shore, and had the right to collect tolls therefor as stated in the lease of the city of Paducah of the ferry privilege to *V. Owens*, to the exclusion of every other person, etc. A demurrer was sustained to this petition, and this court on appeal affirmed the case, stating in substance that as *Owens Bros.* claimed to own the ferry privileges by lease from the city of Paducah, it was indispensable for them to allege and show that the city of Paducah was the owner of the franchise. In the case at bar it is alleged in the petition, and shown by the proof, that appellee *Sullivan* was, by the county court of Lewis county, granted this franchise for the benefit of the appellee company, and that appellees *Brown* were, as lessees, in possession of this landing, right, privilege and franchise, and operating the ferry from this landing, all under a lease duly executed and delivered by co-appellees.

In the *Owens v. Lockwood* case, *supra*, *Owens Bros.* were attempting to recover damages from a person running a rival ferry without right. They could, therefore, only recover by showing that they rightfully held the exclusive ferry privilege. There was no alleged trespass upon the lands of *Owens Bros.* in that case. The appellant also contends that the petition was defective in failing to allege compliance with subsection 3 of section 1808, Kentucky Statutes, in that they failed to allege that the lease to the *Browns* was by "leave of court," and that the lessees had executed covenant with surety in lieu of the former covenant. This language is found in the subsection named: "Upon failure to comply with any requisition of this sub-

posted at the courthouse door, etc."

Thus it will be seen that the statute designates the method by which a ferry license may be revoked. A party can not justify trespasses committed upon the land of another by showing that the owner and possessor has failed to comply with some provision of the statutes. If the appellants have failed to comply with the requirements of subsection 3 of section 1808, Kentucky Statutes, or violated the provisions of section 1812, Kentucky Statutes, let the county court, the grantor of the ferry right, or the public, or some member thereof, take the necessary steps to have this ferry right revoked by the county court. Another contention of appellant is that the judgment should be reversed because the court sustained a demurrer to his answer, in which he alleged that the appellee, the Maysville & Big Sandy R. R. Co., in connection with the appellees, Brown, had obtained this ferry franchise in furtherance of a combination and conspiracy to control the ferry business between Covington and Ashland, Ky., on the Ohio river, whereby prices had been raised, competition had been shut out, except in accordance with the will of appellee corporation, and that they had violated, by reason of this conspiracy, pool and combination, section 3915 of the Kentucky Statutes. If this be true, the statutes, sections 3917-3918 and 3919, fixes the penalties and the methods by which they can be enforced. If appellees violated these statutes we are of the opinion that it would be no defense for trespass committed by him on the lands of appellees. We are, however, at a loss to understand how a combination, pool or trust could be formed, and in pursuance thereof the prices of ferriage could be raised or lowered to the detriment of individuals or the public, when it is the duty of the county court from time to time to fix, by an order of court, the rate of tolls to be charged, and a penalty for an overcharge is fixed by the statutes. (Sections 1813 and 1814, Kentucky Statutes.)

Perceiving no error prejudicial to the substantial rights of the appellant the judgment of the lower court is affirmed.

SOUTH COVINGTON AND CINCINNATI STREET RY. CO. v. McHUGH.

(Filed December 2, 1903—Not to be reported.)

1. Excessive damages—A verdict for \$800 injury to a hack, the killing of a horse and destruction of harness is not excessive under the proof.
2. Estoppel—Evidence—The statement of the amount of the damage to the hack by the owner of it soon after the accident and when he was trying to get a settlement for his loss is not an estoppel as against his right to recover a greater amount in an action for that purpose; but such statement is competent evidence to go before the jury.
3. Error not prejudicial—Incompetent evidence erroneously admitted by the court, but subsequently withdrawn by written instruction and admonition, can not be said to have prejudiced the minds of the jury where their verdict showed that they had obeyed the instruction of the court.
4. Gross negligence—The running of a street car at a very high rate of speed on a down grade upon a much traveled highway within the limits of

tive damages, if appellant's agent in control of the car was grossly negligent at the time of the collision, defining properly to the jury what constituted gross negligence. It is complained that there was no evidence of gross negligence. We think there was. The railway track was upon and near the margin of a much traveled public highway, and within the limits of an incorporated town. The grade of the track was downward at this point. The carriage was emerging from a gate opening from a driveway, flanked by trees and bushes in foliage. Appellee's evidence was that the car was being run at a speed of twenty miles an hour, and without ringing of gong, or other signal of its approach. We think it proper to submit to the jury whether such a high rate of speed on a down grade, at a point on a much used highway in a town where carriages and pedestrians had the right to be, and might reasonably be expected at any time, and where a view of their approach was obstructed, was not such gross negligence as evinced a reckless disregard of life and property.

Appellant asked, but the court refused, an instruction telling the jury that if appellant's car was being run at a reasonable rate of speed, and that the car could not have been stopped by the motorman with the means at hand after discovering appellee's peril without endangering the lives of his passengers, the company was not liable. This instruction made appellant's duty to the carriage and its occupants begin only upon the discovery of their jeopardy from the car. This is not the law as to street cars using a public highway. Drivers and pedestrians on the highway are not trespassers. They have an equal right to use the highways with the street cars. The car driver must keep a proper lookout for their presence, and give them timely warning of his approach. If he fails to keep such lookout and give such warning, his master will be liable for a resulting injury, although the car was running at a reasonable rate of speed, and although after the driver actually discovered the peril of the person on the track he unavailingly used every means at his command to avert the injury.

Perceiving no error prejudicial to appellant's substantial rights the judgment is affirmed, with damages.

ROBERTSON v. DAVIESS GRAVEL ROAD CO.

(Filed December 2, 1903.)

1. Drainage—Collection of water into ditch—Although the owner of higher ground is entitled to have the natural drainage of the surface water flow onto and over the lower adjoining lands of another, there is no right to collect such surface drainage into a ditch and discharge it upon the lower land at one point in accumulated quantity and with accelerated force and to require the owner of such lower ground to dispose of it so as not to damage the higher ground.

2 Same—Easement—The fact that the owner of the higher ground may have acquired by prescription the right to the use of a ditch over the lower ground for the purpose of carrying off the water from her own ditch does not carry with it the right to require the owner of the lower ground to keep

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge O'Rear.

Appellant is the owner of a tract of land lying adjacent to appellee's gravel road near Owensboro. The land in that immediate neighborhood is low and nearly level, but it lays so that its surface drainage is naturally toward the gravel road. More than fifteen years before this suit her land and other lands lying back of it were drained by a ditch through her land, which emptied into another ditch running alongside the road. She alleges that before appellee acquired the road, and while it was operated as a public highway by Daviess county, the county kept the latter ditch open so as to accommodate the water drawn off by her ditch. Her complaint then continues: "Plaintiff states that defendant has reconstructed said road in front of her land, and has raised the roadbed to a higher grade than the grade which was maintained and existed while the same was in control of Daviess county as a public road, so as to render it impossible for the water falling on her and the Hathaway lands, and flowing into her ditch above mentioned, to drain over said road as reconstructed by defendant, and so as to cut off all escape for the water thus accumulating in her said ditch, except as the defendant might have opened and kept open at all times a sufficient ditch running parallel with its said reconstructed road of sufficient width and depth to have carried off said water. This the defendant could have done. * * * That within the last five years the defendant has failed and refused to construct, keep or maintain along or across its said road in front of her land any drainage sufficient to carry off and discharge the accumulations of water in her ditch above mentioned, which flows to and against defendant's said road, but instead of doing this, as it was its duty to do, it wrongfully, unlawfully and against plaintiff's protest, suffered and permitted such inadequate drainage as exists along its roadway to become filled up and so obstructed as to cause the water flowing, in time of rains, from her own and said Hathaway land, to overflow her ditch above mentioned, and to back up so as to overflow her house, yard, etc."

A demurrer was sustained to appellant's petition, and it was dismissed. Although appellant was entitled to have the natural drainage of the surface water from her land and the lands lying back of and above it to flow off and over appellee's land, as was held by this court in *Stith v. L. & N. R. Co.*, 109 Ky., 174 (22 Ky. Law Rep., 653), this right did not extend further than to burthen the lower estate with the surface water of the upper as nature had done it. Appellant's contention is that she has the right to collect, not only the surface water from her own land, but that from adjacent land which would otherwise flow over hers, into an artificial channel, and then to thereby carry it in its accumulated quantity and accelerated force and cast it all upon the lower land of appellee at one point, requiring appellee to there receive it, and to provide for its subsequent disposal so that it would not damage her property. The only authority cited in support of the propo-

tained and used her ditch for fifteen years, and that by such user she had acquired the right to so gather and precipitate all the surface water from her land at the point named. Though this be so, it does not follow that the owner of the lower estate was bound to keep open a ditch to receive the water, even if he had done so for a period. The gravamen of the complaint is not that appellee has raised its roadbed, but that it has suffered a ditch alongside its road to fill up so that it won't accommodate the flow from appellant's ditch in rainy seasons. Although it is alleged that the county, prior to appellee's acquisition of the road, did keep the ditch clean, it is not charged that this was done for such length of time as would constitute an easement in favor of appellant's estate. Nor is it charged that appellee or the county had suffered the water from appellant's ditch to run over the road for any length of time. If any easement whatever has been acquired by appellant over appellee's property, under the facts stated in her petition, it is merely to use the ditch alongside its road to receive the water from her ditch. If one acquires the right to use a passway over another's land the owner of this right must repair the way, in the absence of contract to the contrary; that which the owner of the dominant estate acquires is the right to use the servient estate for a designated purpose, appurtenant to the dominant. The owner of the servient estate can not interfere with the enjoyment of the right. But this right applies only to the realty, and not to the personal service of the owner of the servient estate. If appellant has acquired the right by prescription to use the ditch alongside appellee's road, to that extent and as an appurtenant to her land it is her ditch, and she may clean it when necessary for its proper enjoyment. It is not claimed that she has been denied this right.

Wherefore, the judgment must be affirmed.

DUNLAP, ASS'EE, &c. v. FIBLE & CRABB DISTILLING CO., &c.

(Filed December 2, 1903—Not to be reported.)

1. Assigned estates—Allowance to assignee—The assignee of an assigned estate who devoted the greater part of his time and labor for a period of nearly two years to the settlement of three very much involved and entangled estates is entitled to as much as \$2,400 compensation from the three estates, and the order of the chancellor in allowing him only \$1,100 was erroneous.

2. Same—Creditors of the estates can not be heard to criticise the assignee's management of the estates as having been injudicious and wasteful for the purpose of defeating his claim for additional allowance where they permitted his reports made to the court from time to time to be approved and confirmed without exception or objection, and made no attempt to have him removed on account of his alleged wasteful management.

3. Same—Where the same creditors asserted their claims against the assets of two estates which were so badly involved as to require settlement together, it was proper to make an allowance to the assignee out of the unexpended assets in one of them.

W. S. Pryor for appellants.

Opinion of the court by Judge O'Rear.

The Fible & Crabb Distilling Co., a coporation, W. L. Crabb, as surviving partner of a firm of liquor dealers styled Fible & Crabb, and W. L. Crabb individually, executed a joint deed of assignment of all their property to appellant, John L. Dunlap, in 1887, for the benefit of their creditors generally, the assignors being insolvent. Appellant qualified as assignee of each of the estates, and entered upon the discharge of his duties. He immediately filed a petition in the Henry Circuit Court, setting up the deed of assignment, and alleged that the affairs of all the assignors were so intermingled with each other, and were so complicated and in such a state of confusion, that it was impossible for him to immediately render a statement thereof, but that they were all insolvent; that they had each endorsed for the others to such an extent that it was necessary to settle all the estates together to avoid costs, delay and confusion. An injunction was sought and granted requiring all the creditors to present their claims in the one action. The advice and direction of the chancellor in the manner of the administration of the estates was sought by the prayer in the petition. Numerous warehouse receipts had been issued by the distilling company, of which W. L. Crabb was the president, some of which appear to have been duplicated, involving the estates and the title to the whisky in great confusion. The assignee devoted his time and labors for a considerable while, probably for the better part of two years, to the untangling of the involved conditions and settling with the United State government, and collecting warehouse storage fees, paying taxes, and the general supervision of the estates. He advanced some money to pay expenses to the extent of ten or twelve hundred dollars. He moved for an allowance for his services before distribution, but the court allowed at that time only \$1,000 on account, and reserved the matter of further allowance. Later he moved again for an additional allowance, but it seems not to have been acted upon at the time. The court directed the disbursement of the proceeds of the liquor and of the sale of the distillery property, amounting to over \$80,000. At the winding up there was found to be about \$1,400 in the hands of the court's commissioner. Appellant asked that he be allowed \$2,000 additional for his services as assignee. This was objected to by a number of the larger creditors upon the ground that the \$1,400 in question had been derived exclusively from the estate of W. L. Crabb, which in the aggregate had netted less than \$3,000; that an allowance of \$2,000 for the settlement of that estate was unauthorized. A special circuit judge sustained the objection, and allowed appellant \$100 only.

Although appellees severely criticize appellant's management of the assigned estates as having been injudicious and wasteful, from the record before us the charge is not sustained. Furthermore, it appears from the record that appellant made settlements from time to time, and reported fully his conduct of the affairs of the estates. These were all approved and confirmed by the court without exception by the creditors, all of whom had been made parties to the record. If appellant's management of the trust had been wasteful or negligent, or otherwise inefficient, it was the privilege of the credi-

that is, \$1,400 more than the sum heretofore allowed to and paid him, that is, his services to all three of the estates are worth that much.

In view of the fact that the objecting creditors are the ones to whom about \$60,000 of the proceeds of the assigned estate of the distilling company have been paid as preferred creditors and holders of warehouse receipts for all the whisky, and that these same creditors are claiming the \$1,400 in question, or the greater part of it, as general creditors of W. L. Crabb, by reason of his endorsement of the distilling company's paper owing to them, the court might without impropriety direct the payment of the \$1,400 on hands to the assignee; or, if it should appear more equitable, and if there should appear any material indebtedness of W. L. Crabb, which was not also an indebtedness of the Fible & Crabb Distilling Co., then the court should require the creditors of the Fible & Crabb Distilling Co., who have received all the assets of that concern, to pay back pro rata enough of the money which they have received to make \$1,000, and then appropriate \$400 of the money on hand of W. L. Crabb to the assignee, making \$1,400 additional to be paid to the assignee in full for his services. Although all the whisky was in lien to these creditors of the distilling company, yet the services of the assignee were rendered in their behalf, were received by them without objection, were presumably beneficial to them in that they relieved them of a personal investigation and management and control in straightening out the affairs of the distilling company, it is only proper that they should pay for them. Fible & Crabb do not appear to have had any assets.

The judgment is reversed and cause remanded for further proceedings consistent herewith.

CHESAPEAKE & OHIO RY. CO. v. BOARD.

(Filed December 2, 1903—Not to be reported.)

1. Master and servant—Negligence—Where the foreman of a crew of workmen in the employ of a railroad company directed one of the crew to let a heavy timber down into a hole, which was being excavated by another of the crew with the knowledge of the foreman, the failure of the foreman to warn the workman that the timber was to be let down into the hole where he was at work and to furnish an adequate force to handle the timber was negligence which rendered the company liable for the injury to the workman from the timber falling on him.

2. Gross negligence—Definition of—The following instruction correctly defined gross negligence, viz.: "Gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life, under circumstances of equal or similar danger to the plaintiff on the occasion under consideration."

3. Excessive damages—A verdict for \$450 for a very painful injury to the leg, disabling a man totally or partially for several months, is not excessive.

W. H. Wadsworth and E. L. Worthington for appellant.

A. D. Cole for appellee.

Appeal from Mason Circuit Court.

for punitive damages, and none was asked or given.

Whether the proof in the case did in fact warrant an instruction for punitive damages does not appear to us to be material to the question presented and decided on this appeal. We do not indicate an opinion on the subject, which may or may not arise upon another trial in the circuit court.

The petition for rehearing is, in other respects, overruled.

GRAY, &c. v. UNITED STATES SAVINGS AND LOAN CO.

(Filed December 3, 1903.)

Compromise—Contract containing usury—A compromise by a debtor, upon the advice of his legal counsel, of a contract which he claims contains usury, but the usurious nature of which the creditor in good faith disputes in view of decisions of circuit courts in his favor, the appellate court not having passed upon the question, is binding upon the parties notwithstanding a subsequent decision of the Court of Appeals that such a contract contained usury, the true test in such matters being whether or not there is a bona fide controversy between the parties, about which lawyers might differ, without regard to the final determination of the question by the courts.

D. L. Pendleton and Hazelrigg & Chenault for appellants.

Beckner & Jouett for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Barker.

In the year 1894 the appellee, the United States Savings and Loan Co., which was a going concern, with its head office at St. Paul, Minn., instituted an action against appellant to recover judgment against him on two notes, one for \$500 and the other for \$400, and to enforce a mortgage lien, by which their payment was secured. On the 24th day of May, 1894, a judgment was entered as prayed for in the petition. The judgment rendered, with the accrued interest and costs, amounted, in round numbers, to \$1,300. Appellant, although summoned, made no defense to this action, but on the contrary his counsel consented that it should be entered.

Afterwards, on the 27th day of August, 1894, he entered into an agreement with appellee by which, in discharge of the judgment against him, he executed and delivered to it his note, with Betty Gray as surety, for \$1,050, payable on or before June 1, 1895; and to secure its payment they executed a mortgage on property belonging to them in Winchester, Ky. There were, after this compromise was made, a number of payments, the aggregate amount of which is in dispute, but which appellee admits to have been as much as \$271.50. Appellant failed to pay any further upon his note, and this action was instituted by appellee to recover judgment for the balance due thereon, and to enforce the mortgage lien given to secure it. To this action appellant filed an answer, alleging much larger payments on the note than the amount of the credits given in the petition; that the claim against him contained a large amount of usury, and also charging fraud and covin in the obtention of the original judgment against him, and in the compromise by which he executed and delivered his note for \$1,050 in its discharge.

Appellee, a member of a crew of workmen on appellant's railroad was injured while at his work. It was his duty to clear the dirt away the bottom of a partly filled trench, some four or five feet deep, and be the railroad track. The object of the excavation was to admit a post support to the track. The post was of pine, about twelve inches square three feet long. It weighed probably one hundred pounds. While appellant was stooping over his work the foreman of the gang, one Bullio, who was in the presence of appellee and was directing the work, ordered another workman to let the timber down into the hole. The workman dropped the timber into the hole, whereby appellee was injured. Appellant claims that the negligent act of dropping the timber was that of appellee's fellow workman. Even if this be true, the actionable negligence of the foreman, which, in appellant's opinion, makes the company liable for this injury, was two-fold: First, in not giving appellee timely warning that the timber was to be let down into the hole where he was at work; and, second, in not providing adequate support to handle the timber with due care to the safety of the workman below. Having been shown that it required at least two men to properly handle a piece of timber at that juncture.

In defining gross negligence the court instructed the jury that "gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe to avoid injury to his own person or life, under circumstances of equal or similar danger to the plaintiff on the occasion under consideration."

While it is admitted by appellant that this instruction conforms strictly with the definition given by this court in the McCoy case, 81 Ky., 403, it is urged that appellee was not engaged in that class of work which was subject to such extraordinary hazard as to justify it. It is insisted instead that the proper definition, to wit: "Gross negligence is the want of slight care" (Shear and Redfield Neg., volume 1, section 49, 5th edition), should have been used. It may be doubted if there is an appreciable practical difference between the two. And whatever the hazard of the particular employment may be, whether upon a railroad or elsewhere, the degree of care is required to correspond with the danger of the situation. The definition given by the court or its equivalent should be applied in all cases where gross negligence is an element of the suit. Under it the jury will find whether the proper degree of care, necessitated by the particular circumstances of the case, has been shown. The verdict of \$450 for a very painful injury to the leg, disabling the man totally or partially for several months, is not excessive.

Judgment affirmed.

LOUISVILLE RAILWAY CO. v. O'MARA.

(Filed December 2, 1908—Not to be reported.)

Original opinion ante, 819.

Fairleigh, Straus & Fairleigh for appellant.

Wm. A. Earl for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Division, No. 2.

Judge O'Rear delivered the following response to petition for modification.

for punitive damages, and none was asked or given.

Whether the proof in the case did in fact warrant an instruction for punitive damages does not appear to us to be material to the question presented and decided on this appeal. We do not indicate an opinion on the subject, which may or may not arise upon another trial in the circuit court.

The petition for rehearing is, in other respects, overruled.

GRAY, &c. v. UNITED STATES SAVINGS AND LOAN CO.

(Filed December 3, 1903.)

Compromise—Contract containing usury—A compromise by a debtor, upon the advice of his legal counsel, of a contract which he claims contains usury, but the usurious nature of which the creditor in good faith disputes in view of decisions of circuit courts in his favor, the appellate court not having passed upon the question, is binding upon the parties notwithstanding a subsequent decision of the Court of Appeals that such a contract contained usury, the true test in such matters being whether or not there is a bona fide controversy between the parties, about which lawyers might differ, without regard to the final determination of the question by the courts.

D. L. Pendleton and Hazelrigg & Chenault for appellants.

Beckner & Jouett for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Barker.

In the year 1894 the appellee, the United States Savings and Loan Co., which was a going concern, with its head office at St. Paul, Minn., instituted an action against appellant to recover judgment against him on two notes, one for \$500 and the other for \$400, and to enforce a mortgage lien, by which their payment was secured. On the 24th day of May, 1894, a judgment was entered as prayed for in the petition. The judgment rendered, with the accrued interest and costs, amounted, in round numbers, to \$1,300. Appellant, although summoned, made no defense to this action, but on the contrary his counsel consented that it should be entered.

Afterwards, on the 27th day of August, 1894, he entered into an agreement with appellee by which, in discharge of the judgment against him, he executed and delivered to it his note, with Betty Gray as surety, for \$1,050, payable on or before June 1, 1895; and to secure its payment they executed a mortgage on property belonging to them in Winchester, Ky. There were, after this compromise was made, a number of payments, the aggregate amount of which is in dispute, but which appellee admits to have been as much as \$271.50. Appellant failed to pay any further upon his note, and this action was instituted by appellee to recover judgment for the balance due thereon, and to enforce the mortgage lien given to secure it. To this action appellant filed an answer, alleging much larger payments on the note than the amount of the credits given in the petition; that the claim against him contained a large amount of usury, and also charging fraud and covin in the obtention of the original judgment against him, and in the compromise by which he executed and delivered his note for \$1,050 in its discharge.

gations of fact inconsistent with those of the petition, and then, actively, setting forth the following state of facts: That, after the rendition of the original judgment against appellant he was about to prosecute an appeal therefrom to the Court of Appeals, contending that the judgment against him embraced a large amount of usury; that at that time appellant contended that it was a Minnesota corporation, and that its contract with appellant was a Minnesota contract; that under and by virtue of the laws of Minnesota it was valid and binding, and that the amount adjudged in favor against appellant was properly recoverable under the contract as construed and enforced by the laws of the State of Minnesota; that the question of the validity of this contract had not, at that time, been decided by this court, but, on the contrary, had been decided by the circuit court of Clark county, and various other circuit courts throughout the State of Kentucky, to be a Minnesota contract, and enforceable as such here; that the controversy between appellant and appellee was bona fide, and involved no question of whether or not the judgment in favor of appellee contained an element of usury; that, with this condition of affairs existing, appellee and appellant in person, and with the aid and guidance of his attorney, Rodney Haggard, an able and efficient counselor, in good faith, and for the purpose of settling and adjusting the differences between the parties, entered into the contract by which the note sued on was executed and delivered by appellant to appellee; that this contract of settlement and compromise was made in the presence of Rodney Haggard, appellant's counsel, with his aid, assistance and advice, both he and appellant being present at the time; that all of its terms were fully understood, approved and urged by appellant in person, and by counsel; that it was made and accepted in good faith by appellee, who had once stopped the sale of the property, which was advertised for that purpose, and thereafter, in good faith, abandoned and released all claims of any kind under the judgment.

No rejoinder was made to this pleading, and no proof adduced by appellant to establish the allegations of payment and fraud, which were pleaded in issue by the denials of the reply; the case being submitted on the pleadings, a judgment was rendered as prayed for in the petition.

In the absence of a rejoinder all of the well-pleaded allegations of fact in the reply are to be taken as true; and in the absence of evidence to support them all of the allegations of payment and fraud in the answer, which were controverted by the reply, must be taken as untrue. The question then for adjudication is whether or not the compromise made between the parties litigant, as set forth in the reply, can be upheld. There is a difference between a compromise by which a debtor agrees to pay in settlement of his debt a less amount of usury than that claimed by the creditor where there is no dispute between the parties as to the usurious character of their contract; and a compromise by a debtor of a contract which he claims to be free from usury, but the usurious nature of which the creditor in good faith disputes. The crucial question in such matters is, always, whether there was in good faith a controversy between the parties. The line between these two classes of cases sometimes becomes exceedingly fine, but it is none the less real for that reason.

on one side or the other, because there can be but one good right to the same piece of property."

In the case of *Fisher v. Mays' Heirs*, 2 Bibb, 418, in which one party undertook to dispute and uproot a settlement made with the other, for reasons set forth, the court said: "This is certainly no ground for relief. There can be but one superior and equitable right. If, therefore, the solemn compromise of the parties about property of doubtful title is made to depend on the question whether the parties have so settled their dispute as the law would have done, then it may be truly said that a compromise is an unavailing and idle act, which questions even the power of the parties to bind themselves."

In the case of *Creutz v. Hell*, 89 Ky., 429, the following admirable rule governing the question under discussion was laid down: "It seems that the inquiry is, whether the party, relying on the agreement, had reasonable and proper cause for believing that the question was doubtful, and that the right might ultimately prove to be with him. In other words, it is sufficient that there was an honest claim on his part, asserted without fraud, and that there was a real ground for dispute. If the point is so clear that it can only be answered in one way, the compromise would be invalid as wanting a consideration to uphold it. The adequacy of the consideration can not be inquired into; but the want of any consideration whatever may be inquired into. The verdict of a jury, or the decision of a court, depends in a greater or less degree upon the human understanding as to what is right and equitable in a given state of case; but when the given state of case has received such judicial interpretation as to admit of no question, supposing that the judicial mind will continue to run in the same channel (and such supposition should always be indulged in), then there can arise, in a legal and equitable sense, no consideration for a compromise of such matter. It is only in reference to such matters as counsel, learned in the law, or courts might differ, although the right ultimately turns out to be wholly on one side, that constitutes a valid consideration for compromising such matters. The question of such consideration can not be measured, hence its adequacy will not be inquired into."

The admitted facts show that at the time the compromise under consideration was entered into there was a bona fide controversy between the parties litigant; that at that time that contract between them had been upheld by the circuit court in which it was then depending as valid and binding; that the other circuit courts had so held, and this court, at that time, had made no ruling adverse to that position. It may be said, therefore, that there was a real controversy between the parties, the ultimate outcome of which, if carried to this court, could not then be known. This was evidently believed by the counsel for appellant, who was a man of high rank and standing in his profession, or he would not have advised his client to make the compromise. There is no more reason why a contract as to the usurious nature of which there is a genuine dispute, should not be compromised, than if it related to any other question of disputed legal right. In

ber and the corporation, and they had settled and adjusted their differences, the court, in upholding the settlement, said: "The parties to avoid litigation had a clear right to agree on what this amount was, and a compromise of such matter, if made as alleged in the answer fairly, deliberately and with the advice of counsel, can not be disregarded. By the arrangement appellees not only had their note cancelled and the mortgage on the land released, but got rid of all liability as stockholders in the association and terminated all connection with it or liability to it or to its creditors thereafter. The law delights to uphold compromises because they keep down strife and prevent litigation. The reasons which allow usury paid upon a compromise to be recovered have no application to a compromise made in good faith of other matters not tainted with usury, and for which a legal liability existed."

In the case of the United States Building and Loan Association, 23 Ky. Law Rep., 2109, it was said: "The court is of the opinion that the contract between the association and its borrowing member, by which they settled the matter of usury contained in its debt against him, and in which they agreed upon the price to be paid by the association for appellee's stock in it, and allowed as a credit upon the debt, was a meeting of the minds of the parties competent to contract about those matters. The controversy existing between them, and the problematical value of the stock, were sufficient consideration to support the agreement. It was a contract in every essential. It was such a contract that had the value of the stock of appellee been greater than was allowed in his settlement, he would have been compelled to accept the settlement and to have specifically performed it."

In the case of Latham v. Glasscocke, 10 Ky. Law Rep., 77, in an opinion by the Superior Court, it was said: "As the issue was made as to the usury in the note sued on, and the parties, after the issues were joined, compromised the matters involved in the action, whereby it was agreed that the judgment should be rendered for plaintiff for a certain amount, which was considerably less than the amount claimed, and the judgment was so entered, this judgment as effectually disposed of the question of usury as if the court had, upon the trial of the issues joined, rendered judgment for the same amount."

The case of the Cynthiana Building and Savings Association v. Ecklar, 23 Ky. Law Rep., 1467, is not inconsistent with the cases here cited. In that case there was no dispute on the question of usury; it was a mere compromise, which had the effect of causing the creditors to remit a part of the usury, and the debtor agreeing to pay the balance, together with the principal debt. There is no magic in the word "usury," which forbids a question as to its existence being settled between the parties the same as any other disputed and doubtful claim. In the case at bar, at the time the compromise was made, it was doubtful as to what would be the ultimate outcome of the claim on the part of the corporation, that its contract was a Minnesota contract, valid and binding by the laws of that State, and which should be valid and binding here. This court had made no ruling upon that question, and at that time the judicial utterance of the circuit court was in favor of the contention of appellee. Subsequently this court has

reason now to upset the settlement in favor of appellant, because this court has finally decided adversely to the claim of the appellee, than there would have been to upset it in favor of the appellee, so as to permit it to collect the full amount of the judgment originally rendered, if this court had adjudged the contract to have been a Minnesota contract enforceable by the laws of this State. As has been well said, it does not matter upon which side the right ultimately appears to have been, if at the time the settlement was made there was a bona fide controversy between the parties, about which lawyers and courts might differ.

For these reasons the judgment of the circuit court is affirmed.

MURPHY v. METZ, &c.

(Filed December 3, 1903—Not to be reported.)

Cloud on title—Where the owner of lands conveyed a part thereof to the trustees of a common school district for school purposes and afterwards conveyed the tract to another without excepting the previous conveyance, and subsequently, after many successive conveyances without excepting the school grounds, a remote vendee conveyed that part to the school trustees imposing certain conditions upon them not embraced in the former deed, the conditions cast a cloud upon the title which the trustees were entitled to have removed.

D. R. Castleman, Pryor & Sapinsky and W. S. Pryor for appellant.

Lane & Harrison for appellees.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.

Opinion of the court by Judge Paynter.

This action was brought by the appellees as trustees of School District No. 21, of Jefferson county, Kentucky, to remove a cloud from the title of about two acres of land upon which a school house is situated, and which is in the possession of appellees. On the 29th day of August, 1850, James Stinson, the owner, conveyed the land to Benjamin Williams, Preston Zenor and David Arnold as trustees of the school. The two acres seem to have been a part of a farm of about 120 acres. After Stinson conveyed the property to the school trustees he conveyed the farm and did not except from the deed the two acres. The farm, by subsequent deeds, was conveyed to others, and in none of which were the two acres excepted. Finally it was conveyed to the appellant by the same character of deed. In 1901 the question arose as to whether the school trustees had the title to the property. After some consultation the appellant executed and delivered to the trustees of the district a deed for the lot, which was placed upon record. There was a recitation in the deed as follows: "The parties of the second part agreeing, and it is hereby made a condition of this conveyance, in consideration of these presents, to keep the said property aforesaid fenced in on all sides. It is made a further condition herein that at any time the property conveyed herein shall be abandoned or ceased to be used for school purposes, both the title and possession shall revert to the first party hereof."

The trustees not being aware of the rights of the district when this was made, but subsequently being advised that they had title to the property by virtue of the Stinson deed, instituted this action to remove the trust upon the title by the deed made by the appellant. There was no trust in the Stinson deed which imposed the burden upon the trustees to the property, nor did the Stinson deed provide that the property should revert to him. If the appellant had any interest in the property, it was greater than that which remained in Stinson after his deed to the trustee. If any right remained in him and was vested in the appellant, she did not attempt to convey such right to the trustees of the district. Instead of a deed vesting the district with any rights, the purpose of it seems to have been, and the effect of it was, to restrict or limit their rights in the property. Its terms were prejudicial to their rights and cast a cloud upon their title to the property, and the court properly adjudged that it should be removed. If the property is ever abandoned for school purposes the question can be determined whether the Stinson deed vested the trustees of the school with the fee-simple title to the property.

The judgment is affirmed.

BROOKS v. PAINE.

(Filed December 3, 1908—Not to be reported.)

Discharge in bankruptcy—New promise—A promise to pay a debt after discharge has been discharged in bankruptcy will support an action on the debt provided the promise is clear, distinct and unequivocal. The evidence in this case shows an unconditional promise to pay.

O'Neal & O'Neal for appellant.

Samuel Avritt for appellee.

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division.
Opinion of the court by Judge Paynter.

The appellee, while indebted to the appellant in a sum greater than \$3,000, obtained a discharge in bankruptcy, claiming that appellee had, subsequent to his discharge in bankruptcy, promised to pay the debt, this action was brought by appellant on the promise.

Under the adjudication of this court such an action can be maintained on a promise made under such circumstances. The question here is, was the promise made? The appellant, Brooks, testified that appellee had repeatedly made the promise. In detailing what appellee said on some occasions it was evident that there were conditions in the promises, and on such promise an action could be maintained unless the plaintiff pleaded and proved the occurrence of the conditions. The mere expression of an intention to pay was not sufficient to enable the debtor to maintain the action as the promise to pay must be clear, distinct and unequivocal. The fact that the bank made promises with conditions attached, or merely expressed an intention to pay, would not operate to prevent a recovery on a clear, distinct and unequivocal promise to pay the debt. We are of the opinion that such a promise was made. The appellant and Joseph J. Brooks testified that on

constitutionally or otherwise, to pay the debt. W. F. Adams testified that appellee told him he intended to pay Brooks his debt and that he had promised to pay it. The testimony of Adams tends to contradict Palne's statement that he had not made any promise to pay the debt. We are forced to the conclusion that appellee promised unconditionally to pay the appellant's debt.

The judgment is reversed for proceedings consistent with this opinion.

COMMONWEALTH, BY, &c. v. CHESAPEAKE & OHIO RY. CO.

(Filed December 3, 1903.)

Railroads—Taxation of capital stock—Situs—The capital stock of a railroad corporation which fails to pay the taxes due by it does not thereby become taxable in a county through which the railroad runs, and in which it has an agent, on the theory that the corporation has the possession of the corporate property as the bailee of the stockholders and that, therefore, the stock of such stockholders is taxable in such county; but, being personal property, the stock is, under the well settled law, taxable at the place of residence of the owner.

W. T. Cole and A. E. Cole & Son for appellants.

W. H. Wadsworth and E. L. Worthington for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Barker.

Samuel T. Bailey, the sheriff of Greenup county, Kentucky, instituted this proceeding in the county court of Greenup, under section 4241 of the Kentucky Statutes, authorizing the sheriff to list omitted property.

The proceeding was commenced by filing in the Greenup County Court a statement, in the form of a petition, which sets forth, substantially, the following:

That the Chesapeake & Ohio R. R. Co. consists of three corporations: First, a corporation created by the laws of the State of Virginia; second, a corporation created by the laws of the State of West Virginia; and, third, a corporation created and existing under and by virtue of the compliance of the first two with sections 194 and 211 of the Kentucky Constitution, and sections 571 and 841 of the Kentucky Statutes; that these corporations have one or more places of business in Greenup county, with an authorized agent, or agents, thereat, upon whom proces can be served; and by their compliance with the Constitution and statutes of Kentucky, they, as well as the stockholders, agreed and undertook to submit to the laws of this Commonwealth, and especially that the situs of the stock in the corporation should be for the purpose of taxation within this Commonwealth.

That these three corporations jointly own and possess and operate a line of railway, beginning at Covington and running along the Ohio river through Greenup county to Ashland, Ky., and through the State of West Virginia to Newport News, in the State of Virginia.

That on or about the 1st of January, 1899, the Virginia and West V. corporations entered into a written contract with the Maysville & Big R. R. Co., by which they leased its line of road extending from Cov through Greenup county to Ashland, Kentucky, for a term of ninety years, with the right of perpetual renewal.

That neither of these corporations, nor any one for them, has ever this lease for taxation, and it has been entirely omitted by the assessor Greenup county and the assessor of every other county in this State by all other officers, whose duty it is to list the property, or assess it, listing the railroad commission and the board of valuation and assessment the State.

That neither of these corporations has ever paid any taxes to the Commonwealth on this lease; that they have, since the — day of —, 1891 prior thereto, exercised a franchise continuously within this Commonwealth and neither of them has ever reported to the railroad commission, or board of valuation and assessment, or any one else, the value of this lease, or franchises, for taxation, and they have been wholly omitted by board of valuation and assessment, the railroad commission, and every officer whose duty it is to attend to these matters. Nor has any tax been paid to the Commonwealth by any of the corporations on their franchise although these franchises are of the value of twenty million dollars in open market, and the lease is of the value of fifteen million dollars in open market, that the capital stock of each corporation has been at all times of the value of \$62,525,000, divided into shares of the par value of \$100 each and that this stock has always been worth par value in the open market; that this stock has been owned and held by divers and sundry persons whose names appellant has not been able to ascertain, but which are all known to the appellee.

That by reason of the failure of the corporations to pay taxes on their corporate property the stockholders therein should have listed their stock for assessment and taxation, but they have wholly failed and refused to do so and the stock has been wholly omitted by the assessor of Greenup county, the board of valuation and assessment, the railroad commission, and every other officer in this State, whose duty it is to cause it to be listed, and no taxation has ever been paid thereon to the Commonwealth; that the capital stock, surplus, reserve fund, franchises, good will and business opportunities and possibilities of the corporations, which represent the stock belonging to the stockholders, have at all times been in the possession, physical control and keeping of the corporations, as bailees of the stockholders thereof; that, therefore, the different corporations are liable to the Commonwealth on account of taxes due from their stockholders on their stock for the years from 1892 to 1902, inclusive.

Wherefore, it was prayed that the defendant corporations be compelled to list in their own names, as bailees in possession, the stock of their stockholders, and that it be assessed against the corporations, as bailees in possession, for each and every year, beginning with 1892, up to and including the year 1902.

A demurrer was filed by appellee, which was sustained by the judge of the county court, and the petition dismissed; whereupon the plaintiff prayed

It is the theory of the appellant that because the corporations have failed to list and pay taxes due upon the corporate property, therefore, all of the individual stock held by the stockholders in the corporations becomes at once liable for taxation in Greenup county, Kentucky, without reference to the residence of the owner. This theory is based upon sections 4030 and 4088 of the Kentucky Statutes, which are as follows:

"Section 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, * * * shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair value estimated at the price it would bring at a fair voluntary sale.

"Section 4088. The individual stockholders of the corporation which are, by this article, required to report and pay taxes upon its corporate franchises, shall not be required to list their shares in such companies so long as the corporation pays the taxes on the corporate property and franchises, as herein provided."

By these sections it is contended that the stock of the individual stockholders, upon the failure of the corporation to pay its just taxes, at once becomes liable to taxation in any county through which the road runs, and in which it has an agent upon whom process can be served.

Sections 4077 to 4086, inclusive, of the Kentucky Statutes contains an elaborate and thorough system for the assessment and collection of taxes from a large class of the important corporations of the State, including railroads, both foreign and domestic. By this system the board of valuation and assessment is established, whose duty it is, upon information obtained in the manner therein set out, to assess the franchises of these corporations, and to certify to the various counties, municipalities and taxing districts the amounts liable to them respectively for local taxation.

Conceding it to be true, for the purposes of this case, that by section 4088 the stock of the individual stockholders of a railroad corporation becomes liable to taxation if the corporation itself fails to pay the taxes on its corporate property and franchises, it does not follow that this stock is taxable anywhere else than the residence of the owner. Section 4052 is as follows: "All taxable estate shall be assessed and valued as of the 15th of September in the year listed, and the person owning or possessing the same on that day shall list with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same.

"Section 4023. The holder of the legal title, and the holder of the equitable title, and the claimant or bailee in possession of the property, on the 15th of September of the year the assessment is made, shall be liable for taxes thereon; but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment."

The corporations in question are not the bailees in possession of the individual stock within the meaning of the sections of the statute above quoted, and the allegation of the petition to that effect is a mere conclusion

of law. On this subject the petition states: "Plaintiff states that its capital stock, surplus, reserve fund, franchises, good will and business intangibles and possibilities of said corporations which represent the property belonging to the stockholders of said corporations have at all times been mentioned been in the possession, physical control and keeping of the defendant corporations as bailees of the stock of said stockholders, in virtue thereof said defendants are liable to this Commonwealth on a return of taxes due from the said stockholders in said corporation on their property from the year 1892 up to and including the year 1902."

It will be observed that the allegation is that the corporate property has been in the possession, physical control and keeping of the defendant corporations as bailees of the stock of said stockholders." Undoubted corporate property has been in the possession and control of the corporations but not as bailees of the stockholders; the corporate property belongs to the corporation, and is, of course, rightfully in the possession of its officers. The shares of stock belonging to the stockholders are mere certificates representing the respective interests of the various holders in the corporate property but it is well settled that the capital stock of a corporation, and the shares of stock held by the stockholders for the purpose of taxation, may be considered generally as, entirely distinct property. Shares of stock are personal property, belonging to the shareholder, and, as such, it is taxable (if taxed) at the residence of its owner. In the case of *Wren v. Boske, Sheriff*, 2 Law Rep., 1780, on the subject of the situs of personal property for taxation this court said: "We are referred to a number of decisions holding that the personal property of nonresidents of the State, which has obtained a license to do business in the State, may, if the legislature so provides, be taxed in that State. The same rule no doubt would apply between the different counties of the same State if the legislature so provided. But the question after all is one of legislative intent. By our statute land shall be listed in the county in which it is located. (Kentucky Statutes, section 4015.) The assessor makes the list on the taxpayers, and takes their lists. (Kentucky Statutes, section 4016.) Personal property of every kind must be stated and valued separately from real estate. (Section 4050.) All taxable estate shall be assessed as of the first day of January next, and the person owning or possessing it on that day shall be liable to the assessment. (Section 4052.) The assessor, before returning an assessment, must apply at his residence. (Section 4055.) There is no provision in the statute anywhere for the assessment of personal property in the county in which it is situated, although there are such provisions for the assessment of land, and, taking the whole statute together, we think it reasonably clear that the legislature contemplated that personal property was to be given in by the taxpayers in the county of their residence." *Jones v. Commonwealth*, 63 Ky., 2, this court said: "By the general law the owners of property subject to taxation are called on and give in their property in the county in which they reside, though the property may be in other counties." Again, in *Gates v. Barrett*, 79 Ky., 200, the court said: "If personal movable property is to be assessed for taxation at the place of the owner's residence." (*Boske, Sheriff v. Security Trust and Safety Vault Co.* Ky. Law Rep., 181; *Covington v. Wayne*, 23 Ky. Law Rep., 826.)"

In the case of *Langdon-Creasy Co. v. Trustees of Owenton Common S*

taxable, not where the branch business was carried on, but in the county where the corporation had its residence and principal place of business; in other words, that the situs of the personal property for taxation was the residence of the owner. All doubt on the question involved in this action seems to be set at rest by the fact that the schedule required by section 4058 to be furnished the taxpayer, for the purpose of listing his property, provides for the listing of stock in corporations which have not paid the taxes due by them. Item 10 of the schedule is as follows: "Amount of stock in joint stock companies or associations of this State not paid on by the company or association." This shows conclusively that the stock in the corporation is to be listed for assessment by the individual stockholder in the county where he gives in his assessment.

The statute authorizing the assessment and taxation of personal property in the hands of the bailee in possession refers to personal property held by one person for the use of another. This is not true in the case at bar. The shares of stock are in the possession and under the control of the individual stockholders, and not in the hands of the corporation, at all. The stock sought to be taxed in this case in Greenup county is, perhaps, scattered throughout the commercial centers of the world; it is being bought and sold day by day on the stock exchanges of New York, London, Paris, Berlin, and other cities; it is constantly changing hands, and can not, therefore, be considered, in any sense, in the possession of the corporation. It would be a strange rule of fiscal law which would authorize the taxation of \$62,525,000 of stock in this large corporation in Greenup county, when it does not appear that one share of it is owned by a resident of that county. As said in the case of the City of Louisville v. Sherley, 80 Ky., 71: "The proper place to list personal property in this State, or rather its value under the equalization law, is in the county where the owner lives."

As this was the conclusion reached by the trial judge the judgment is affirmed.

AULBACH'S EX'OR v. READ, &c.

(Filed December 3, 1903—Not to be reported.)

1. Courts of continuous session—Motion for new trial—A motion to set aside a judgment in an equitable action pending in a court of continuous session made within fifteen days after its rendition is in effect a motion for a new trial, and operates to suspend the judgment until it is finally disposed of, which disposition may be made after the expiration of sixty days.

2. Decedent's estate—Judicial sale—Purchase by executor—Where the executor of a will bought in the mortgaged property at a judicial sale for the amount of the testator's debt and had a deed made to himself as executor and afterwards charged the estate with numerous items of expense incurred in attending to the property, he can not be heard to claim the property as his own so as to defeat the right of the executor under a will probated subsequently to the one which made him the sole devisee, and which made an entirely different disposition of the estate, to the property or the proceeds of a sale thereof.

O. P. Schmidt for appellant.

W. A. Byrne for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barker.

Theresa Aulbach died domiciled in Hamilton county, Ohio, leaving wills; the first of these was admitted to probate, and by it the testator after the payment of her just debts, devised all of her property to the appellant, and nominated him as her executor, without bond.

Among the assets of the estate there came into the hands of appellant a note of John E. Hamilton for the sum of \$1,500, the payment of which was secured by a mortgage on a farm in Kenton county, Kentucky. This appellant prosecuted to a judgment, enforcing the mortgage; and the commissioner's sale purchased the farm for the debt due the estate. The action was prosecuted in the name of Frank Fehr, executor of Theresa Aulbach, and the deed of the commissioner was so made to him. After that he seems to have charged himself, in his accounts as executor, with the \$1,500 note. Subsequently he sold the farm to Mrs. Adelhelde Dickman for the sum of \$1,500, \$400 of which was paid cash, and for the balance the purchaser executed six notes, secured by a lien on the property. The last of these notes amounted, in the aggregate, to \$1,000, and not being at maturity, appellant instituted an action in the Kenton Circuit Court for judgment and enforcement of his lien.

In the meantime another will of Theresa Aulbach had been admitted to probate in the proper court in Hamilton county, Ohio, which was altogether different from the one first probated. By it the decedent left her property to her relatives. The order admitting this second will to probate and setting aside the order of probate of the first will was appealed by appellant to the Supreme Court of Ohio, where it was finally affirmed, and the question of the validity of the two wills was decided adversely to appellant. Upon a copy of the second will was admitted to probate in the county of Kenton county, and John B. Read, the appellee, was appointed administrator with the will annexed. When this was done the appellee, as administrator with the will annexed of Theresa Aulbach, intervened in the case of Frank Fehr, Executor v. Adelhelde Dickman, by filing a petition to be set aside a party, which substantially set up the facts as herein stated, and prayed that the assets arising from the enforcement of the mortgage lien be turned over to him instead of to appellant, who had then ceased to be executor.

This claim was disputed by appellant, who alleged that he had purchased the farm in his individual capacity, and that it thereby became his property, so that the notes and their proceeds belonged to him individually; and this is the real question in this case. Adelhelde Dickman paid into the court the sum of \$1,223 50, being the full amount of the balance due from the purchaser of the farm in question, and from that time ceased to be interested in the litigation, leaving the appellant and appellee to contest over the money.

The issues having been made up between the parties litigant, the case was finally submitted to the court, and a judgment rendered in favor of appellant. This judgment, upon motion of appellee, was set aside in order

appellant; whereupon appellee again moved to set aside the judgment motion was made within fifteen days after the adverse judgment rendered against him. The court took the matter under consideration after the expiration of about five months, set aside the former judgment and entered a judgment in favor of appellee; of which appellant complaining.

The first proposition urged by appellant is that the court, at the time it set aside the judgment in his favor, had lost jurisdiction to do so by reason of the expiration of more than sixty days from its rendition. This proposition is founded upon the theory that the motion of appellee, made within fifteen days after the rendition of the judgment, was not a motion for a new trial, and in support of this appellant relies upon the case of *Williams v. Williams*, 21 Ky. Law Rep., 1209. To this we can not agree. In this case, this being an equitable case, the motion to set aside the judgment within fifteen days after its rendition was for all purposes a motion for a new trial. The opinion in the case of *Williams v. Williams* turns upon the fact that the motion was not made within fifteen days after the rendition of the judgment and it was, therefore, held that it could not operate as a motion for a new trial, and that the court lost jurisdiction after the expiration of fifteen days to set aside its judgment. The point relied upon by appellant was not made in the case of *Trapp v. Aldrich, Receiver*, 23 Ky. Law Rep., 1663, in which the question under discussion was elaborately argued, *Williams v. Williams*, and other cases, explained and limited as herein set out.

We think the motion to set the judgment aside, having been made within fifteen days after its rendition, was a motion for a new trial, and, if granted, it suspended the judgment until it was disposed of. (*Conover v. Bavarian Brewing Co.*, 24 Ky. Law Rep., 1663.)

On the merits appellant contends that he purchased the farm in his individual capacity, and that the words in the deed, by which it was conveyed to him as executor of Theresa Aulbach, were merely descriptive.

This contention can not be upheld. The note from Hamilton was the property of the decedent, and the purchase of the farm at the time was a purchase with the assets of the estate; being such, appellant purchased the farm as trustee, and not individually. (*Longest, Adm'r v. Taylor*, 1 Duvall, 193; *Moore v. Moore*, 5 Dana, 464; *Handlin v. Davis*, 11 Clayton v. Clayton's Ex'or, 11 Ky. Law Rep., 472; *Bartlett v. Gray*, 4 Ky. Law Rep., 615.)

Independent of the law of the case, however, as a question of fact, it is clearly shown that appellant purchased the farm as executor, and not in his individual capacity. A statement of the estate of Theresa Aulbach, with his pleading shows that he charged the estate with \$60 for the farm, \$65 for clover seed, and \$55 for timothy seed; \$135 for material and labor; \$625 for one hundred and twenty-five trips to the farm, and \$30 for the expense of selling it. An affidavit made by him in reference to the estate was put in evidence, contains the following:

"Frank Fehr, being first duly sworn, makes oath and says that

of the items or credits in his account filed as executor of said estate unable at this time to produce vouchers for the various reasons here stated as to the various items:

"Voucher No. 2. This item is for taxes paid on a farm which he bought as executor at the sale of John E. Hamilton, assignee, who was a minor to deceased; that he actually paid this amount, it being for two years and had a receipt therefor, but to the best of his knowledge and recollection said receipts were handed over to Mrs. Dickman, who purchased same from him. * * *

"Voucher No. 5. This amount was paid to Mr. Stauffenberg, who owned a farm adjoining the farm purchased by him as executor, and was for pruning the trees on said farm.

"Voucher No. 6. This was paid out to various persons for labor and material used in the construction of a fence around the farm, but affiant to produce only the receipt for the barbed wire and locks used for said amounting to \$31.

"Voucher No. 22. This amount was paid to the master commissioner prepared the deed from himself to affiant, as executor; affiant received receipt therefor.

"Voucher No. 24. The amount represented by this voucher was paid to Mr. Herzog, a real estate agent in Covington, as commissions for the sale of the farm.

(Signed) "FRANK FEHR, Executor."

"Sworn to before a notary."

Appellant did not testify in the case, and offered no evidence to controvert or explain away the statements in his account and affidavit. This conclusively, that his claim, to have purchased the property individually, was an afterthought to meet the emergency arising upon the probate of the second will. The fact that he charged himself with the \$1,500 is immaterial; he did not pay out this money, and when the real representative of the estate receives the funds now in court appellant's accounts as executor can be corrected so as to do him justice.

For these reasons the judgment is affirmed.

BOWMAN, &c. v. MOSS.

(Filed December 3, 1908—Not to be reported.)

Action in ejectment—Partial transcript—None of the title papers produced on the trial before the jury nor the record in the suit in which plaintiff claimed to have purchased the property at commissioner's sale having been copied into the transcript, the verdict for defendant must be assumed to be correct.

N. J. Weller for appellants.

Cook & Jones for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Hobson.

This was a common-law action of ejectment brought by appellants against appellee. The defendant traversed the allegations of the petition, a

defendant, and the plaintiffs appeal.

None of the title papers introduced on the trial before the jury are copied in the record. The parol testimony heard on the trial and the maps introduced before the jury are brought up, but there being nothing in the transcript to show plaintiffs' title to the property the verdict can not be disturbed. It appears from the parol evidence that the dispute was as to what is lot four in block ten of Hull's addition to Pineville, and arose in this way: Both the plaintiffs and the defendant claim title under a commissioner's sale, at which the commissioner held in his hand a printed map and sold the lots as indicated on this map, pointing them out on the ground as the sale progressed. Plaintiffs bought lot four at this sale, but insist that the lot they bought is not lot four on the printed map used by the commissioner in selling the property, but lot four on the recorded map of the town. The recorded map of the town is lost, and only a tracing of it was introduced in evidence. There is some question made as to the correctness of this tracing, but in the absence of the record of the case in which the sale was made, and the deed made by the court pursuant to the commissioner's report, we must presume that the verdict of the jury is correct. The parol evidence tends to show that the lot plaintiffs now claim is not in fact the lot they bought at the sale, and the verdict of the jury seems to be in accord with the real equity of the case.

Judgment affirmed.

BROWN & BRO. v. LAPP.

(Filed December 3, 1903—Not to be reported.)

Commissions on sales—Interest—In this action to recover commissions on sales of whisky the judgment is supported by the evidence, and the court properly allowed interest from the date of the institution of the suit.

E. E. McKay for appellants.

Norton L. Goldsmith for appellee.

Appeal from Jefferson Circuit Court, Common Pleas Branch, First Division.

Opinion of the court by Judge Hobson.

Appellee Lapp filed this suit against appellants, alleging that they employed him as their sole agent in the city of Louisville for the sale of a brand of whisky known as The Queen of Nelson, and agreed to pay him for his services 50 cents on every barrel of the whisky sold by him, or them, or any other person, in Louisville. He alleged that the defendants sold to Collins & Co. 960 barrels of the whisky, on which his commissions would amount to \$480, and refused to pay him the commission they had promised to pay him. The defendants traversed the allegations of the petition, and there having been a verdict and judgment for the plaintiff, they appeal.

The testimony of Lapp established the contract set up in his petition, also the sale of the whisky by the defendants as therein alleged. Lapp is a

whisky broker, and sold a good deal of the whisky. It showed that the whisky belonged to Brown & Bro. The & Bro. contradicted Lapp as to the contract and as to the whisky; but the questions of fact were fairly submitted to the jury, and there was sufficient evidence to warrant the case to the jury. In view of the facts brought out in the payment of commissions on other sales to Lapp, it appears to have been done in the name of Brown & Bro., and if correspondence was carried on in this name, we can not say the jury was not warranted by the evidence. The court directed the jury to allow interest from the filing of the suit. The interest. The filing of the suit was a demand for the money to allow interest from the filing of the petition in cases of Judgment affirmed.

WYMOND, &c. v. BARBER ASPHALT PAV

(Filed December 3, 1903—Not to be reported)

1. Street improvements—Original construction—The regular turnpike road which had been taken into a city along with did not constitute an original construction within the meaning of cities of the first class, which makes abutting property for the improvement of a street only in case of original construction to preclude the city from assessing the cost of a subsequent against the property owners.

2. Apportionment of cost—In apportioning the cost of construction of a street which was paralleled on the east side by the west side by another street for a part of the distance the council of the city properly treated the territory as if divided by principal streets, and correctly defined the territory to be lying a line midway between the improved street and the parallel east side and between it and the street on the west side at the point where it ceased to be parallel.

Carroll & Carroll and Lane & Harrison for appellants.

William Furlong for appellee.

Appeal from the Jefferson Circuit Court, Chancery Branch.

Opinion of the court by Judge Paynter.

This appeal involves the question of the validity of assessments for street improvement. The general council of the city by appropriate resolution, ordered the improvement of Park Place construction. The territory embracing Park Place was taken many years ago. At that time Park Place was the old National Road. Some years previous to the passage of the resolution under consideration the city expended about \$400, and at another time repairing the road and in placing metal on it.

As the turnpike road had been constructed before the turnpikes was brought into the city, and as the city made the road, and thereafter used it as a street, it is contended by the property owners with the cost of the improvement in the

of Louisville. The construction of the road before the territory through which it runs was annexed did not make it, in the meaning of the charter, an improvement by original construction. It seems to the court that the repairs which the city made on it can not be regarded as a construction of the road in any sense, much less be regarded as an improvement by original construction. Until the street was improved as provided by the resolution of the general council, and for which the property owners are charged, there was no original construction of the street. (*McHenry v. Salvage, &c.*, 99 Ky., 232.)

East of Park Place is Third street, running parallel therewith. On the west is Fourth street, which parallels it only in part. In making the apportionment the general council treated Fourth street as paralleling Park Place the entire distance. In making the apportionment the territory to be taxed on the east side of Park Place was defined by a midway line between Park Place and Third street. The territory on the west side was defined by a midway line between Park Place and Fourth street and Fourth street extended. It results from this that the territory to be taxed on the east side of Park Place is wider than that on the west side of it. The general council deemed it proper to treat the territory in making the apportionment as if it was defined into squares by principal streets. If Fourth street had been actually extended, and the territory defined by principal streets, the law would have taxed the territory in the manner attempted to be done by the general council. It was the duty of the general council to define the territory to be taxed, and we are of the opinion that it did so in an equitable and just way. We think this apportionment is sustained by *Dumesnil, &c. v. Shanks, &c.*, 97 Ky., 354, and *Cooper v. Nevin*, 90 Ky., 88.

It appears that about one hundred and forty feet of the distance to be improved near the Confederate monument had been improved by original construction. The city authorities recognized that the property owners along the improvement should not, under the charter, be required to pay for the improvement of that part of the street. The city paid for the construction of that part of it, hence the property owners were not made to pay that cost. We do not think that this was prejudicial to the property owners.

The judgment is affirmed.

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13. a married woman has the power, with the consent of her husband properly evidenced, to dispose of her separate personal estate last will and testament, and such consent is no fraud upon the rights of his creditors
14. section 2535 of the Kentucky Statutes, which extends the period within which an action may be instituted for damages to the real estate of a married woman for a like number of years after the removal of her disability or death as is allowed to persons having no disability to bring such action after the accrual of the right of action, is not repealed by the married woman's act of 1894 authorizing her to sue and be sued as a single woman
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4. insufficient indictment for violation of special local option statute
5. sufficient indictment for embezzlement against president and director of investment company
6. mock marriage—solemnizing marriage under pretense of authority—indictment need not set out what pretense of authority was made, nor aver conspiracy between the person performing the ceremony and the seducer
7. robbery—avowment of ownership—allegation that the property stolen was taken from the person of a particular individual was a sufficient allegation of ownership
8. an indictment against the president of a turnpike for failure to make annual report to the county court is defective in failing to negative the presumption that directors had made it
9. an indictment for rape committed, as alleged, upon a girl over twelve years of age while she was insensible from the effects of a drug, need not aver knowledge of her condition on the part of the accused
10. an indictment for rape may properly state in the alternative the several modes by which the crime might have been committed
11. an indictment for failure of a physician to keep a registry of births and deaths, as required by statute, is defective in failing to charge that the accused has attended births and deaths
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2. immaterial irregularities in proceedings to sell infants' real estate
3. answer to merits of action instituted by infants is waiver of defect of service on infants
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9. an action by the holder of a purchase money lien on lands to recover the amount of the sale bonds therefor was not barred by the judgment ordering a sale of the lands to satisfy a mortgage lien, where the second suit was a direct attack upon the judgment for fraud in the procurement thereof
10. a personal judgment entered against a party not before the court is void—consent of an attorney who had no authority to represent such defendant does not validate it
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8. the mere fact that there are ninety-five acres in a tract of land does not indicate that it can be divided without materially impairing its value
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2. conflicting titles—in certain case the title of him whose deed was first recorded was superior.
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- an ordinance of a city of the second class imposing a license tax upon the business of real estate agent is not violative of the Constitution

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2. particular facts constituting pledge of pig iron.
3. what constitutes a *lis pendens* lien.
4. partial assignments of choses in action—priority as between equities in same.
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6. construction of dock—under laws of Indiana no lien attaches for materials unless claim is recorded in the proper office within ten days.
7. carrier has lien for charges on freight transported by it, and such lien extends to charges advanced to connecting carrier.
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4. a municipality is liable to the jailer for the keep of city prisoners committed to jail by the police court in cases in which the officer gets the benefit of a fine, although the police court failed to observe the provisions of the statute requiring such prisoners to be confined in the city workhouse
5. the city is not liable for the keep of prisoners in cases in which fines are imposed by statute
6. an ordinance which allows to the property owner the privilege of himself putting down sidewalks which were thereby ordered constructed is not thereby invalidated, although the statute does not require the granting of that privilege
7. the property owner can not successfully assail the ordinance because the opportunity allowed him for putting down his sidewalk was not ample
8. an ordinance of a city of the sixth class granting the privilege of constructing and operating a telephone system within the city passed at a called meeting of the board and at the same meeting at which it was introduced, is void
9. construction of streets—where an ordinance of the city provides that contracts for street construction should be let, after advertisement, to the lowest and best bidder, the provision should be strictly complied with, and a mere compliance with the form, in the absence of actual competition in the bidding, is not sufficient
10. an ordinance requiring the construction of a street with a patented composition, which is under the exclusive control of one person, and on which there can be no competitive bidding, without placing it in competition with other like or equally good material for such purposes, is void
11. an ordinance of a city of the second class which imposes a license tax upon the business of a real estate agent, embracing within the one head the numerous kindred occupations, and imposing only one tax on the whole, is not subject to objection by a person engaged in either or all of them
12. the general council of cities of the first class have the power to pass an ordinance to punish the offense of operating a pool room and is not precluded from doing so by reason of the fact that such act was an offense at common law
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18. the backing of a railroad train over a crossing at a leading time of day where the main part of a town in the dark and with no signal is gross negligence
19. where the foreman of a crew directed the letting of a heavy piece of timber into a hole which was being excavated, without notifying a workman who was in the hole that the timber was to be let down, was negligence which rendered the company liable for an injury to the workman resulting from the timber falling on him

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1. where no affidavits filed showing newly-discovered evidence sufficient to error to overrule motion for new trial
2. newly-discovered evidence which is merely cumulative does not entitle a party to a new trial
3. where no motion made for new trial by accused on ground of surprise at evidence for the prosecution, not available on appeal
4. a new trial will not be granted on the ground of newly-discovered testimony where the grounds failed to show why the allegedly newly-discovered evidence had not been presented earlier
5. a motion for a new trial considered, in a certain case, as one to be made aside the judgment
6. where the trial court is convinced that a verdict is not warranted by the evidence, or is the result of passion or prejudice, it has a duty to grant a new trial
7. a new trial will not be granted on the ground of newly-discovered evidence in the absence of a showing why the newly-discovered witnesses could not have been discovered previous to the trial
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2. it is competent to read a deposition taken by the adverse party where either party could have called the witness, if present testify to the facts stated in the deposition.
3. objectionable statements of counsel in argument not excepted at the time are not grounds for reversal on appeal.
4. it is the proper practice to allow the amendment of a pleading to conform to the proof, giving to the adverse party the benefit of continuance in the event of a surprise.
5. election as to cause of action—action for settlement of partnership for sale of partnership property, and for judgment requiring defendant to pay one-half firm debts after exhausting partnership assets—no grounds for election existed.
6. after defendant has filed an answer to the merits an issue raised in the answer that he was not a nonresident can not avail to quash the process.
7. action of ejectment—the defendant is not required to file the tax bond under which he claims with his answer before the trial.
8. the defendant having alleged in his answer that the plaintiff knew of the existence of his claim when he bought the land in controversy, the defendant was entitled to a trial of the issue.
9. the trial court has the power to set aside a default judgment the term at which it was entered and allow a defense.
10. where the court fixed a time in the next term for filing a bill of exceptions the next regular term was meant and the intervention of a special term did not affect the time.
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12. action for allotment of dower—defendants entitled to have petition verified before they can be required to plead thereto.
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14. objection that there was an erroneous delegation of the trial of the issues involved to a commissioner not sustained where the commissioner reported the testimony to the court and the court tried the exceptions to the report, it being presumed that the testimony was considered on the hearing.

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5. nonresident engaged in business in this State—process may be served on agent in charge of business without showing that defendant was actually absent from State ..
6. the statute authorizing the service of process on the agent of a nonresident engaged in business in this State is not invalid on the ground that it deprives citizens of other States of the privileges of citizens of this State ..

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3. improper joinder of defendants did not authorize removal
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